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**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES  
(CCJE)**

**Opinion of the CCJE Bureau**

**following a request by the Romanian Judges Forum Association**

**as regards the situation on the independence**

**of the judiciary in Romania**

## INTRODUCTION

1. The CCJE received a request from the Romanian Judges Forum Association, on 15 November 2018, to express its position as regards the independence of the judiciary in Romania. The request referred to an overall long history of tense battle in Romania, since 2017, for the preservation of the independence of judges and prosecutors, as well as certain other issues. The request *inter alia* also emphasised the problems, which have received widespread national and international attention, in the fight against corruption and, in particular, the dismissal, in July 2018, by the Minister of Justice of the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruta Kovesti<sup>1</sup>.
2. As to issues of direct relevance to the CCJE mandate, the Romanian Judges Forum Association pointed to the Amendments to the following Laws: 1) on the Superior Council for Magistracy which entered into force in October 2018; 2) on the Statute of Judges and Prosecutors which entered into force in October 2018; 3) on Judicial Organization which entered into force in July 2018.
3. The request described how these amendments were developed and proposed, without any meaningful dialogue and involvement of the judiciary and the prosecution. The request also referred in-depth to the Opinion of the Venice Commission on the above-mentioned Amendments which confirmed that “the legislative process took place in a context marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption”<sup>2</sup> and that “this context makes any legislative initiative, which has the potential of increasing the risk of political interference in the work of judges and prosecutors, particularly sensitive”<sup>3</sup>.
4. As regards judges in particular, the CCJE was requested to answer a list of questions, from the point of view of European standards for judicial independence, concerning the role and functioning of the Superior Council for Magistracy, the material liability of judges, the establishment of a separate prosecutor office structure for the investigation of offences committed by judges, the freedom of expression of judges, repeated and unprecedented attacks against judges directed by political actors and the right of judges to stand against any policies or actions affecting their independence.
5. In considering these issues, the CCJE Bureau takes note of the Venice Commission's above-mentioned Opinion, as well as of the Progress Report issued by the European Commission, on 13 November 2018, in the framework of the Cooperation and Verification Mechanism (CVM), which *inter alia* called on Romania to suspend immediately the implementation of the above-mentioned Amendments, and to revise them taking fully into account the recommendations under the CVM and those issued by the Venice Commission<sup>4</sup>.

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<sup>1</sup> Technically she was dismissed by the President of Romania who initially objected to the dismissal and dismissed Ms Kovesti only after a decision by the Constitutional Court of Romania that upheld the Justice Minister's decision and required the President to sign the dismissal.

<sup>2</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 13.

<sup>3</sup> *Ibid.*, para 17.

<sup>4</sup> See at [http://europa.eu/rapid/press-release\\_IP-18-6365\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6365_en.htm) .

6. In this way, having examined the request of the Romanian Judges Forum Association in the light of the relevant European standards, including the Council of Europe Committee of Ministers' Recommendations, CCJE and Venice Commission standards, as well as the case law of the European Court of Human Rights (ECtHR), the CCJE Bureau has delivered the below Opinion. It comprises a legal analysis of the Amendments together with corresponding recommendations in bold at the end of each section. A summary of the recommendations appears at the beginning of the Opinion in order to make it reader-friendly and to facilitate a quick reference to the key findings and recommendations of the CCJE Bureau.

## **Summary of Recommendations**

7. **The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, agrees with the concerns expressed by the Romanian Judges Forum Association as regards the independence of judges in Romania and the adoption of Amendments to the Laws on the Superior Council for Magistracy, on the Statute of Judges and Prosecutors and on Judicial Organization.**
8. **As regards the role and functioning of the Superior Council for Magistracy (SCM), the CCJE Bureau recommends to reconsider the grounds for revocation of the SCM members and in particular to remove the possibility to revoke elected members of the SCM through a no-confidence vote of the general meetings of courts, including by way of a petition.**
9. **The CCJE Bureau also concludes that exclusion of the SCM members who are civil society representatives from all meetings of the SCM Sections – bodies entrusted with decision-making under the Amendments – runs contrary to the European standards.**
10. **The CCJE Bureau consequently recommends that it is not appropriate to have such a limited role of civil society representatives in the work of the SCM and that should be reconsidered.**
11. **As regards the material liability of judges, the CCJE Bureau is concerned about any decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and cannot therefore be appropriate for assessing the existence or causes of any judicial error. The CCJE Bureau recommends that this should be fully reconsidered. Such claims, if any, should be exclusively decided before an independent court providing all the guarantees of Article 6 of the European Convention on Human Rights (ECHR).**
12. **In addition to these procedural aspects, the CCJE Bureau recommends, as a very minimum, that the new definition of judicial error be supplemented by clearly stating that judges are not liable unless bad faith or gross negligence on their part has been established through a due procedure. The CCJE Bureau would like to further recommend considering only bad faith – and not gross negligence - as a possible ground for liability for judicial errors.**

13. **As regards the establishment of a separate prosecutor office structure for the investigation of offences committed by judges, the CCJE Bureau recommends to abandon this idea entirely.**
14. **The CCJE Bureau concludes that the new obligation imposed on Romanian judges, limiting their freedom of expression, is not necessary, raises many questions, may be subject to arbitrary and abusive interpretations endangering judicial independence, and recommends therefore to remove it.**
15. **As regards the reported repeated and unprecedented attacks against judges directed by political actors, the CCJE Bureau condemns any statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring judges or demonstrating disrespect towards them, using simplistic, irresponsible or demagogic arguments or otherwise degrading the judicial system or individual judges.**
16. **As regards the right of judges to stand against any policies or actions affecting their independence, the CCJE Bureau resolutely confirms the legitimate right of judges in Romania and elsewhere to stand against any policies or actions affecting their independence in a climate of mutual respect, and in a way which is consistent with maintaining judicial independence or impartiality.**

## **Legal Analysis**

### ***The role and functioning of the Superior Council for Magistracy (SCM)***

17. First of all, the CCJE Bureau notes that, as regards the revocation of a SCM member, according to the Amendments to the Law on the Superior Council for Magistracy, this is possible at any time if he/she no longer meets the legal requirements for being an elected SCM member; is the subject of one of the disciplinary sanctions provided by law; and the majority of judges in the courts that he/she represents withdraws confidence in respect of him or her.
18. Furthermore, a vote of no-confidence may be adopted by petition signed by a majority of judges in those courts. This would mean that the revocation can be decided without holding a meeting and without giving the possibility to the concerned SCM member to address the judges and defend his/her position<sup>5</sup>.
19. The CCJE Bureau wishes to recall that Councils for the Judiciary are bodies the purpose of which is to safeguard the independence of the judiciary and of individual judges, and to promote thereby the efficient functioning of the judicial system. Their introduction has been recommended by the Committee of Ministers of the Council of Europe, by the CCJE and by the Venice Commission<sup>6</sup>. Over recent years, many European legal systems have introduced Councils for the Judiciary.

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<sup>5</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 145.

<sup>6</sup> See Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (Rec(2010)12), paras 26-29; see also CCJE Opinions No. 1 (2001), para 45, and No. 10 (2007); see also the Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para 32, which all recommend the establishment of such Councils.

20. Even though the CCJE has not yet expressed itself on the issue of revocation, it has particularly emphasised that the “members of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality”<sup>7</sup>. This certainly supposes the existence of safeguards against their arbitrary or otherwise unfounded or questionable revocation.
21. The same logic applies to Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (hereafter Rec(2010)12), which, while not addressing directly the issue of revocation of members, has underlined that “Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges”<sup>8</sup>.
22. Consequently, the CCJE Bureau agrees with the Venice Commission in that as concerns the first ground for revocation, it is not clear what it exactly means<sup>9</sup>, and that “the possibility to revoke an SCM member for having been the subject of one of the disciplinary sanctions provided by law for judges and prosecutors is also questionable, as it allows the dismissal of the person even for the lightest disciplinary sanctions”<sup>10</sup>. It may also be recalled in this context that “the Venice Commission is of the opinion that decisions on suspension of a member should take into account the gravity of the accusations and the existence of at least a probable cause that a serious disciplinary offence has been committed”<sup>11</sup>.
23. The CCJE Bureau also fully endorses what the Venice Commission has stressed regarding the third – most problematic – ground, allowing the revocation of elected SCM members by a withdrawal of confidence, i.e. by vote of the general meetings of courts. “The Venice Commission has consistently objected to the introduction of such a mechanism, because it involves a subjective assessment and may prevent the elected representatives from taking their decisions independently. A vote of confidence is rather specific to political institutions, and is not suitable for institutions such as judicial councils, and even less for individual members of such councils”<sup>12</sup>.
24. It is important to note that, as already mentioned in the Introduction to the present Opinion, the European Commission's Progress Report on Romania under the CVM, adopted on 13 November 2018, called on Romania to suspend immediately the implementation of the justice laws, including the Amendments to the Law on the Superior Council for Magistracy, and to revise the justice laws taking fully into account the recommendations under the CVM and those issued by the Venice Commission<sup>13</sup>.

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<sup>7</sup> See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 36.

<sup>8</sup> See Rec(2010)12, para 26.

<sup>9</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 141.

<sup>10</sup> *Ibid.*, para 142.

<sup>11</sup> See the Venice Commission's Opinion on the Draft Law on the Judicial Council in North Macedonia, CDL-AD(2019)008, para 37; see also the Venice Commission's Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, CDL-AD(2014)028, para 30.

<sup>12</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 143.

<sup>13</sup> See at [http://europa.eu/rapid/press-release\\_IP-18-6365\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6365_en.htm) .

The Progress Report emphasised that the key problematic provisions included in particular the extended grounds for revoking SCM members<sup>14</sup>.

- 25. Accordingly, the CCJE Bureau recommends to reconsider, in line with the above-mentioned observations, the grounds for the revocation of SCM members and in particular to remove the possibility to revoke elected members of the SCM through a no-confidence vote of the general meetings of courts, including by way of a petition<sup>15</sup>.**
26. The CCJE Bureau further notes that according to the Amendments to the Law on the SCM, the decision-making on issues of specific relevance for the two professions - judges and prosecutors - is transferred from the SCM Plenum to the two SCM Sections (for judges and for prosecutors, respectively).
27. While this structural change, aiming at clearly separating the careers of judges and prosecutors, does not in itself contradict European standards, it has certain repercussions as regards some members of the SCM.
28. As regards in particular the SCM members who are representatives of civil society, they can participate only in the SCM Plenum meetings. The Amendments clearly prevent their participation in the SCM Sections meetings, which means that, as noted by the Venice Commission, they will not take part in the adoption of the decisions taken by the SCM Sections<sup>16</sup>.
29. The CCJE has acknowledged that the “the composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively”<sup>17</sup> and has welcomed the possibility of its mixed composition, where “members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence”<sup>18</sup>.
30. As regards the possibility of selective participation of different members in different sessions of a Council for the Judiciary, “when there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel”<sup>19</sup>.
31. In this context, the CCJE Bureau notes the non-obligatory nature of this recommendation, and even more importantly, the reference to only “some” of the tasks which are not necessarily those connected with participating in delivering decisions in the collective body.
- 32. The CCJE Bureau therefore concludes that the exclusion of the SCM members who are civil society representatives from all meetings of the SCM Sections –**

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<sup>14</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>15</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 165.

<sup>16</sup> Ibid., para 137.

<sup>17</sup> See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 15.

<sup>18</sup> Ibid., para 21.

<sup>19</sup> Ibid., para 20.

**bodies entrusted with decision-making under the Amendments – runs contrary to the European standards.**

- 33. The CCJE Bureau consequently recommends that it is not appropriate to have such a limited role of civil society representatives in the work of the SCM and that should be reconsidered.**

### ***Material liability of judges***

34. The Amendments to the Law on the Statute of Judges and Prosecutors prescribe that the action for recovery brought by the state against a judge having committed a judicial error in bad faith or as a result of gross negligence is no longer optional. Such action has become obligatory, and moreover it is an executive body - the Ministry of Public Finance – which is entrusted to start the procedure by requesting the Judicial Inspection to provide a report. Such a report is of a consultative nature, and this Ministry may depend on it, as well as on its own evaluation. It is important also to note that the new procedure will apply both to serving judges and those who are no longer in office.
35. It is interesting to note that, as regards the definition of a judicial error, two successive versions were challenged before the Constitutional Court of Romania for being unclear and unpredictable and affecting the independence of magistrates, and they have been declared unconstitutional<sup>20</sup>.
36. Under the Amendments, there is also a risk of two parallel procedures for acting in bad faith or with gross negligence - action for recovery and disciplinary procedure - with different possible outcomes; there is the increased role of the Judicial Inspection in the recovery process and the large powers of the Chief Inspector.
37. In this regard, the CCJE Bureau wishes to underline that, first of all, a judge should not have to operate under the threat of a financial penalty, the presence of which may, however subconsciously, affect his/her judgment<sup>21</sup>.
38. The CCJE has established that, “as a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including e.g. excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State”<sup>22</sup>.
39. In this manner, the CCJE has endorsed a full functional immunity of judges if they act in good faith. Only bad faith should trigger liability of judges for any judicial errors. As regards negligence, the CCJE has pointed out that “the application of concepts such as gross or inexcusable negligence is often difficult... it is not appropriate for a judge to be

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<sup>20</sup> See Constitutional Court of Romania, Decision no.45 of 30 January 2018, Decision no. 252 of 19 April 2018.

<sup>21</sup> See CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paras 53 and 55.

<sup>22</sup> Ibid., para 55; see also CCJE Magna Carta for Judges (2010), para 21.

exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default”<sup>23</sup>.

40. In non-admitting the gross negligence as a ground for material liability of judges due to practical difficulties of interpretation and application, the CCJE has in fact gone further than the Committee of Ministers of the Council of Europe and the Venice Commission<sup>24</sup>.
41. The CCJE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular the new provisions on material liability of magistrates for their decisions<sup>25</sup>.
42. **The CCJE Bureau is concerned about any decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and cannot therefore be appropriate for assessing the existence or causes of any judicial error<sup>26</sup>. The CCJE Bureau recommends that this should be fully reconsidered. Such claims, if any, should be exclusively decided before an independent court providing all the guarantees of Article 6 of the ECHR.**
43. **The CCJE Bureau further points out that the new liability procedure is particularly worrying when seen in the context of other Amendments establishing a new body for investigating criminal offences of judges and imposing limitations on their freedom of speech. In this context, there is a high risk of pressure on judges undermining their independence<sup>27</sup>.**
44. **In addition to these procedural aspects, the CCJE Bureau recommends, as a very minimum, that the new definition of judicial error be supplemented by clearly stating that judges are not liable unless bad faith or gross negligence on their part has been established through a due procedure<sup>28</sup>. The CCJE Bureau would like to further recommend considering only bad faith – and not gross negligence - as a possible ground for liability for judicial errors.**

### ***Establishment of a separate prosecutor office structure for the investigation of offences committed by judges***

45. The Amendments to the Law on the Judicial Organization prescribe the establishment, within the Prosecutor's Office attached to the High Court of Cassation and Justice, of a Section for the investigation of criminal offences in the judiciary. This Section will have

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<sup>23</sup> See CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 57; see also CCJE Magna Carta for Judges (2010), para 22.

<sup>24</sup> See Rec(2010)12, para 66; see also the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 113.

<sup>25</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>26</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 117.

<sup>27</sup> Ibid., para 121.

<sup>28</sup> Ibid., para 122.



exclusive competence for the prosecution of criminal offences committed by judges and prosecutors, including SCM members, even when other persons, in addition to judges and prosecutors, are under investigation.

46. In this regard, the CCJE Bureau wishes to underline from the outset that it finds it difficult to identify references to such practices in member States, and moreover to standards in this respect elaborated in international or regional instruments. The CCJE has *inter alia* pronounced itself clearly on issues of specialisation of judges which “can help judges, by repeatedly dealing with similar cases, to gain a better understanding of the realities concerning the cases submitted to them, whether at the technical, social or economic levels, and therefore to identify solutions better suited to those realities”<sup>29</sup>.
47. By analogy, the CCJE Bureau may presume that specialisation of prosecutors can also be helpful. Indeed, the Consultative Council of European Prosecutors (CCPE) has found that “the need of specialisation of prosecutors, as well as within the public prosecutors organisational structure, should be seen as a priority, to better respond to new forms of criminality”<sup>30</sup>. For example, when elaborating its Opinion on the quality and efficiency of the work of prosecutors, the CCPE combined it with the fight against terrorism and serious and organised crime which of course requires a certain degree of specialisation<sup>31</sup>.
48. However, the CCJE Bureau strongly doubts that specialisation will help in dealing not with certain serious types of criminality, but with persons of similar profession, i.e. judges, who, by every indication, do not seem destined to commit similar crimes.
49. The specialisation of prosecutors vis-à-vis representatives of specific profession, judges in the case of Romania, immediately raises several questions about the rationale for such a discriminatory approach, its effectiveness and added value. It also raises concerns as regards the public image of the judiciary because such a step may be interpreted by society as evidence of an inclination of the whole professional group to commit a specific type of crime, for example, corruption. In this way, it will not only be derogatory for this professional group but will also damage, possibly severely, the public confidence in the judiciary.
50. Moreover, in the context of the existence in Romania of the National Anticorruption Directorate (DNA), which is responsible for the specific crime of corruption, committed by anybody and not just by a specific professional group, such a step as the establishment of a separate Section for the investigation of criminal offences of judges seems even more questionable.
51. The Romanian Judges Forum Association referred, in its request addressed to the CCJE (as well as to the CCPE), to the problems which received widespread national and international attention in the fight against corruption in Romania and, in particular, the dismissal, in July 2018, by the Minister of Justice of the Chief Prosecutor of the DNA, as it was already mentioned in the Introduction to the present Opinion. This dismissal was also criticised by the European Commission's above-mentioned Progress Report on Romania under the CVM<sup>32</sup>.

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<sup>29</sup> See CCJE Opinion No. 15 (2012) on the specialisation of judges, para 11.

<sup>30</sup> See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors (Rome Charter), Explanatory Note, para 119.

<sup>31</sup> See CCPE Opinion No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime.

<sup>32</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1

52. The CCJE Bureau further notes that “according to many interlocutors of the Venice Commission, there is no reasonable and objective justification for the necessity of creating a separate structure to investigate offences perpetrated within the judiciary since, despite isolated cases, there appears to be no widespread criminality among Romanian magistrates”<sup>33</sup>. Consequently, the establishment of this new structure has raised questions and strong concerns as regards its rationale, its impact on the independence of judges and prosecutors and on the public confidence in the criminal justice system, possible conflicts of competence with the DNA and other bodies, and the possible rerouting of high-profile cases of corruption pending with the DNA. The latter has been pointed out as one of the most serious risks as, together with judges and prosecutors under investigation, other persons investigated for corruption will be removed from the specialised jurisdiction of the DNA. This would undermine both the DNA’s anti-corruption work and the DNA as an institution<sup>34</sup>.
53. The CCJE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular the establishment of a special prosecution section for investigating offences committed by magistrates<sup>35</sup>.
- 54. Therefore, the CCJE Bureau recommends to abandon the establishment of a separate prosecutor’s office structure for the investigation of offences committed by judges and prosecutors.**

### ***Freedom of expression of judges***

55. The Amendments to the Law on the Statute of Judges and Prosecutors prescribe that judges and prosecutors are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive.
56. It is notable that the notion of defamation is not clearly defined in Romania and the above-mentioned obligation relates specifically to other state powers<sup>36</sup>. It raises in fact a lot of questions. First of all, it is not clear what is the rationale for the specific reservation “in the exercise of their duties” and how it will be applied. Secondly, the law should evidently protect all persons and legal entities from defamation, and not just the legislative and executive powers. Therefore, the selective approach of the new provision in these two key aspects is very questionable.
57. In this way, one may presume that judges should refrain from defamatory statements in general, and in respect of everybody, including the legislative and executive powers.

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(Benchmark one: judicial independence and judicial reform. Dismissal of the DNA Chief Prosecutor and political pressure on judicial institutions), page 4.

<sup>33</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 84.

<sup>34</sup> Ibid., para 83; see also GRECO, Greco-AdHocRep(2018)2, para 34.

<sup>35</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>36</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 130.

The CCJE Bureau notes in this regard that the legislative and executive powers have the same obligations.

58. The CCJE Bureau wishes to recall that the European Court of Human Rights (hereafter the ECtHR) has recognised that it is of fundamental importance in a democratic society that the courts inspire confidence in the public<sup>37</sup>, and therefore judges must be protected against destructive attacks lacking any factual basis. Moreover, since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do<sup>38</sup>. Judges should express themselves above all through their decisions; discretion and the choice of words are important when judges give statements to the media on cases pending or already decided in accordance with the law<sup>39</sup>.
59. In the view of the CCJE, “there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings. Neither should individual judges be personally attacked. Politicians must never encourage disobedience to judicial decisions let alone violence against judges, as this has occurred in some member states”<sup>40</sup>.
60. The judges, for their part, have, as a bottom line, the same right to freedom of expression under the ECHR as everybody else, and they, “like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature”<sup>41</sup>.
61. The CCJE has also underlined that there is a “need to strike a balance between the judges’ freedom of opinion and expression and the requirement of neutrality”<sup>42</sup>. At the same time, it should be noted that this statement was made in the context of the “extra-judicial conduct of judges”<sup>43</sup>. The quote in paragraph 60 of the present Opinion likewise refers to the conduct of judges outside their duties.
62. In this way, the CCJE Bureau wishes to underline that, as it is evident from the above quotes, judges may be subject to a certain degree of restraint, however this should relate to their extra-judicial conduct. Putting limitations on judges in the exercise of their duties, as done by the Amendments to the Law on the Statute of Judges and Prosecutors, may result in arbitrary and abusive interpretations and it carries the risk of obstructing judges in the course of their work.
63. The Venice Commission has also mentioned that the rationale for such a new provision in the Romanian legislation is questionable since there is a risk that it may prevent

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<sup>37</sup> ECtHR *Olujic v. Croatia*, 2009.

<sup>38</sup> ECtHR *De Haes and Gijssels v. Belgium*, 1997.

<sup>39</sup> ECtHR *Daktaras v. Lithuania*, 2000; *Olujic v. Croatia*, 2009.

<sup>40</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 52.

<sup>41</sup> *Ibid.*, para 42.

<sup>42</sup> See CCJE Opinion No. 3 (2002) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, para 33.

<sup>43</sup> *Ibid.*, Section A(1)(b) entitled “Impartiality and extra-judicial conduct of judges”.

judges from criticising other state powers when addressing cases involving the state and may be used as a tool for political pressure<sup>44</sup>.

64. The CCJE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular restrictions on the freedom of expression for magistrates<sup>45</sup>.
65. **In this context, the CCJE Bureau concludes that the new obligation imposed on Romanian judges, limiting their freedom of expression, is not necessary, raises many questions, may be subject to arbitrary and abusive interpretations endangering judicial independence, and it recommends that it be removed.**

***Repeated and unprecedented attacks against judges directed by political actors***

66. The Romanian Judges Forum Association requested the CCJE to pronounce its position as regards the reported repeated and unprecedented attacks against judges directed by political actors in Romania.
67. The Venice Commission has also mentioned that “there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns”<sup>46</sup>.
68. The CCJE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has stated that “judges and prosecutors have continued to face personal attacks in the media, with mechanisms for redress falling short”<sup>47</sup>.
69. In this regard, the CCJE Bureau wishes to repeat what was already mentioned in paras 58-59 of the present Opinion referring to the ECtHR case law and the CCJE standards on the subject of attacks, intimidations, disrespect, pressures, simplistic and demagogic arguments directed against judges.
70. The CCJE Bureau also underlines that the executive and legislative powers should not only strictly abstain from the above-mentioned but they “are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary. Unbalanced critical commentary by politicians is irresponsible and causes a serious problem because public trust and confidence in the judiciary can thereby be unwittingly or deliberately undermined. In such cases, the judiciary must point out that such behaviour is an

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<sup>44</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 124.

<sup>45</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>46</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, paras 15 and 157.

<sup>47</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 2 (General Situation), page 2.

attack on the constitution of a democratic state as well as an attack on the legitimacy of another state power. Such behaviour also violates international standards<sup>48</sup>.

71. **The CCJE Bureau consequently condemns any statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring judges or demonstrating disrespect towards them, using simplistic, irresponsible or demagogic arguments or otherwise degrading the judicial system or individual judges.**

***The right of judges to stand against any policies or actions affecting their independence***

72. In view of the difficult situation of the judiciary, the Romanian Judges Forum Association also requested the CCJE to confirm its position on the right of judges to stand against any policies or actions affecting their independence.
73. Continuing the topic of attacks against judges, mentioned in the previous chapter of the present Opinion, the CCJE has stated that “individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism. Individual judges who have been attacked often hesitate to defend themselves (particularly in the case of a pending trial) in order to preserve their independence and to demonstrate that they remain impartial. In some countries, councils for the judiciary or the Supreme Court will assist judges in such situations. These responses can take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence<sup>49</sup>.”
74. Judges certainly have the right to stand against any other policies or actions affecting their independence resulting from new legislation or amendments to the existing one, as in Romania, or in the case of discriminatory or selective approaches during the selection or appointment of judges, or political engineering to provide for a decisive role of the dominant political force, for example, during elections/appointment by Parliament, or interference into the judicial administration through executive bodies, for example by the Ministries of Justice, as well as in other cases.
75. As the CCJE has noted, “courts may criticise legislation or the failure of the legislative to introduce what the court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect. Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality<sup>50</sup>.”
76. While “in all cases of conflict with the legislature or executive involving individual judges the latter should be able to have recourse to a council for the judiciary or other independent authority, or they should have some other effective means of remedy<sup>51</sup>”, the European Commission's above-mentioned Progress Report on Romania under the

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<sup>48</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 52.

<sup>49</sup> Ibid., para 53.

<sup>50</sup> Ibid., para 42.

<sup>51</sup> Ibid., para 43; see also Rec(2010)12, para 8.

CVM has clearly pointed to the “mechanisms for redress falling short”<sup>52</sup> in cases where judges and prosecutors faced personal attacks in the media.

77. The CCJE has also emphasised that “it is not acceptable that reasonable critical comments from the judiciary towards the other powers of the state should be answered by removals from judicial office or other reprisals”<sup>53</sup>.
- 78. Thus, the CCJE Bureau resolutely confirms the legitimate right of judges in Romania and elsewhere to stand against any policies or actions affecting their independence in a climate of mutual respect, and in a way which is consistent with maintaining judicial independence or impartiality.**

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<sup>52</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 2 (General Situation), page 2.

<sup>53</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 42.