FORUMUL JUDECĂTORILOR DIN ROMÂNIA

To the attention of
The Council of Europe
Mr. Michele Nicoletti,
President of the Parliamentary Assembly
of the Council of Europe (PACE)

The Association "*Judges' Forum in Romania*", a private law, independent, non-profit, non-governmental and apolitical legal person, the professional association of judges in Romania, hereby submits this request to consult the *European Commission for Democracy through Law (the Venice Commission)* on certain current issues regarding the amendment in Romania of the "laws of justice" and certain related regulations, for the following reasons:

A. Preliminary issues

The Venice Commission, created in 1990, is a consultative body of the Council of Europe in constitutional matters. The Commission is internationally recognized as an independent reflection body. The Venice Commission also contributes to the dissemination and development of the common constitutional heritage, playing a unique role in promptly providing constitutional solutions for transition states, in line with standards and good practice in the field. The Venice Commission aims to disseminate and develop constitutional justice, in particular through the exchange of information.
Based on Article 3 (1) and (2) of the Statute of the European Commission for Democracy through Law adopted by the Committee of Ministers on 21 February 2002, at the 78th Meeting of the Ministers' Deputies, without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements.Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe. The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the

Secretary General, or by a state or international organisation or body participating in the work of the Commission.
In Romania, the parliamentary debate on these draft laws ignored the overwhelming majority view of the magistracy and the negative consecutive opinions issued by the Plenum of the Superior Council of Magistracy.
In October 2017, approximately 4,000 Romanian judges and prosecutors, i.e. more than half of their total, signed the *Memorandum for the withdrawal of the draft law amending the "laws of justice"* addressed to the Government of Romania, and in November 2017, over 90% of the general meetings of the Romanian courts and prosecutor's offices opposed the current draft laws adopted by the Parliament. Therefore, over 6000 Romanian judges and prosecutors did not accept this draft law, their will not being taken into account, any dialogue with them being avoided. At the same time, the silent protests of the Romanian magistrates, starting with 18 December 2017, in front of the courts of law, are notorious, having being covered by the press all around the world.[1]
The latest **Report under the Cooperation and Verification Mechanism** (2017)[2] expressly recommends, in the case of Romania, "in order to improve further the transparency and predictability of the legislative process, and strengthen internal safeguards in the interest of irreversibility", that "the Government and Parliament (...) should ensure full transparency and **take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity** on the Criminal Code and Code for Criminal Procedures, on corruption laws, on integrity laws (incompatibilities, conflicts of interest, unjustified wealth), **on the laws of justice (pertaining to the organisation of the justice system)** and on the Civil Code and Code for Civil Procedures".
The ability of the Government and Parliament to ensure an open, transparent and constructive legislative process on the laws of justice will be essential. In general, a process in which the independence of the judiciary and its point of view are properly assessed and taken into consideration, **and taking into account the Venice Commission opinion**, is a prerequisite for the sustainability of the reform and is an important element in meeting the benchmarks set by the CVM.
By the Joint Statement of European Commission President Juncker and First Vice-President Timmermans on the latest developments in Romania of January 24, 2018, it was expressly emphasized that "the laws of justice [are] an important test of the extent to which the legitimate interests of judicial and other stakeholders are given an opportunity to be voiced, and are taken sufficiently into account in the final decisions. Events since then have done nothing to address these concerns." **The European Commission has called on the Romanian Parliament to rethink the proposed actions, launch the debate as recommended by the Commission and build a broad consensus on the way forward.**

[1] See, for example, the web page http://www.euronews.com/2017/12/18/romanian-judges-protest-over-government-backed-legal-reforms[last accessed on 20 February 2018].
[2] See the web page https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf[last accessed on 20 February 2018].

Although the Constitutional Court of Romania was asked by the parliamentary groups of the National Liberal Party of the Chamber of Deputies and the Senate to request the point of view of the Venice Commission, when examining the unconstitutionality pleas on the laws of justice, the plenum of the Constitutional Court found that, subject to constitutional review in the present cases, there is no need for clarification, by way of a friendly *amicus curiae* opinion formulated by the Venice Commission, on the incidence of certain aspects of comparative constitutional and international law.

Moreover, although both the Parliament of Romania and the President of Romania were asked to request for an opinion from the Venice Commission, both of them refused to do so. As a result, this lead to an unprecedented action of the President of the High Court of Justice of Romania, who attempted in its turn to ask for an opinion from the Venice Commission, action which was rejected as unreceivable by the Venice Commission for the reason that the President of the High Court of Justice of Romania was not among the persons entitled to request an opinion.

However, on 22 December 2017, the Secretary General of the Council of Europe, Thorbjorn Jagland, sent a letter to the President of Romania, Klaus Iohannis, in which he suggested that the President should notify the Venice Commission of the CoE about the legislative reforms in justice adopted by the Bucharest Parliament, saying that *"an opinion from the Venice Commission would make clear the compatibility of these texts with the fundamental principles of the rule of law".* The Secretary General of the Council of Europe offered assurance that he carefully monitored the legislative process that led to the adoption of three texts on justice (the Superior Council of Magistracy, the statute of judges and prosecutors and the judicial organization) and that he was aware that these reforms were widely discussed by those interested and by the Romanian society in general.[3]

B. Legal and factual aspects regarding the modification in Romania of the "laws of justice", as well as of certain related regulations

The following legislative texts or, as the case may be, decisions of the Constitutional Court of Romania require an opinion from the Venice Commission, since they rule aspects where good international constitutional practices can help the Romanian lawmaker to find acceptable legislative solutions under the rule of law:

Law amending and supplementing Law no. 303/2004
12. In Article 9, after paragraph (2), one new paragraph, (3), is introduced which

[3] See the web page http://stiri.tvr.ro/secretarul-general-al-consiliului-europei-despre-legile-justi--iei--o-opinie-din-partea-comisiei-de-la-venetia-ar-aduce-claritate_826125.html#view [last accessed on 20 February 2018].

shall read as follows:
"(3) Judges and prosecutors are required, in the exercise of their duties, to refrain from defamatory conduct or expression, in any way, as regards the other state powers - the legislative and the executive".

Decision No. 45 of 30 January 2018 issued by the Constitutional Court

134. (...) To accept the request of the High Court of Cassation and Justice would mean that judges and prosecutors, apart from the requirement to refrain they already have, may express in judicial acts, and not only, in a contemptuous/defamatory manner as to the other state powers, which is inadmissible. Even in the matter of administrative litigation, which the High Court of Cassation and Justice gives as an example as the most susceptible to such problems, it is found that it concerns the activity of settlement by the competent administrative courts according to the organic law of disputes in which at least one of the parties is a public authority and the conflict arose either **from the issuance or conclusion**, as the case may be, **of an administrative act, or from the failure to settle within the legal time or the unjustified refusal to settle an application for a legitimate right or interest** [see Article 2 paragraph (1) letter f) of the Administrative Contentious Law no. 554/2004]. Therefore, this activity does not involve issuing defamatory/contemptuous/insulting/denigratory considerations as regards the public authorities, but analyzing the claim of the person deemed prejudiced by the action or inaction of the public authorities, and its settlement according to the law, which means that the judge is unable to issue personal views on the way of exercising the powers of the public authority by other public institutions/authorities.

(...)

136. Independence of justice does not mean an absolute freedom for the judge to express himself or to act arbitrarily, but to comply with his requirement to refrain. In this regard, the European Court of Human Rights ruled that "magistrates are held with a requirement to refrain that prevents them from reacting to a particular situation" [see Judgment of 26 April 1995 in *Prager and Oberschlick v. Austria*, paragraph 34, or the Judgment of 18 September 2012 in *Alter ZeitschriftenGmbh No. 2 v. Austria*, par.39, or, for the same purpose, the Constitutional Court Decision no. 435 of 26 May 2006, published in the Official Gazette of Romania, Part I, no. 576 of 4 July 2006].

137. Also, the public expression of representatives of judges/prosecutors, for example, members of the Superior Council of Magistracy, the president/deputy president of the High Court of Cassation and Justice or the general prosecutor of Romania, must follow the same coordinates, **within the limits and according to the law**.Their public positions can be firm, but at the same time they must be animated by an institutional respect that must characterize the activity of any state official.

The term "defamation" implies so many meanings in the Explanatory Dictionary of the Romanian language that, in legal terms, it is an unpredictable and imprecisely defined concept, and, therefore, unconstitutional. In principle, any normative act must meet

certain qualitative conditions, including predictability, which implies that it must be sufficiently precise and clear to be applied.
The text allows the legislature and the executive to file complaints against a magistrate who, in the exercise of his duties, expresses an opinion on the conduct of a state authority. For example, in a court decision or criminal prosecution act, the judge or prosecutor expresses an opinion of the unlawful, illicit or abusive conduct of an authority or its representative. There are no criteria for assessing a statement as defamatory as to the other powers (the notion of power is not defined either) and under what conditions statements about the conduct of representatives of those *powers* become relevant to *power*.
In the ECHR jurisprudence, a question would arise in principle whether there is a violation of Article 10 of the Convention, namely freedom of expression, in certain factual situations. *Nota bene*, opinions expressed by judges on the proper functioning of justice, a matter of public interest, are conventionally protected "even if they have political implications, and judges cannot be prevented from engaging in the debate on these issues. Fear of sanctions may have a discouraging effect on judges in expressing their views on other public institutions or public policies. This dissuasive effect is detrimental to society as a whole". (ECHR, *Baka v. Hungary*).
Regarding the *freedom of expression of magistrates*, the Venice Commission set the following benchmarks:
"83. In assessing the proportionality of an interference with the freedom of expression of a judge, the European Court of Human Rights takes into account all the circumstances of the case, including the function performed, the content of the statement, its context, the nature and severity of the sanctions applied. [...]
84. As regards the participation of judges in the political debate, the internal political situation in which this debate takes place is also an important element to be taken into account in order to specify the limits of freedom of expression. Thus, the historical, political and legal context of the debate - whether or not the debate is on a matter of general interest, or whether the contested statements were made in an electoral campaign - is particularly important. A democratic crisis or a reversal of constitutional order must, of course, be judged decisive in the concrete context of a case and essential to determining the scope of the fundamental freedoms of judges".
CDL-AD (2015) 018, Opinion 806/2015 - Report on Freedom of Expression of Judges, Venice, 19-20 June 2015, par.83,84[4]

The question to be addressed to the Venice Commission:
"Can the legislative regulations on absolute interference in the freedom of expression of magistrates as to the legislative and executive powers be justified?"

[4] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)018-e [last accessed on 3 January 2018].

Law amending and supplementing Law no. 303/2004

61. After Article 46, three new articles are introduced, articles 46^1-46^3, which shall read as follows:

Art.46^2.- (1) The judges and prosecutors who had the "very good" rating at their last evaluation, have not been disciplined in the past 3 years, **have obtained the professional grade corresponding to the court or the prosecutor's office where they apply for promotion** and have been effectively employed for at least two years at the lower court or prosecutor's office, in the case of promotion to the office of a court of appeal, prosecutor with the prosecutor's office attached to the court of appeal or prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice may participate in the actual promotion contest for the courts of law and prosecutor's offices immediately higher in ranking.

(2) The provisions of article 44 paragraphs (3) and (4) shall apply accordingly.

Art.46^3.- (1) The actual promotion contest consists in a test aimed at ***assessing the activity and conduct of candidates in the past 3 years.***

(2) The procedure for organizing and conducting the contest, including the competition commissions and their establishment, the matters subject to verification as part of the test provided in paragraph (1) and the way of establishing and challenging the results, shall be established by the Regulation provided by art. 46 para. (4).

78. In Article 52^1, paragraph (2)(b) shall be amended and shall read as follows:

"b) an interview held before the Judicial Section of the Superior Council of Magistracy".

79.In Article 52^1, paragraph (2)(c) shall be repealed.

These provisions blatantly ignore the international acts which enshrine the fundamental principles regarding the independence of judges - the importance of their selection, training and professional conduct, respectively of the *objective standards* that must be observed both at the entry into the profession of magistrate and in establishing the modalities of promotion.

According to the *Fundamental Principles of Independence of Judges*, adopted by the United Nations VIIth Congress, approved by United Nations General Assembly resolutions no. 40/32 of 29 November 1985 and 40/146 of 13 December 1985, "those selected for the office of judge shall be **upstanding** and **competent persons** with **appropriate training** or **legal qualification**. Any method of selection and promotion of judges/prosecutors shall be drafted in such a way as not to allow appointments for inappropriate reasons" (paragraph 10). It also states in **paragraph 13 that "the**

promotion of judges, wherever such a system exists, must be based on objective factors, in particular professional qualifications, integrity and experience".
The Committee of Ministers of the Council of Europe has recommended that the governments of the Member States adopt or strengthen all necessary measures to promote the role of judges individually and of magistrates as a whole in order to promote their independence by applying in particular the following principles: (...) I.2.c. "Any decision relating to the professional career of judges must be based on **objective criteria, the selection and promotion of judges must be based on merits and according to their professional training, integrity, competence and efficiency".** (*Recommendation no. (94)/12 of 13 October 1994 on the independence, efficiency and role of judges*)
Any "objective criteria" that seek to ensure that the selection and career of judges is based on merit, taking into account professional training, integrity, capacity and efficiency" can only be defined in general terms. It is primarily intended to **give content to general aspirations towards "merit-based appointment" and "objectivity"**, aligning theory to reality.
Objective standards are required not only to exclude political influences, but also **to prevent the emergence of favoritism, conservatism and "nepotism"**, which exist when appointments are made in an unstructured manner. Although appropriate professional experience is an important condition for promotion, **seniority in work in the modern world is no longer generally accepted as a dominant principle in determining a promotion.**
The public has an increased interest not only in the independence, but also in the quality of the judiciary and especially in times of great change. There may be a potential sacrifice of dynamism when promotions rely entirely on seniority, which cannot be justified by a real gain in independence.
As regards the change of the way of promotion in non-executive positions, it is an insufficient and totally subjective criterion - an evaluation of the activity and conduct during the past 3 years, at the expense of an objective examination. The evaluation over the past 3 years is not a test, being a procedure lacking transparency and predictability, and cannot lead to the conclusion that the marks given are supported by objective assessments. On the contrary, any source of subjective appreciation must be removed. However, such a proposed method would give rise to suspicions as to the assessment of certain candidates and the way in which they obtained certain qualifications, although the marks on the written test did not justify them.
The condition of obtaining in advance the professional grade corresponding to the court or prosecutor's office to which the promotion is requested represents a disproportionate restraint of the right to work. Hierarchical grades in the magistrates' system in Romania are related to the hierarchy of courts and are not independent. Therefore, obtaining an appropriate grade to the court or prosecutor's office entitles the person to work at that court/prosecutor's office, without further formalities.
The wording "*evaluation of the activity and conduct of candidates in the past 3 years*" is not foreseeable, and it is not clear and precise which is the object of the regulation.The only criterion that the text establishes is related to arbitrary,

subjective judgment, which departs from the principle of merit-based promotion in magistracy.

The MCV reports, which have appreciated the evolution of the magistracy, have certainly given a clue that a merit-based promotion is the basis for providing an independent judiciary, free from all sorts of influences, both inside and outside.The return to promotion on subjective criteria, lacking any objective control on the part of the magistrates, any possibility of challenging the results and any predictability, will deprive the judiciary of this basis.

If the test for promotion is the analysis of magistrates' acts there could situations where, for example, a magistrate has been seconded and has only drafted administrative acts (administrative proposals approved by the minister/president of the SCM/NIM director, etc.) receives a maximum rating because the administrative notes were perfectly drawn up while a judge remaining in court, with hundreds of judgments handed down annually, would have the misfortune to have judgments handed down in repetitive cases, with a brief analysis, which could be criticized at least for "lack of imagination" in their reasoning. The latter judge will not be promoted, while the seconded judge will be able to claim a seat at the higher court without any problems. The text assumes a deeply subjective actual promotion procedure and allows a non-rigid choice, the selection on highly subjective, non-transparent criteria of those who will have access to the superior levels of the courts and prosecutor's offices. In other words, a procedure is established for the election of judges/prosecutors, which is extremely non-transparent, and the solution is restricting, for very unclear reasons, the professional path of magistrates who have not won favour with the evaluators. This proposed method of promotion seriously affects the independence of the judiciary from the point of view of the procedure for selecting magistrates for higher courts, based on criteria other than strictly professional and merit-based ones.

Therefore, promotion to the higher levels of the judiciary will be done through a highly non-transparent, subjective procedure (the evaluation of documents drawn up actually means the opinion of certain individuals on those documents, an individual's opinion being, by definition, not objective); and also a **volatile** one (it can be regulated to will and according to the interests of the moment - provided that the procedure itself will be established by the SCM Regulation), circumstance which will have the effect only of impairing the quality of the magistracy, by increasing the degree of discontent and distrust, within the system first of all, as to the fairness and objectivity of the promotion procedure. The disputable nature of the promotion procedure within the system will not be kept in-house, and its export to the press and society will also lead to a decrease in confidence in the act of justice (the citizen/journalist will have no reason to trust a magistrate who reached the higher courts following a selection process challenged within the profession).

The promotion of judges to the High Court of Cassation and Justice should also be free from legislative tricks, whereby the selection of candidates is still carried out by the SCM Plenum, based on subjective factors, and any such means which cannot be compatible with promotion to an elite position, the highest of the judiciary, should be excluded.

On the one hand, such a test is superfluous, as the conduct, deontology and integrity of the candidates, their motivation and their human and social skills are inherent to the performance of the offices of judge or prosecutor. Also, for example, the verification of good reputation is carried out in a distinct procedure, regulated by art. 27 ind. 1 of the Regulation for the organization and functioning of the Superior Council of Magistracy, and not under a promotion examination, not even organized for the High Court of Cassation and Justice.
On the other hand, in practice these interviews highlighted some not very rigorous and serious aspects, besides the impression of the individual selection by the SCM Plenum just of those candidates that were desirable to hold the position of judge in the supreme court. The judge/prosecutor thus examined by the SCM Plenum, including by peers of inferior professional grade and by certain members of civil society, in the context of his promotion to the Complaints and Taxation Division of the High Court of Cassation and Justice, will also resolve appeals against SCM judgments or judgments handed down by the courts of appeal referring to other rulings issued by the SCM, which seriously calls into question aspects of his impartiality, at least for a certain period of time since his promotion to the High Court of Cassation and Justice.
Regarding the ***procedures for the evaluation of judges***, the Venice Commission established that:
"[...] This provision seems problematic as it defines the court president as a central figure in the judges' evaluation process. This not only can lead to a conflict of interests but also to abuse, limiting the individual independence of judges".
CDL-AD (2013) 015, Opinion on the draft law on the courts of Bosnia and Herzegovina, par.66[5]
"Periodic evaluations of a judge's performance are important tools for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the assessment be first and foremost qualitative and focus on the professional, personal and social skills of the judge. There should be no assessment based on the content of the decisions and solutions, nor on the basis of quantitative criteria such as the number of aquittal or quashing solutions, which should be avoided as a standard basis for evaluation".
CDL-AD (2011) 012, Joint Opinion of the Venice Commission and OSCE/Office for Democratic Institutions and Human Rights on the constitutional law on the judiciary and the status of judges in Kazakhstan, par. 55[6]
"It is important that the evaluation system is neither used nor judged to be used as a mechanism for subordinating or influencing judges".
CDL-AD (2013) 015, Opinion on the draft law on the courts of Bosnia and Herzegovina, par.68[7]

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[5] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e [last accessed on 3 January 2018].
[6] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)012-rus [last accessed on 3 January 2018].

The question to be addressed to the Venice Commission:
"Can the newly introduced promotion system in Romania's magistracy, based exclusively on assessments of conduct and activity of a judge or prosecutor and based on subjective judgment criteria, be compliant to the criteria established by the Venice Commission?"

Law amending and supplementing Law no. 303/2004

156. Article 96 shall be amended and shall read as follows:
"Art.96.- (1) The state is patrimonially liable for damages caused by judicial errors.
(2) A judicial error shall result in holding a judge or prosecutor liable only if they have exercised their office in bad faith or with gross negligence.
(3) There is a judicial error when, in accomplishing the act of justice, the wrongful conduct of a judicial procedure is determined, which results in harm to the legitimate rights or interests of a person.
(4) There is a bad faith when the judge or prosecutor, in the exercise of his office, knowingly violates the Convention for the Protection of Human Rights and Fundamental Freedoms, the fundamental rights and freedoms provided by the Romanian Constitution, or the rules of substantive or procedural law, thus causing a judicial error.
(5) There is gross negligence when the judge or prosecutor, in the exercise of his office, by fault, disregards the rules of substantive law or procedural law, causing a judicial error.
(6) The person who, in the course of the trial, has in any way contributed to the judicial error by the judge or prosecutor, is not entitled to compensation.
(7) In order to compensate for the prejudice caused by a judicial error, the injured party may bring an action only against the state, represented by the Ministry of Public Finance, according to the law, at the tribunal with territorial competence over the injured party domicile or seat, as the case may be. Payment by the state of the amounts due as compensation shall be made within a maximum of one year from the date of communication of the final judgment.
(8) After the damage caused by a judicial error was covered by the state, the Ministry of Public Finance is obliged to take recourse action against the judge or prosecutor who caused the judicial error. The competence to judge in first instance lies with the Bucharest court of Appeal, and the provisions of the Civil Procedure Code are fully applicable.
(9) The limitation period of the right of action of the state provided for in paragraph (8) shall be one year from the date on which the damage was fully paid.
(10) The Superior Council of Magistracy may establish conditions, deadlines and

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[7] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e [last accessed on 3 January 2018].

procedures for the compulsory professional insurance of judges and prosecutors. The compulsory insurance shall not delay, diminish or remove liability for a judicial error caused by bad faith or gross negligence".

Decision No. 45 of 30 January 2018 issued by the Constitutional Court

217. At the same time, the lawmaker should bear in mind that the concept of judicial error, as ruled in Article 52 paragraph (3) of the Constitution, is an autonomous concept, which must be interpreted both to the letter and in the spirit of the Constitution [see also, with regard to the interpretation of constitutional texts, Decision no. 22 of 17 January 2012, published in the Official Gazette of Romania, Part I, no. 160 of 9 March 2012]. It calls into question the defective functioning of the service of justice, so that, in defining it, account must be taken, in addition to the intensity of the previously emphasized deviation, of two elements, namely: the settlement of a litigious matter contrary to the factual/legal reality, as well as the manifest irregularity in the conduct of the procedure, which has not been remedied in the course of the procedure, both related to the idea of harm to fundamental rights and freedoms. **In other words, the judicial error must not be viewed solely in the light of ruling the wrong judgment, which is contrary to reality, but also in terms of the way in which the proceedings are conducted [lack of speed, unjustified delays, late drafting of the judgment]. This latter component is important for the way the court proceeding takes place, which in itself can cause irreparable damage; therefore, even if a party successfully achieves/defends its subjective right submitted for settlement, such party can suffer more serious damages than the gain obtained from the favorable settlement of the trial [for example, an excessively lengthy procedure].**

218. The Court further notes that an unusual/gross departure from the ordinary course of judicial proceedings or from the application of substantive law, which was not remedied during the review procedure or during the procedures provided for by law must result in damage to the fundamental rights and freedoms of a person to qualify as a judicial error.

219. In view of the above, it is found that the definition of the judicial error contained in Article I. item 156 [with reference to Article 96 (3)] of the law is too generic. It is obvious that a wrongful conduct of a judicial procedure, even remedied in the court proceedings, is *per se* causing damages to the legitimate rights/interests of a person. Or, such a normative definition is not included in the concept of judicial error. Practically, from the definition of the judicial error, by the text of art. I p.156 [with reference to art. 96 paragraph (3)] of the law, the state will be responsible for any procedural non-compliance, regardless of its nature or intensity.

220. Next, it is noted that in order to hold the State liable for a judicial error, such error must be ascertained as such. It is clear from the text of the law that paragraph (7) governs an action for civil liability in which the **judicial error** [that is to say the unlawful

act, except for the hypotheses of Article 538 and Article 539 of the Criminal Procedure Code, where the error was already established], **the actual damage** [the injury produced is to be repaired by appropriate indemnity to the injured party], and the **causal relationship** between the unlawful act and the damage. In the new legislative paradigm, the judge/prosecutor can be granted the right to intervene even in this procedure.

221. After reparation of the prejudice in this manner, the state, according to the Constitution, has a right to recourse action against the judge/prosecutor if he exercised his office in bad faith or with gross negligence. It is the State which, in the context of the recourse action, must prove that the magistrate exercised his office in bad faith or with gross negligence [Decision no. 80 of 16 February 2016, published in the Official Gazette of Romania, Part I, No. 246 of 7 April 2014, par. 173]. With regard to the establishment of the authority to judge of the Bucharest Court of Appeal regarding the recourse action of the state, paragraph (8), newly conceived, is not contrary to Article 52 paragraph (3) or Article 134 of the Constitution.

The concept of judicial error subject to regulation is totally unpredictable, vague, lacking clarity and precision. Moreover, the magistrate may be held liable even for default, which is excessive, the judicial error being the *determination of the wrongful conduct of a judicial procedure*.The concept is foreign to the rule of law, as in internal normative acts, in case law or literature there is no reference or definition of the *"wrongful conduct of a judicial procedure"*, a purely colloquial wording.

The text that establishes the obligation of the state to initiate recourse action against the judge or prosecutor who caused the judicial error is a form of pressure on the magistrates, which will undermine their independence in adopting the solutions. In order to hold a judge or prosecutor liable, it is necessary to assess that the rule has been breached taking into account a number of criteria, such as the clarity and precision of the legal provisions, the excusable or inexcusable nature of the legal error committed or the failure by the court to perform its obligation to initiate an action for a preliminary ruling.

In ***Spain***, very serious and serious deviations include those relating to the absolute and manifest lack of reasoning of judgments and the use in court judgments of unnecessary, extravagant or offensive or unreasonable expressions from the point of view of legal reasoning. In ***Italy***, a serious violation of the law due to ignorance or inexcusable negligence is deemed as a disciplinary offense. In ***France***, through organic law no. 830 of 22 July 2010, it was stated that the serious and deliberate violation by a magistrate of a procedural rule which constitutes a fundamental guarantee of the rights of the parties, established by a final court decision, entails disciplinary liability. The French case law on the magistrate's civil liability for judicial errors has defined the concept of serious violation of the law as a gross error that a magistrate normally aware of his duties could not do" or as "a serious and inexcusable misunderstanding of the essential duties of a magistrate in the exercise of his office". In ***Germany***, in the field of disciplinary liability, a distinction is made between the essence of the judicial activity, which includes the

actual finding of the judicial truth and the ruling of the solution, and the field of external order, which includes ensuring the regular performance of the activity and the external form of performing office duties.
The common element of the above-mentioned legislation in different countries is that the magistrate's disciplinary liability in relation to the judicial activity can only intervene to the extent that his independence is not affected. The establishment of a disciplinary control over the manner in which the judge/prosecutor understands to interpret the rules of law and the evidence administered in the case with the judgment/settlement he was vested with is liable to affect his independence, since in this case the judge/prosecutor has to decide freely, without any influence or pressure. Another common feature of the legislation under consideration is that in the judicial activity, the disciplinary liability of the judge/prosecutor can be triggered ***only if there is a deliberate mistake or a serious, inexcusable fault***.
In procedural matters, the concept of *legitimate procedural interest* does not exist and this type of interest is not protected by law. In par. 5, definition of *gross negligence* violates art. 52 par. (3) of the Constitution. According to this article, state liability does not remove the liability of magistrates who have exercised their duties *with gross negligence*. Or, defining in art. 96 par. (5) gross negligence as *any fault (any negligence)*, including the lightest fault, contravenes the constitutional provisions.
The state is also imposing an overly burdensome budget burden with unpredictable consequences, assuming liability for any procedural or material error in law, which, in fact, in any system of law, is cured during the review procedures. The State undertakes to pay damages for having affected a *legitimate interest*, including of a procedural nature (paragraph 3 in conjunction with paragraph 5). The case is judged by a lower and non-specialized court, the tribunal - civil section, verifying judgments delivered by specialized higher-level courts, including the High Court of Cassation and Justice, in matters where it is not specialized.
The limitation period is also unpredictable; the judge may also be vulnerable to other public authorities, parties in the trial, leaving the decision of the first instance to become finalby failing to appeal.
In ***Volkov v. Ukraine***, the European Court of Human Rights has held that *limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time. Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences.*
Linking the judicial error to the perspective of the way the procedure is conducted [lack of speed, unjustified delays, late drafting of the judgment], as suggested by the Romanian Constitutional Court's Decision no. 45 of 30 January 2018, is inappropriate.
For the **duration of court proceedings**, culpability is often a matter of **legislative power**, given the inflexible procedural rules that are likely to prolong the settlement of litigations, either by the successive quashing mechanism with submission of the case

for retrial or by the prolongation/suspension of judgments imposed by the need to comply with the rules of procedure, a fact which has been repeatedly found in ECHR case law.
In the case of ***Vlad and Others v. Romania***, judgment of 26 November 2013, the European Court of Human Rights held that the provisions of Law no. No 202/2010 amending the Civil Procedure Code did not represent effective domestic remedies in respect of the applications examined in the present case and found that it entered into force after the completion of the judicial proceedings in question in the first and third applications. Only the enforcement procedure applicable in the second case is subject to the provisions of this new law, but the Court noted that this procedure had lasted for more than five years already, three years of which having passed since the entry into force of the new law. It was found that the Government did not demonstrate the practical way in which this new normative act influenced the reduction of the length of judicial proceedings. In addition, the procedural way provided by art. 522 and 529 of the new Civil Procedure Code has not been considered by the Court as an effective one, and this has not yet been proven in practice.While welcoming the new legislative changes designed to prevent the prolongation of the length of proceedings for the future, the Court could not ignore, on the one hand, the statutes of the Council of Europe's Parliamentary Assembly in its resolution of 26 January 2011 which noted “with great concern” the issue of excessive duration of legal proceedings in Romania and, on the other hand, that all national legislative amendments failed to address the issue of the length of proceedings pending at the time when these new rules came into force.
Regarding the ***material liability of magistrates***, the Venice Commission set the following benchmarks:
“77. a) Holding a judge liable is permitted, however, only where there is a guilty mental component (either intent or gross negligence) on the part of the judge.
b) Holding judges liable as a result of an ECHR judgment having a negative effect should be based on the finding of a national court on the intention or gross negligence of the judge. The ECHR ruling should not be used as the sole basis for the judge to be held liable.
c) Moreover, holding judges liable, initiated as a result of an amicable settlement of a case on the dockets of the ECHR or the formulation of a unilateral declaration admitting to the violation of the Convention, must be based on the establishment by a national court of the intent or gross negligence of the judge.
d) In general, judges should not be held liable by means of a recourse action when exercising their judicial function according to professional standards established by law (functional immunity).
e) The finding by ECHR of a violation of the Convention does not necessarily mean that national judges may be criticized for the interpretation and enforcement of the law (violations may originate in the systemic weaknesses of the Member States, e.g. reasonable time, in which case individual liability cannot be triggered).
f) Also, the functioning of the ECHR literature as a living instrument, which responds to the evolution of society, can make it difficult to predict ECHR solutions by national courts.

78. For the above-mentioned reasons, the procedure of recourse action against judges can lead to arbitrary results where the liability of national judges is nothing more than a corollary of a judgment (or amicable settlement or unilateral declaration) of the ECHR finding the existence of a violation of the Convention.
79. Furthermore, holding judges liable for applying the Convention without establishing individual guilt can have an impact on their independence, which implies the professional freedom to interpret the law, to establish the facts and to weigh the evidence, in each particular case. Erroneous decisions should be appealed in a review procedure, and not by holding individual judges liable, as long as the error is not due to the bad faith or gross negligence on the part of the judge.
80. Holding judges liable may be compatible with the principle of independence of judges, as long as such liability complies with the law. However, the relevant provisions must not conflict with the principle of the independence of judges".
CDL-AD (2016) 015-e, Republic of Moldova - Opinion amicus curiae for the Constitutional Court on the right to recourse action by the state against judges (Article 27 of the Law on the Government Agent No. 151 of 30 July 2015), Venice, 10-11 June 2016, par. 77-80[8]

The question to be addressed to the Venice Commission:
"Are the requirements necessary for holding magistrates materially liable, newly introduced in respect of magistrates in Romania, compatible with the standards accepted in a state governed by the rule of law?"

Law amending and supplementing Law no. 304/2004

45. After article 88 a new section shall be introduced, Section 2 ind. 1 for the establishment of the **Section for the Investigation of Criminal Offenses in the Judiciary** (art.88^1-88^9)

The establishment of the special section for the investigation of criminal offenses in the judiciary within the Prosecutor's Office attached to the High Court of Cassation and Justice will allow the rerouting of dozens of high-profile cases pending with the National Anti-Corruption Directorate by the mere submission of fictitious complaints against a magistrate, thus simply dissolving the activity of the National Anti-Corruption Directorate, constantly praised in the CVM Reports.
The cooperation and verification mechanism was established at the time of Romania's accession to the European Union in 2007, to remedy the shortcomings of the judicial reform and to fight against corruption. **Among the commitments undertaken by**

[8] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)015-e [last accessed on 3 January 2018]. Translation into RO of the Supreme Court of Justice of the Republic of Moldova.

Romania to the European Union,[9] **it is worth noting the sustainability and irreversibility of progress in the fight against corruption, which implies the institutional strengthening of the National Anti-Corruption Directorate.** The Declaration adopted by the General Assembly of the European Partners against Corruption/European contact-point network against corruption (EPAC/EACN), held in Paris on 20 November 2015, reveals that corruption is a serious threat to development and stability, has negative consequences at all levels of government, undermines public confidence in democracy and requires European decision-makers to strengthen the fight against corruption, in particular the introduction of an automated cross-border financial intelligence exchange to investigate corruption, accessible to law enforcement agencies, the establishment of an appropriate instrument at both national and transnational level to protect key witnesses under threat and those who denounce corruption offenses and intensify cooperation and exchange of information between anti-corruption authorities and police surveillance structures in Europe, using the new EPAC EACN communication tool of the Europol Expert Platform.

Therefore, demonstrating the sustainability and irreversibility of progress in the fight against corruption does not mean the split of the specialized prosecutor's office, while its results are praised and encouraged by the European Commission, but its institutional strengthening.

Annually, thousands of fictitious reports are filed against magistrates, in which a minimum investigation must be carried out. At present, these complaints are being investigated by more than 150 prosecutors in 19 prosecutor offices (the Prosecutor's Office attached to the Court of Appeal, PECCC, the Directorate for Investigation of Organised Crime and Terrorismand the National Anti-Corruption Directorate). It is obvious that the 15 prosecutors in the new section will be overcome by the volume of activity. This reinforces the suspicion that it is not intended to make criminal investigations more efficient in cases where criminal charges are brought against magistrates, but only to create a unit that could be even used punctually against a certain judge or prosecutor who is "*inconvenient*".[10]

In fact, the Constitutional Court, under its Decision no. 33 of 23 January 2018 on the challenge of unconstitutionality of the provisions of the Law amending and supplementing Law No. 304/2004 on judicial administration, found that "135.The

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[9] See **COM (2006), Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania.**

[10] The chief prosecutor shall be appointed by the SCM Plenum following a *"competition"* consisting in the submission of a project before a commission of three judges appointed by the Section for Judges, and one prosecutor appointed by the Section for Prosecutors, whereas the other 14 prosecutors are selected following a *"competition"* consisting in an interview before a commission which includes also the section's chief prosecutor and three judges appointed by the Section for Judges and one prosecutor appointed by the Section for Prosecutors. Thus, the appointment of prosecutors, including as head of the section, is completely controlled by the Section for Judges, coming against the claimed need for career segregation in magistracy, one of the reasons for adopting these laws. See, *in extenso*, Bogdan Pîrlog, *Principaleleaspecte de natură a afectagravsistemuljudiciar [Main aspects of a nature to seriously affect the judiciary]*http://www.forumuljudecatorilor.ro/index.php/archives/3122[last accessed on 14 February 2018].

establishment of specialized prosecutor's offices on areas of substantive jurisdiction (the National Anti-Corruption Directorate or the Directorate for Investigation of Organised Crime and Terrorism) or individual jurisdiction (the Section for the Investigation of Criminal Offenses in the Judiciary) shows the lawmaker's choice which, depending on the need to prevent and fight against certain criminal phenomena, decides on whether regulation thereof is advisable". As the President of the Chamber of Deputies showed in the point of view submitted to the Constitutional Court that the Section for the Investigation of Criminal Offences in the Judiciary" was not established to address an alleged widespread criminal phenomenon among magistrates, but to remove any possible pressures that may be exerted by criminal prosecution bodies on judges and prosecutors", it is only logical that prevention and fighting against criminal phenomena across the magistracy are neither advisable, nor necessary.

The Venice Commission has found that **"The use of special prosecutors in such cases [corruption, money laundering, trading of influence, etc.] has been successfully employed in many countries.The offences in question are specialised and can better be investigated and prosecuted by specialised staff.In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system"** *CDL-AD (2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro par.17, 18 and 23*[11]

Therefore, establishment of this section further undermines the use of special prosecutors [corruption, money laundering, trading of influence, etc.] because it is not proportionate to any potential purpose pursued.

The question to be addressed to the Venice Commission:

"The establishment of a special section to investigate criminal offences in the judiciary within the Prosecutor's Office attached to the High Court of Cassation and Justice can be supported, under a rule of law system, by the need to prevent or fight against (inexistent) criminal phenomena across the magistracy?"

Decision No. 45 of 30 January 2018 issued by the Constitutional Court

168. The introduction of these incompatibilities in the very text of the Constitution was aimed at **instituting and maintaining a neutral and impartial status** for the persons who work in the judiciary, or the Public Ministry against the other powers of state. While for judges this objective is closely linked to the principle of independence and separation of powers of state, for prosecutors who, while not being part of the judiciary *per se*, are part of the judicial authority, the constituent law-maker wished to put in

[11] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e [last accessed on 3 January 2018].

place a status that would safeguard impartiality from the legislative and executive powers. It is a matter of principle that the elected offices [the President of Romania, deputies, senators, offices within the authorities of the local public administration] or appointed offices [offices qualified as such under the law in public institutions/authorities, such as the Government (with all its structure, including the office of prime minister, deputy prime minister, minister, minister delegate, secretary of state, under-secretary of state), the Romanian Academy, the Legislative Council, the Ombudsman, the Court of Accounts, the Government Secretariat General, the President's Administration, the National Audiovisual Council, the National Council for the Study of the Securitate Archives, the Standing Electoral Authority, the National Integrity Agency, the National Office for Prevention and Fight against Money Laundering, the National Registry Office for Classified Information, the Prefect's Institution, etc.], restated in Annex no. IX - *Public Offices* to the Framework Law no. 153/2017 on the wages of staff paid from public funds, published in the Official Gazette of Romania, Part I, no. 492 of 28 June 2017 **are, by their nature, either highly political, or administrative in a nature which is completely disconnected from the work the judge or the prosecutor is called to render.** The Court notes that Article 1 of Law no.303/2004 defines magistracy as the judicial activity carried out by **judges to serve justice, and by prosecutors to defend the general interests of the society, the system of laws, as well as the rights and freedoms of citizens.** Thus, the core of their work **consists in the application and judicial interpretation of the law, and in leading and controlling the criminal prosecution work**, as applicable, with the exclusion of any specific activity in connection to law-making or law enforcement by administrative instruments. Consequently, it follows that the above listed public offices have no relation whatsoever with the magistracy, for which reason the constituent law-maker articulated this straightforward dividing line between the judicial authority, on one hand, which includes the courts of law, and the Public Ministry and the Superior Council of Magistracy, and the other two state powers - executive and legislative.

Unlike other constitutional systems [for instance, those in Germany or Sweden; see Opinion no. 806/2015 on the freedom of expression of judges adopted by the Venice Commission at its 103rd Plenary Session of 19-20 June 2015], which are more permissive in terms of the compatibility between the duties of judges and public offices, in our constitutional system, the above mentioned rules are very stringent in terms of the incompatibilities attached to the position of judge/prosecutor, their rationale being to avoid any potential confusion between these positions and any other public or private offices or positions, of whatever nature [political or economic]. Otherwise, should this constitutional text be circumvented through various legal mechanisms, the work of judges/prosecutors would fall pray to lack of independence and bias, as applicable, and the citizens' perception of justice would be severely and irrecoverably affected. The very Venice Commission in its Opinion on the Draft Review of the Constitutional Law on the Status of Judges in Kyrgyzstan, par. 45, adopted at its 77th Plenary Session of 12-13 December 2008, emphasized that: "In the case of loss of powers that include cases where the candidate is involved in political activities that he or she is prohibited from doing, the President

makes a decision. If the circumstances that led to the cessation (for example, the person is a member of the political party), the judge recovers his / her duties by decision of the President. The Venice Commission recommends, however, that a judge should first resign before being able to contest political office, because if a judge is a candidate and fails to be elected, he or she is nonetheless identified with a political tendency to the detriment of judicial independence". Similarly, the Report of the Venice Commission on the independence of the judicial system, Part I: The independence of judges, par. 62, adopted at its 82nd plenary session of 12-13 March 2010, states that "judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges".

170. **Considering the above, the Court finds that the law-maker cannot regulate any departure from the constitutional texts under art. 125 para. (3), and art. 132 para. (2).** Avoiding constitutional incompatibility through a formal mechanism for temporary suspension of the duties of judges/prosecutors, which the Superior Council of Magistracy takes note of, amounts again to a violation of the Constitution. As the Constitution provides, in overriding terms, for the incompatibilities attached to these positions, the law-maker cannot then come and remove the constitutional provisions. **As long as a person holds the position of judge or prosecutor, they may only pursue activities which are specific to these positions. Their appointment or posting to public offices, of whatever designation, cannot be accepted in the light of the requirements of the Constitution, because this would inevitably lead to a change in the type of work they render which, in reality, justifies the rights and duties attached to their status. Moreover, the entire status of judges/prosecutors is axiomatically built on their constitutional role, as defined under art. 124 and 125, respectively art. 131 and 132 of the Constitution. Or, by assuming, through different mechanisms [appointment/posting], a role which is different from that of serving justice and/or of defending the general interests of the society, the system of laws, and the rights and freedoms of citizens, on the one hand, the principle of independence of judges, the principle of the separation of powers, and the provisions regarding the role and incompatibilities of judges [art. 1 para. (4), art. 124 and 125 para. (3) of the Constitution] and, on the other hand, the constitutional provisions regarding the role and incompatibilities attached to the prosecutor status [art. 131 and 132 of the Constitution] are directly violated.**

171. In light of the foregoing, the Court shall extend control, in this respect, on the grounds of art. 18 para. (1) of Law no. 47/1992, also over art. I para. 7 [with reference to art. 5 para. (1) penultimate and last sentence], item 97 [with reference to art. 58 para. (1) the wordings *"or any other public authorities, in any positions or offices, including appointed public offices"* and *"as well as in institutions of the European Union or international organizations, at the request of the Ministry of Justice"*], item 143 [with reference to art. 82 para. (2) the wording *"the office of minister of justice"*], and item

153 [with reference to art. 85[1] the wording*"the office of minister of justice"*] of the law, which provisions, necessarily and manifestly, cannot be disjoined from those in art. I item 112 [with reference to art. 62[2]] of the law.

172. Thus, art. I item 7 [with reference to art. 5 para. (1) penultimate and last sentence] of the law, reading that the positions of judge, prosecutor, assistant magistrate and judicial assistant are compatible with the teaching, training and advanced training activities delivered in institutions for professional training of other legal professions, as well as with the positions which can be occupied under international conventions Romania is a party to, contains provisions which come against art. 125 para. (3), and art. 132 para. (2) of the Constitution, meaning that the position of judge/prosecutor is not inherent to a professional training activity as regards other legal professions because, in reality, it concerns another position or contractual relation under which the judge/prosecutor renders a service which is in connection with neither the training to be delivered to judges/prosecutors, nor any other higher education teaching position. Of course, insofar as the judge/prosecutor has the capacity of teaching staff, by virtue of this position they are afforded the possibility to render legal professional training activities for other categories of staff. Similarly, **neither the performance of activities abroad,** which can bring about the expressly enforced constitutional incompatibilities and the constitutional role of the judge/prosecutor, **is permitted**. Therefore, the position of judge/prosecutor is incompatible with any other official capacities by virtue of which the judge/prosecutor carries out activities abroad, except for the teaching ones.

173. The Court does not deny the possibility for the judge/prosecutor to be eligible for holding a position in European Union institutions or international organizations assuming that the **applicable international instrument expressly renders access** to the respective position **conditional**upon the capacity of judge/prosecutor, but for this, the law-maker is called to regulate an appropriate solution, in line with the demands of the Constitution. Considering the express constitutional incompatibility, assuming that the judge/prosecutor opts to exercise such a position, the previously held position ceases, and they can resume their offices, insofar as these have been reserved for them.

174. Also, for the same reasons, the Court finds that art. I item 97 of the law [with reference to art. 58 para. (1) the wordings *"or any other public authorities, in any positions or offices, including appointed public offices"* and *"as well as in institutions of the European Union or international organizations, at the request of the Ministry of Justice"*] is unconstitutional. Thus, the above are also applicable to non-executive and executive public positions, other than public offices, in the executive or legislative authorities, except for the Ministry of Justice or the establishments under its control, so that the latter are in direct connection with the public service of justice. Therefore, it is not acceptable for a judge or prosecutor to be posted in violation of the constitutional rules concerning incompatibilities, because the law-maker is not allowed to create means whereby constitutional prohibitions can be circumvented. Moreover, the latter is

also under the obligation to remove from the effective laws any legislative solutions which have been found unconstitutional, such as, for instance, those which appear in the current art. 58 para. (1) of Law no. 303/2004.

175. Considering the findings above, the Court further finds that posting of judges/prosecutors is permitted both in the Ministry of Justice and the establishments under its control, as well as in the structure of the judicial authority [in the Superior Council of Magistracy, the National Institute of Magistracy, the National School of Court Clerks, as well as in the system of courts and/or prosecutor's offices, as applicable] as long as their work is rendered in direct connection with the public service of justice.
(...)
177. Considering the above, **the law-maker is under the obligation to reconcile, in the law review process, all the provisions thereof which concern incompatibilities, including those in effect, with this decision.**

There is no ground for extending an incompatibility which is expressly provided under the constitutional text, as regards the exercise of the judge/prosecutor positions, or creating an excessively burdensome status for judges, prosecutors and other staff treated as such by way of case law.
While not denying the possibility for the judge/prosecutor to be eligible to hold a position in European Union institutions or international organizations, assuming that the applicable international instrument expressly renders access to the respective position conditional upon the capacity of judge/prosecutor, the Constitutional Court does deny a judge/prosecutor the right to hold a judge position in the Court of Justice of the European Union, the General Court of the European Union, the Civil Service Tribunal or the European Court of Human Rights, or other positions thereon, as the legislations of various other Member States of the European Union permit, and where their professional experience would allow them to give a professional representation of the Romanian State. Furthermore, it may also be necessary to post Romanian magistrates to the International Criminal Court, as well as to other international organizations of interest for the judiciary.
Magistrates from other Member States of the European Union may be posted, in a permissive and flexible manner, to such bodies, or may be suspended while they temporarily hold positions of the indicated type.

The question to be addressed to the Venice Commission:
"Are the highly restrictive incompatibility and prohibition conditions imposed to the Romanian magistrates compatible with the standards accepted in a rule of law system, and with the prevailing regulations in the Member States of the Council of Europe?"

Decision No. 45 of 30 January 2018 issued by the Constitutional Court

164. Therefore, corroborating article 125 paragraph (2) and article 134 (1) of the Constitution, the Court finds that the promotion of judges in both non-executive and executive positions is carried out by the Superior Council of Magistracy. Under these conditions, ***art. I point 87 [with reference to art. 53 paragraphs (1), (2), (7) and (8)] of the law, regulating the authority of the President of Romania to promote judges, i.e. to appoint them as president and vice-president of the High Court of Cassation and Justice, violates the constitutional authority of the Superior Council of Magistracy*** to order the promotion of judges, as it results from the corroboration of art. 125 para. (2) and art. 134 paragraph (1) of the Constitution. Consequently, from this constitutional point of view, the Court finds that Art. I point 87 [with reference to art. 53 paragraphs (1), (2), (7) and (8)] of the law is unconstitutional, being contrary to art. 125 paragraph (2) of the Constitution. On the other hand, the promotion and appointment of judges in the office of Section President of the High Court of Cassation and Justice by the Superior Council of Magistracy, regulated by Art. I point 87 [with reference to art. 53 paragraph (9), first sentence and paragraph (10)] of the law does not violate Article 94 (c) of the Constitution.

165. With regard to the criticism of unconstitutionality of Article I, paragraph 88 [with reference to Article 54 (3)] of the law, the Court finds that, according to Article 132 (2) of the Constitution, "*Public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice"*. Given the two-headed nature of the executive, the lawmaker opted for a procedure in which the Government and the President work together. The central role in this equation is, however, played by the Minister of Justice, with authority over the prosecutors, organized in prosecutor's offices. The President of Romania has no express constitutional duty to justify a right of veto in this matter. Therefore, if the lawmaker designing the organic law chose such an appointment procedure, maintaining a limited presidential veto in refusing a single nomination proposal in the executive offices provided by art. 54 paragraph (1) of the law, the lawmaker respected the constitutional role of the minister of justice in relation to prosecutors, the President being given the dutyof appointment considering the solemnity of the act and the need for a permanent cooperation and consultation within the two-headed executive. Therefore, the violation of Article 94 (c) of the Constitution cannot be sustained. Consequently, Art. I item 88 [with reference to art.54 paragraph (3)] of the law does not violate art. 94 letter c) and art.132 paragraph (1) of the Constitution.

166. With regard to the criticism of unconstitutionality of Article I, point 108 [with reference to Article 62 paragraphs (1^2) and (1^3)] of the law, the Court finds that they are inadmissible asnot substantiated. The text refers to the situation of the judge/prosecutor suffering from a health condition other than a mental illness and to the possibility of the appropriate section of the Superior Council of Magistracy to suspend him, upon his request or upon the request of the executive board of the court or prosecutor's office, for up to 3 years. Therefore, there is no question of the existence of any attribution of the President of Romania.

In accordance with the separate opinion, there is no constitutional basis for which the President's right has been removed from the appointment procedure to executive positions in the supreme court, or the President's right to refuse appointments as judges or prosecutors or in high-ranking executive positions at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism has been removed or limited to only one refusal, and thus be obliged to accept any nomination by the SCM. **In fact, this results in rendering the attributions of the President innocuous.** The right of the President to refuse proposals from the SCM, in a substantiated manner, is a further guarantee that the independence of the judiciary is preserved.

All the procedures for appointment and dismissal in the office of judge or prosecutor, as well as in executive offices at the supreme court and at the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism - respectively those provided by Law no. 303/2004 into force - were the basis for the achievement of real justice in Romania, thanks to a tripartite mechanism that proved to offer counter-weights: The President of Romania (the public official elected directly by citizens with the greatest democratic, popular legitimacy), the Minister of Justice (representative of the Government) and the SCM (the guarantor of the independence of justice, made up of magistrates' representatives).

The solutions adopted by the Court in this decision for the purpose of removing the President from the procedure of appointing and revoking the president, vice-presidents and section presidents of the High Court of Cassation and Justice and of removing his right of refusal of the appointments of judges and prosecutors, including in high-ranking executive offices, are in full contradiction with the Court's previous case-law.

The President of Romania is democratically elected by popular vote and is therefore the only representative of the popular will in relations with the judicial authority. This latter capacity justifies the establishment in favor of the President of his right of refuse the appointment of judges and prosecutors if he considers that the SCM proposal for the appointment of a specific judge or prosecutor, including in high-ranking executive offices at the level of the High Court of Cassation and Justice, the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism, is not substantiated and needs to be reviewed by the same SCM.

It is essential that, in such a dispute, the Superior Council of Magistracy has the final say, so it retains its full and unhindered right to decide on the matter. In constitutional terms, this type of legal relationship between the President and the SCM is a perfect implementation of the constitutional principle of the "separation and balance of powers" referred to in Article 1 (4) of the Fundamental Law.

At the same time, Article 125 paragraph (1) of the Romanian Constitution states that the judges are appointed by the President of Romania, a provision involving a great legal responsibility for the President of the state. The President's signature for the appointment of a judge cannot only be a formal one, but is also a matter of substance, including when appointments are made to executive positions either at the level of the

supreme court in the state, or at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism.
The European Commission's report in the CVM of 27 January 2016 notes that, in the longer term, "a more robust and independent system of appointing top prosecutors should be settled in law: no criteria exist at legislative level for ensuring the highest level of professional skills and integrity, and the current procedure includes a strong political element in terms of the role it gives to the Minister of Justice. Past appointment procedures have been the subject of considerable controversy and subject to clear political influence. Using guidance from the Council of Europe, the Minister of Justice and the Superior Council of the Magistracy should lead the debate about whether it is appropriate for the key decision to rest with a government Minister, particularly when it comes to appointments at levels below the top management of institutions".
The successive MCV reports highlighted the fact that, although there was a tendency for appointments to be made more and more transparent and merit-based, the law on the appointment of chief prosecutors and the practice of implementing it are not robust enough in order to avoid excessive political influence on appointments. From past experience, this can lead to doubts about the independence of a candidate, may delay appointments due to political deadlocks, or even lead to the appointment of magistrates that are later proven to have integrity problems. There are different legal traditions in Europe regarding appointments in the office of Prosecutor General (or similar high-ranking prosecutor offices) and this is recognized by the Venice Commission. The key is, however, to ensure adequate safeguards in terms of transparency, control and balance, even in cases where the final decision is taken at a political level.

The question to be addressed to the Venice Commission:
"The mechanism promoted by the Parliament of Romania and interpreted by the Constitutional Court is capable of creating balance between the powers of the state, provided that the key decision is, in the case of appointments in high-level executive positions at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism, in the hands of the Minister of Justice?Is this a more robust and independent system for the appointment of high-ranking prosecutors?"

Decisionno. 1/2017 issued by the Constitutional Court of Romania

According to Decision no. 1/2017 issued by the Constitutional Court of Romania[12], the attachment to the case file and the publication of the dissentingand concurring opinions shall be at the discretion of the President of the Constitutional

[12] Published in the Official Gazette of Romania, Part I, no. 477 of 23 June 2017.

Court, provided no text of the law allows such a deviation from the legal obligation to publish these opinions.
The provisions in Decisionno. 1/2017 issued by the Constitutional Court of Romania add to the express provisions of Law no. 47/1992 on the organization and functioning of the Constitutional Court, as follows:
"Art. 2. - A dissentingor concurring opinion shall be handed over to the President of the Constitutional Court with the decision to which it relates. After discussing the decision, the President of the Constitutional Court, insofar as he finds that there are deviations from the rules established in art. 1, shall request the judge, by resolution, to reissue the decision.
Art. 3. - If the Constitutional Court judge fails to comply with the request under Art. 2, the president of the Constitutional Court, by resolution, orders that the dissentingor concurring opinion, as the case may be, should not be published (...) nor attached to the case file.
Art. 4. - This judgment concerns the jurisdictional duties of the Constitutional Court only".
We believe that the right of Constitutional Court judges to produce dissentingand concurring opinions cannot be restricted, given the considerations of legality, and that, as expressed by the **Venice Commission (Opinion No. 537/2009[13])**, these views *"do not weaken a Constitutional Court but they have numerous advantages*. *They enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the review of the case".*
Also, **the Venice Commission (through Opinion 622/2011 [14])** considered that *dissentingand concurringopinions also affirm the moral independence of judges and their freedom of expression, and improve the quality of judgments and their convincing character, strengthening institutional transparency.At the same time, their publication together with the decision must be mandatory.*
By this ruling of the Constitutional Court, which deviates from the rules established for similar courts of the EU Member States that allow dissentingand concurring opinions[15], without prior consultation of the Venice Commission,

[13] See the Opinion on the draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan adopted by the Venice Commission on 17-18 June 2011, available on the website http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)018-e [last accessed on 31 January 2018].
[14] See the Opinion on draft amendments to the law on the constitutional court of Latvia adopted by the Venice Commission on 9-10 October 2009, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042-e [last accessed on 31 August 2017].
[15] For example, the Czech Republic, Lithuania, Slovenia or Poland. See, for further details, the study *Opinions divergentes au sein des courssuprêmes des Étatsmembres*, edited by the European Parliament, authored by Rosa Rafaelli, available on http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_FR.pdf [last accessed on 27 June 2017]. In doctrine, ample discussions took place in the specialty Western literature, see, for an exhaustive debate, Anne Langenieux-Tribalat, *Les opinions séparées des juges de l'ordrejudiciairefrançais*, thesis available on

there is practically a censorship of the minority opinion, thus affecting the independence of those judges.This censorship not provided by law can result in negative consequences, affecting the right of litigants to know the arguments of the minority and hindering the evolution of the Constitutional Court case law.

We reaffirm a series of **principles regarding the activity of Constitutional Court judges**:

- judges of the Constitutional Court shall be independent (Article 145 of the Romanian Constitution);
- the jurisdictional powers of the Constitutional Court are those established by the Constitution and by the law for the organization of the Court (Article 3 paragraph 1 of Law no. 47/1992) and not by acts with restrictive or even prohibitive effect which rank lower than the law in the hierarchy of legal rules;
- judges of the Constitutional Court have the right (not restricted in any way by law) to formulate dissentingor concurring opinions, which are published in the Official Gazette together with the Court's decision (Article 59 paragraph 3 of Law n. 47/1992).

Immediately after the issuance of DecisionNo. 1/2017, many non-governmental organizations and magistrates' associations called for a reconsideration of the position of the Constitutional Court regarding the rules of drafting and publishing dissentingand concurring opinions.

The question to be addressed to the Venice Commission:

"Can the right of Constitutional Court judges to formulate dissentingand concurring opinions be restricted? If yes, can this censorship be ordered by the President of the Constitutional Court?"

Decision No. 377 of 31 May 2017 issued by the Constitutional Court of Romania

The Law approving the Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code provides as follows:

*"**Art. I.** - Government Emergency Ordinance no. 95 of 8 December 2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code published in the Official Gazette of Romania, Part I, no. 1009 of 15 December 2016 is hereby approved.*

***Art.II.** — Law no. 134/2010 on the Civil Procedure Code, republished in the Official Gazette of Romania, Part I, no. 247 of 10 April 2015, as subsequently amended and supplemented, shall be amended and supplemented as follows:*

*1. **In Article 509, paragraph (1), after point 11 four new points, 12-15, shall be***

http://epublications.unilim.fr/theses/2007/langenieux-tribalat-anne/langenieux-tribalat-anne.pdf [last accessed on 31 August 2017].

introduced which shall read as follows:
"12. when, after delivery of the final judgment, the Constitutional Court adopts a decision declaring that the legal provisions on which the final judgment was based are unconstitutional or whose considerations and/or operative part are contrary to the final judgment;
13. the judgment is pronounced in violation of constitutional provisions, even though the issue of public order has not been invoked before the courts;
14. the judgment is delivered in disregard of the provisions of the Constitutional Court's decisions, as well as of their considerations;
15. where the judgment is unlawful by imposing sanctions on the basis of legal provisions which were not in force at the time when the legal relationship subject to settlement in court has arisen".
2. ***In Article 509, paragraph (2) shall be amended and shall read as follows:***
"(2) For the reasons of review provided in paragraph (1), point 3, but only in the case of the judge, point 4 and points 7-15, judgments which do not refer to the merits shall also be subject to review".
3. ***In Article 511, after paragraph (3), two new paragraphs, (3^1) and (3^2) are introduced which shall read as follows:***
"(3^1) For the reasons set out in Article 509 (1), points 13 to 15, the time limit shall be 12 months from the date the judgment has remained final.
(3^2) For the reasons set out in Article 509 paragraph (1) point 12, the term is 12 months from the date of publication in the Official Gazette of Romania, Part I, of the decisions of the Constitutional Court".
Art. III. *- In the situations provided for in Article 511 (3^1) and (3^2) of Law no. 134/2010 on the Civil Procedure Code, republished, as subsequently amended and supplemented, including those brought by this law, in which the judgment or the Constitutional Court's decision, as the case may be, is prior to the entry into force of this law, the term shall be 12 months from the date of entry into force of this law".*

The Constitutional Court of Romania was referred, by the Decision No. 1 of 10 May 2017, issued by the High Court of Cassation and Justice - Joint Sections, with the plea of unconstitutionality of the provisions of the Law for the approval of Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code.
By Decision no. 377 of 31 May 2017[16], the Constitutional Court admitted the plea of unconstitutionality formulated and found that the provisions of Articles II and III of the Law for the approval of Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code are unconstitutional, for the following reasons:

[16] **Published in the Official Gazette of Romania, Part I, no. 586 of 21 July 2017.**

In the reasoning of the plea of unconstitutionality of the provisions of Article II (1) of the Law [referring to art. 509 paragraph (1) point 13 of the Civil Procedure Code], although reference is made to the violation of Article 1 (5)) of the Constitution in its provisions on the quality of the law, in fact, it mainly concerns the violation of the constitutional provisions regarding the authority of the Constitutional Court and of the courts and, only subsidiarily, the requirements of the quality of the law in terms of determining the scope of the wording *"in violation of constitutional provisions"*.
In order to carry out a full analysis of Art. II point 1 [with reference to Article 509 paragraph (1) point 13 of the Civil Procedure Code] from the perspective of Article 1 paragraph (5) of the Constitution, this legal text must be corroborated with the provisions of Art. II point 1 [with reference to Article 509 paragraph (1) point 14 of the Civil Procedure Code]. This latter text governs the hypothesis of review of court rulings issued in violation of the Constitutional Court decisions; therefore Article 509 (1) point 13 of the Civil Procedure Code should aim to review judgments given in violation of the Constitution and, since the case of review of the violation of Constitutional Court decisions is distinct, this means that this the text of law requires that the interpretation of the constitutional provisions invoked in the application for review be carried out directly by the courts, at first hand, on a case-by-case basis. (par. 63)
Courts become competent themselves to carry out a constitutional review, verifying the constitutionality of the judgment. Also, the courts will apply the Constitution directly. In that regard, the Court has held in its case-law that a court of law has the power to apply directly the Constitution only in the hypothesis and in the terms established by the Constitutional Court's decision to declare unconstitutionality [see Decision no. 186 of 18 November 1999, published in the Official Gazette of Romania, Part I, no. 213 of 16 May 2000, Decision no. 774 of 10 November 2015, published in the Official Gazette of Romania, Part I, no. 8 of 6 January 2016]. Consequently, the courts can directly apply the Constitution only if the Constitutional Court has found the unconstitutionality of a legislative solution and authorized, by that decision, the direct application of constitutional provisions in the absence of a legal regulation of the legal situation created by the decision to uphold the plea of unconstitutionality. (par. 64-65)
The Court has also held that the court having the authority to examine this case of review is not unique, but, according to Art. 510 paragraph (1) of the Civil Procedure Code, is the court which issued the judgment whose review is requested. Thus, there may be various interpretations of constitutional norms, on the one hand, at the level of each court rank [city court, tribunal, court of appeal, the High Court of Cassation and Justice], provided that the substantive jurisdiction is doubled on the one hand, by an express territorial jurisdiction under civil procedural rules, and, on the other hand, by the level of judge panels in those courts. Under these circumstances, beyond the lack of substantive jurisdiction of the courts to carry out a constitutional review, which inherently presupposes an interpretation given to the constitutional norm, if there is a jurisprudential divergence as to one and the same constitutional norm, the question arises of the authority competent to unify the case law on how to interpret the constitutional norm: The High Court of Cassation and Justice [by the settlement of an appeal in the interest of the law] or the Constitutional Court. *Per absurdum*, there might be a situation where jurisprudential divergences exist with regard to the interpretation of

a constitutional text between the High Court of Cassation and Justice on the one hand and the Constitutional Court on the other hand, when they exercise their right of constitutional review of the judgments, respectively of the primary regulatory norms. (par. 66)

The Constitutional Court of Romania has found that the criticized normative regulation actually establishes a means of achieving constitutional review, namely the constitutional review of judgments, and not a reason for review.

In Romania, constitutional review is carried out by the Constitutional Court, the only authority of constitutional jurisdiction [Article 1 paragraph (2) of Law no. 47/1992], therefore the Constitutional Court has stated that, according to the Fundamental Law, the only authority competent to exercise control over the constitutionality of laws or ordinances is the constitutional court. Therefore, neither the High Court of Cassation and Justice nor the courts or other public authorities of the State have the power to review the constitutionality of laws or ordinances, whether or not they are in force [Decision No. 838 of 27 May 2009, published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009]. Pursuant to Article 142 paragraph (1) of the Constitution, the Constitutional Court is the guarantor of the supremacy of the Fundamental Law and, according to Article 1 para. (2) of Law no. 47/1992, this is the only authority of constitutional jurisdiction in Romania. In other words, in accordance with the constitutional and legal provisions in force, only the Constitutional Court is empowered to control the Government's simple or emergency ordinances, no other public authority having substantive competence in this area [Decision no. 68 of 27 February 2017, published in the Official Gazette of Romania, Part I, no. 181 of 14 March 2017, paragraph 79]. Pursuant to the provisions of Article 146 (d) of the Constitution, in conjunction with Law no. 47/1992 on the organization and functioning of the Constitutional Court, this is the only competent authority in the matter of constitutional review, excluding any sharing of this authority with the courts of common law [Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011]. The Court has also found that a dimension of the Romanian state is represented by the constitutional justice exercised by the Constitutional Court, a political and judicial public authority which is outside the sphere of legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution, as a Fundamental Law of a system governed by the rule of law [Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012]. (par. 69)

The granting of a decision-making role to the courts of law in carrying out the constitutional review implies, on the one hand, the interpretation of the constitutional notions and concepts, the determination of the scope and limits of the fundamental rights and freedoms, or the explanation of the organization and functioning of the state authorities in constitutional law relations and, on the other hand, the creation of a hybrid model of constitutional review, unprecedented in other states of the world. Thus, the authority of the Constitutional Court is undermined, since it would remain in the area of the constitutional litigation of norms, while the courts of law would take over the authority to apply in concrete cases the provisions of the Constitution, the final act of judgment - the judicial decision - thus becoming subject to constitutional review by the

judge of common law. It should be noted that, in a plea of unconstitutionality, an *a quo* judge is only allowed to express his opinion on the merits of the plea as an aid to the constitutional court, but instead is denied the authority to make that assessment itself a condition for the admissibility of the plea. The reason why the lawmaker did not set such a condition of admissibility is precisely the fact that the *a quo* court would carry out a constitutional review, the results of which would become a condition precedent for referral to the Constitutional Court. This view of the exercise of constitutionality control is, however, undermined by the legal provisions under consideration, which recognize the decision-making power of the courts both in establishing the meaning of the constitutional norm and in verifying *in concreto* the constitutionality of the act referred to judgment [the court decision]. (par. 70)

In Romania, the authority to exercise the constitutionality control belongs exclusively to the only authority with constitutional jurisdiction, namely the Constitutional Court. Moreover, axiomatically, the European model of constitutionality control excludes the jurisdiction of the courts in exercising such control, and this activity is entirely the responsibility of the specialized constitutional courts. Having clarified the issue of the authority competent to exercise the constitutionality control, the Constitutional Court held that the provisions of Article 146 (a), first sentence and (d), namely (b), (c) and (l) of the Constitution, in conjunction with Article 27 (1) of Law no. 47/1992 expressly regulate the constitutionality control, on the one hand, of primary normative acts and, on the other hand, of international treaties, regulations and parliamentary resolutions. **Thus, the constitutional review of court judgments, by way of the complaint of unconstitutionality, has not been yet regulated.The Constitutional Court found that the exercise of a constitutional review on court judgments implies a review of their compliance with the Constitution, which review can only be performed by the Constitutional Court, and not by the courts of law, and the decision of the constitutional court thus rendered may provide grounds for a review of a court judgment set aside for reasons of unconstitutionality.<u>However, under no circumstances a constitutional review of a court judgment may be performed by the court having jurisdiction to rule on a review application because this would take us to a situation where the unlimited jurisdiction of the Constitutional Court in terms of constitutional review would be defeated.</u>** Otherwise, the Constitution would become subject to more or less heterogeneous interpretations at the level of all existing courts in Romania. It is also obvious that, under these coordinates, the extraordinary appeal of the application to review is not the appropriate legal means for the constitutional review of judgments. (par. 72)

The Constitutional Court found that the violation of the constitutional provisions of Article 142 paragraph (1), according to which the Constitutional Court is the guarantor of the supremacy of the Constitution, as well as of art. 124 paragraph (1) and art. 126 paragraph (1), according to which justice is served in the name of the law by the High Court of Cassation and Justice and by the other courts provided by law. **The Constitutional Court, on the basis of Article 18 paragraph (1) of Law no. 47/1992, has extended its constitutional review over Article II (1) of the Law with reference to Article 509 (1) 14 of the Civil Procedure Code, because the assessment of the compliance of the judgment with the decisions of the Constitutional Court is also**

an aspect of constitutional review on the basis of the complaint of unconstitutionality. Therefore, this legal text also violates art. 124 paragraph (1), Article 126 paragraph (1) and Article 142 paragraph (1) of the Constitution. In fact, assessing the compliance of a legislative solution with the decisions of the Constitutional Court is also an aspect of constitutional review in the light of Article 147 (4) of the Constitution regarding the compliance with the generally binding effects of Constitutional Court decisions [see Decision No. 581 of 20 July 2016, published in the Official Gazette of Romania, Part I, no. 737 of 22 September 2016, paragraph 49 et seq., or Decision No. 681 of 23 November 2016, published in the Official Gazette of Romania, Part I , No. 1000 of 13 December 2016, paragraph 21 et seq.]. Furthermore, the Constitutional Court has the authority to rule on the situation of unconstitutionality created by the non-compliance with the considerations of a decision finding unconstitutionality [Decision no. 463 of 17 September 2014, published in the Official Gazette of Romania, Part I, no. 704 of 25 September 2014, paragraph 37]. (par. 74)

The Constitutional Court found that the lawmaker relied on a correct hypothesis in terms of Article 1 paragraph (5) of the Constitution, referring to the compliance with the Constitution by all public authorities, including by the courts in the judgments they pronounce, but regulated a defective legal mechanism both with regard to the authority competent to exercise the constitutional review and with regard to the procedural manner in which it is carried out.

There are two models of constitutional review in the Member States of the European Union: **the European model**, involving a special and specialized authority that is, as a rule, outside the powers of the state (legislative, executive, and judicial power), authority called Constitutional Council (France), Constitutional Tribunal (Spain, Portugal, Germany, Poland) or Constitutional Court (Austria, Romania, Slovakia, Slovenia, Hungary, Belgium, Bulgaria, Croatia, Italy, the Czech Republic, Cyprus, Latvia, Lithuania, Luxembourg); **the American model,** which involves a constitutional review exercised by supreme courts or by all courts, as the case may be(Denmark, Greece, Sweden, Estonia, Ireland, Finland, the United Kingdom of Great Britain and Northern Ireland).

In several states - a minority (Germany, Spain, Croatia, Austria, Poland, the Czech Republic, Slovakia or Hungary), classic constitutional review is supplemented by the protection of fundamental rights. For example, the Federal Constitutional Tribunal in Germany settles constitutional appeals, which may be formulated by any person who considers himself or herself to be injured in one of his or her fundamental rights or other rights expressly provided for by the Fundamental Law. The system has been taken over also in the other countries listed above, for instance, the Constitutional Court of Spain rules on *recurso de amparo*(individual appeal regarding the violation of the rights and freedoms) differently from the German model because this occurs once the usual remedies have been exhausted. Similarly, the Austrian Constitutional Court rules on appeals against court judgments in the field of asylum law, when violation of a right guaranteed under the Constitution is alleged. These constitutional courts are formed of constitutional judges appointed either by the Parliament (Germany, Poland, Hungary, or Croatia) or by the President (Austria, or the Czech Republic) or by both (Spain, the Government and the Parliament).

With the Decision no. 377 of 31 May 2017, without the prior consultation of the Venice Commission, the Romanian Constitutional Court acts as a maker of effective legislation, attempting to cause the introduction of the "unconstitutionality complaint" concept in the Romanian legislation through a case law contrivance.

As regards the effects of its decisions, the Constitutional Court has constantly argued that, pursuant to art. 147 para. (4) of the Constitution, the general binding nature regards not only the operative part of the Constitutional Court's decisions, but also their underlying considerations. Consequently, both the Parliament and the Government, and the public authorities and institutions, are bound to comply as such with both the considerations and the operative part of the Court's decisions (for instance: Decision no. 196 of 4 April 2013, published in the Official Gazette of Romania, Part I, no. 231 of 22 April 2013; Decision 163 of 12 March 2013, published in the Official Gazette of Romania, Part I, no.190 of 4 April 2013; Decision no.102 of 28 February 2013, published in the Official Gazette of Romania, Part I, no. 208 of 12 April 2013; Decision no. 1039 of 5 December 2012, published in the Official Gazette of Romania, Part I, no. 61 of 29 January 2013; Decision no. 536 of 28 April 2011, published in the Official Gazette of Romania, Part I, no. 482 of 7 July 2011).

Nevertheless, before such a legislative solution is imposed under a decision of the Constitutional Court, which solution can imply even a review of the Constitution of Romania, this needed/needs to be widely discussed across the society, the academic environment and the judicial power.

We believe that the express point of view of the Venice Commission on the draft law the debate of which shall be resumed in the Parliament, further to the decision of the Constitutional Court, is necessary as the legislative solution demands, for the rule of law foundations not to be affected, including for the right to a fair trial, appropriate safeguards (a different selection of the judges sitting in the Constitutional Court, considering that many constitutional judges in Romanian have a political background), and potentially bringing the Constitutional Court of Romania, which is now a special and specialised body, into the judiciary, even with a change of constitutional setup.[17] ***Likewise, pursuant to art. 14 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, the judicial proceedings before this Court are supplemented with the civil procedure rules, but only insofar as these are compatible with the nature of the proceedings before the Constitutional Court, as exclusively determined by the Court.***

The question to be addressed to the Venice Commission:

[17] The Venice Commission issued a positive opinion on certain national draft laws as regards the establishment of to create such legal institutions (constitutional complaints), such as, for instance, in case of Hungary (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)001-e), or of Turkey (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)024-e), including building on the idea that subsequent constitutional review also of the court judgments would help reduce the number of convictions by the European Court of Human Rights. However, due consideration should be given to the entire national constitutional and lower-ranking legislative context.

"Is constitutional review of court judgments by the Constitutional Court of Romania, a special and specialised body outside the national judicial system, by way of the unconstitutionality complaint (as the Constitutional Court ruled under Decision no. 377 of 31 May 2017 where it upheld the challenge of unconstitutionality lodged as regards art. II and III of the Law approving the Government Emergency Ordinance no. 95/2016) liable to affect the foundations of the rule of law system, including the right to a fair trial?"

Sincerely,

Judge Dragoş Călin, Bucharest Court of Appeal, co-president
Judge Ionuț Militaru, Bucharest Court of Appeal, co-president