



**Provisional version**

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## Committee on Legal Affairs and Human Rights

# New threats to the rule of law in Council of Europe member States: selected examples

## Report\*

Rapporteur: Mr Bernd FABRITIUS, Germany, Group of the European People's Party

### A. Draft resolution

1. The Parliamentary Assembly recalls its previous resolutions on upholding the rule of law in the member States of the Council of Europe, in particular [Resolutions 1594 \(2007\)](#) on "The principle of the Rule of Law", 1685 (2009) on "Allegations of politically motivated abuses of the criminal justice system in Council of Europe member States" and 2040 (2015) on "Threats to the rule of law in Council of Europe member States: asserting the Parliamentary Assembly's authority", [Resolution 1703 \(2010\)](#) and [Recommendation 1896 \(2010\)](#) on "Judicial corruption", [Resolution 1943 \(2013\)](#) and [Recommendation 2019 \(2013\)](#) on "Corruption as a threat to the rule of law" and [Resolution 2098 \(2016\)](#) and [Recommendation 2087 \(2016\)](#) on "Judicial Corruption: urgent need to implement the Assembly's proposals".

2. The Assembly notes with concern serious problems related to the rule of law in many member States of the Council of Europe. In its [Resolution 2040 \(2015\)](#), it regretted that a number of its recommendations concerning safeguarding and strengthening the rule of law still had not been implemented by certain member States.

3. Being fully aware of the diversity of the legal systems and cultures of the member States of the Council of Europe, the Assembly recalls that respect for the rule of law is one of the core values of the organisation and is closely interlinked with democracy and respect for human rights. Article 6 of the European Convention on Human Rights ("the Convention")<sup>1</sup> enshrines one of its main components: the principle of independence and impartiality of the judiciary. Furthermore, the Council of Europe is the main international organisation to have developed legal and political documents in this field, through the work of its statutory bodies and specialized instances, such as the European Commission for Democracy Through Law (Venice Commission), the Group of States Against Corruption (GRECO), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE).

4. The Assembly calls again on all Council of Europe member States to fully implement the principle of the rule of law, in line with the above mentioned instruments of the Council of Europe and to continue to cooperate with its relevant bodies and instances.

5. The Assembly has thoroughly examined the situation in five member States of the Council of Europe: Bulgaria, Poland, the Republic of Moldova, Romania and Turkey. Although the list of problems found in those States does not include all of those to be found in Council of Europe member States, the Assembly is

\* Draft resolution adopted by the committee on 5 September 2017.

<sup>1</sup> ETS No 5.

concerned about some recent developments which put at risk respect for the rule of law, and, in particular, the independence of the judiciary and the principle of the separation of powers. This is mainly due to tendencies to limit the independence of the judiciary made through attempts to politicize the judicial councils and the courts (mainly in Bulgaria, Poland and Turkey), massive revocation of judges and prosecutors (Turkey) or attempts to do so (Poland) and tendencies to limit the legislative power of the parliament (the Republic of Moldova, Romania and Turkey). Moreover, corruption, which is a major challenge to the rule of law, remains a wide-spread phenomenon in Bulgaria, the Republic of Moldova and Romania.

6. The Assembly, therefore, calls on the Bulgarian authorities to:

6.1. continue the reform of the Supreme Judicial Council, the judiciary and the prosecution service in line with Council of Europe recommendations, and

6.2. strengthen efforts to combat corruption and, in particular, establish an anti-corruption agency.

7. The Assembly calls on the Polish authorities to:

7.1. refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary;

7.2. ensure that the justice reform which is now under way will be compliant with Council of Europe standards on the rule of law, democracy and human rights, and

7.3. fully cooperate with the Venice Commission and implement its recommendations, especially those with respect to the composition and the functioning of the Constitutional Court.

8. The Assembly calls on the Romanian authorities to:

8.1. support an appropriate public debate on the constitutional criteria for lifting parliamentary immunity;

8.2. revise as soon as possible the criminal legislation by implementing the decisions of Constitutional Court that declared unconstitutional an important number of articles of the Criminal Code and the Criminal Procedure Code;

8.3. ensure that the separation of powers is respected by the government and the judiciary as concerns the competences of the Parliament;

8.4. support, politically and financially, the work of the National Anti-Corruption Directorate (DNA) while the DNA should respect fundamental human rights during the criminal investigations;

8.5. ensure the respect of the essential role and the authority of the Constitutional Court throughout Romanian society.

9. The Assembly calls on the authorities of the Republic of Moldova to:

9.1. continue the reform of the Supreme Council of the Magistracy, the judiciary and the prosecution service in line with Council of Europe bodies' recommendations;

9.2. considerably strengthen its efforts to combat corruption and, in particular, ensure full independence of the major institutions competent in this field, and

9.3. refrain from taking measures which would undermine the separation of powers.

10. Recalling its [Resolution 2156 \(2017\)](#) on the functioning of democratic institutions in Turkey, the Assembly reiterates its deepest concern about the scope of measures taken under the state of emergency and the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and approved in the national referendum of 16 April 2017. Therefore, it calls on the Turkish authorities:

10.1. lift the state of emergency as soon as to the circumstances and threats which led to the declaration of the state of emergency are eliminated;

10.2. reconsider the constitutional amendments approved in the referendum of 16 April 2017, in line with the Venice Commission's opinion No. 875/2017, so there will again be a functioning separation of powers especially with respect to the Parliament and the Constitutional Court;

10.3. make sure that all emergency decree laws passed by the Government under the state of emergency are approved by the Parliament and that their constitutionality can be verified by the Constitutional Court, and

10.4. put an immediate end to the collective dismissal of judges and prosecutors through decree laws and ensure that those who have already been dismissed will have their cases reviewed by a 'tribunal' fulfilling the requirements of Article 6 of the Convention.

11. The Assembly recalls its [Resolution 2178 \(2017\)](#) on the implementation of judgments of the European Court of Human Rights and calls on all member States of the Council of Europe to fully implement the Court's judgments and give a political priority to those which reveal a strong need to carry out comprehensive reforms of the judicial system.

12. The Assembly calls on all member States of the Council of Europe to promote a legal and political culture which would be conducive to the implementation of the rule of law, in conformity with the underlying principles of all Council of Europe standards.

## **B. Explanatory memorandum by Mr Bernd Fabritius, rapporteur**

### **1. Introduction**

#### *1.1. Procedure and fact-finding*

1. Following a motion for a resolution<sup>2</sup> that I tabled on 30 September 2014, I was appointed rapporteur on the issue of “Strengthening the Rule of Law in South-East European countries through targeted reform of the legal system” at the Committee meeting in Paris on 10 December 2014. At its meeting in Erevan (Armenia), the Committee held a hearing on the situation in Bulgaria and Romania with the participation of two experts: Ms Zdravka Kalaydjieva, former judge at the European Court of Human Rights, Sofia, Bulgaria, and Ms Cristina Guseth, Director, Freedom House, Bucharest, Romania. On 19 April 2016, it authorised me to undertake fact-finding visits to Bulgaria, the Republic of Moldova and Romania. Consequently, I undertook fact-finding visits to Bucharest (Romania) on 24 May 2016, and to Chisinau (the Republic of Moldova) on 25-26 May 2016. Following worrying developments in some member States of the Council of Europe, in October 2016, I lodged a motion for a resolution on “New threats to the Rule of Law in Council of Europe member States”.<sup>3</sup> On 25 November 2016, the Standing Committee decided to incorporate the new motion for the resolution into the report on “Strengthening the Rule of Law in South-East European countries through targeted reform of the legal system”.<sup>4</sup> Following the extension of the substantive scope of my mandate, the Committee, at its meeting on 24 January 2017, authorised me to conduct fact-finding visits to Turkey and Poland. Upon agreement of the Turkish delegation to the Parliamentary Assembly, my visit to Ankara was scheduled for 3-5 May 2017; however, a day after the Assembly adopted its [Resolution 2156 \(2017\)](#), in which it decided to reopen its monitoring procedure with respect to Turkey, our Turkish interlocutors cancelled my visit, despite the fact that several high-level meetings had already been planned. Therefore, I was not able to carry out a fact-finding visit to this country. Unfortunately, due to my electoral commitments in my home country, I was also unable to visit Bulgaria and Poland. Therefore, in order to get acquainted with the recent developments in those countries, I organised hearings with experts from these countries before the Committee. As regards the situation in Poland, at its meeting in Strasbourg on 27 April 2017, the Committee held a hearing with the participation of Mr Ireneusz Kamiński (Chair of European and International Law, Professor of Law, Institute of Legal Studies, Polish Academy of Sciences, Warsaw), Mr Kamil Zaradkiewicz (Professor of Law, Faculty of Law and Administration, Warsaw University) and Mr Jean-Claude Scholsem (Venice Commission alternate member, Professor emeritus, University of Liège, Belgium). Concerning Bulgaria, at its meeting in Belgrade (Serbia) on 18 May 2017, the Committee held an exchange of views with Mr Hristo Ivanov, former Minister of Justice of Bulgaria, judicial reform expert and advocate, Chairperson of the political party “Da” Bulgaria.

2. Following the decision of the Standing Committee of 25 November 2016 to incorporate the new motion for the resolution on “New threats to the Rule of Law in Council of Europe member States” into the initial report, I proposed to the Committee to change the title of the report from “Strengthening the rule of law in South-East European countries through targeted reform of the legal system” to “New threats to the rule of law in Council of Europe member States: selected examples”. The Committee agreed at its meeting in Strasbourg on 27 April 2017.

#### *1.2. Issues at stake*

3. The motion for a resolution on “Strengthening the rule of law in South-East European countries through targeted reform of the legal system” recalls that a properly functioning legal system and independent courts are key requirements of the rule of law. A judiciary that is truly independent of political influence forms an indispensable part of the checks and balances between state powers in a democratic State. The extent to which the separation of powers is entrenched depends on tradition and social and political characteristics of the State. According to the signatories of this motion, in certain countries, and especially in the South-Eastern part of Europe, “the proper functioning of the legal system prescribed by the constitution is threatened by extra-legal developments”. Threats to the rule of law and the separation of powers principle might stem, in particular, from the wide-ranging powers of the public prosecutor’s office and changes to the composition of judicial self-government bodies within which the influence of the executive or the parliamentary majority has increased.

4. I initially intended to focus on the situation in certain South-East European countries which, before the fall of the Iron Curtain, used to be part of the Soviet Union or belong to the Communist Bloc and are now

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<sup>2</sup> [Doc. 13614](#), Reference 4087 of 17 November 2014.

<sup>3</sup> [Doc. 14172](#).

<sup>4</sup> Reference 4255 of 25 November 2016.

members of the European Union (Bulgaria and Romania) or enjoy close cooperation with it (the Republic of Moldova). Subsequently, another motion for a resolution on “New threats to the Rule of Law in Council of Europe member States”, which referred to the risk of paralysing the functioning of constitutional courts in certain countries and the emergency measures, including the dismissal of a large number of judges and prosecutors, taken in the aftermath of the failed coup d’Etat of 15 July 2016 in Turkey was tabled and the Committee was invited to take it into account for this report. Further developments have showed that this was the right decision: besides the purges initiated after the attempt of the coup, the situation in Turkey turned out to be even more worrying, as the proposed changes to the Constitution, approved in a controversial referendum of 16 April 2017, threaten the checks and balances system in this country. The functioning of the Polish Constitutional Court was another issue that needed to be analysed more closely. Recent developments in Poland concerning a controversial and hasty reform of the judicial system as a whole also require urgent attention.

5. For these reasons, this report will focus on the five above-mentioned member States of the Council of Europe (in alphabetical order): Bulgaria, Poland, the Republic of Moldova, Romania and Turkey. I will try to identify and investigate possible threats to the rule of law, in particular the separation of powers and the independence of the judiciary, including: 1) the powers and the accountability of prosecutors, including the Prosecutor General, and their degree of independence from undue influence; 2) the situation and recent reforms of the judicial systems, and in particular of the judicial self-government bodies; 3) other threats to the independence of the judiciary, including corruption, 4) transfers of powers, especially between the executive and the legislative, hampering the separation of powers and 5) the status of compliance with and the implementation of the standards and recommendations on respect for the rule of law issued by the relevant Council of Europe bodies, and, if relevant, of the European Union.

6. I will also try to propose practical and concrete measures which the Assembly and the concerned member States should consider in order to tackle effectively the above threats to the rule of law. The Council of Europe and the Assembly itself have conducted considerable work on defining the notion of the “rule of law” and on setting and implementing common European standards in this field (for details, see below).

## 2. The rule of law as a cornerstone of a democratic State and the *acquis* of the Council of Europe

### 2.1. The definition of the “rule of law”

7. According to Article 3 of the [Statute of the Council of Europe](#), every member State of the Council of Europe must accept the principle of the rule law, human rights and democracy; these three core values are closely interlinked. The “rule of law” (in French *prééminence du droit* and in German *Rechtsstaat*) is - or at least should be - a pillar of any national legal order and international organisations, including the Council of Europe, and appears in major international legal and political texts.<sup>5</sup> But it has not been defined in any binding legal text. The European Union (EU) has recently sought to establish a related mechanism for its member States.<sup>6</sup> Several international documents contain a number of indicators meant to help the interested stakeholders in assessing respect for the rule of law in a given State.<sup>7</sup> Since last year, the Council of Europe can also make use of the indicators established by the European Commission for Democracy through Law (“Venice Commission”), which will be examined below.

### 2.2. The case law of the European Court of Human Rights

8. The European Court of Human Rights (ECtHR or “the Court”) has ruled that the rule of law is a concept inherent in all the Articles of the Convention on Human Rights (ECHR or “the Convention”).<sup>8</sup> In its case law, the ECtHR has often referred to this notion through different expressions such as “rule of law in a democratic society”<sup>9</sup> or “general requirement for respect of the rule of law”.<sup>10</sup>

<sup>5</sup> See, for example, the 2005 UN Outcome Document of the World Summit, § 134, Preamble of the Statute of the Council of Europe and Article 2 of the Treaty of the European Union.

<sup>6</sup> Communication from the European Commission of 11 March 2014, [A new EU Framework to strengthen the Rule of Law](#), COM(2014) 158 final. See also the Assembly’s [Resolution 2041 \(2015\)](#) and [Recommendation 2065 \(2015\)](#) on “European institutions and human rights”.

<sup>7</sup> At the United Nations’ level, see the 2011 publication on [“Rule of Law Indicators”](#) and the General Assembly’s [declaration](#) of the high-level meeting on the Rule of Law at the national and international levels of 2012. These indicators focus on three institutions: the police, the judicial apparatus and prisons, and there is a marking or percentage system for each indicator.

<sup>8</sup> *Stafford v. the United Kingdom* judgment, Application no. 46295/99, 28 May 2002, paragraph 63.

<sup>9</sup> See, for example, *Centro Europa 7 et di Stefano v. Italy*, application No 38433/09, judgment of 7 June 2012, paragraph 156.



9. Article 6 of the Convention guarantees the right of access to independent and impartial tribunals and the Court has developed a wide jurisprudence in respect of this provision.<sup>11</sup> Some of its recent judgments – whose execution is currently being supervised by the Committee of Ministers - are noteworthy in the context of reforms of the judiciary and respect for the rule of law.

10. In the case *Oleksandr Volkov v. Ukraine*,<sup>12</sup> the Court found four violations of the applicant's right to a fair hearing on account of his unlawful dismissal from his post as a judge at the Supreme Court of Ukraine in June 2010 (Article 6 § 1). The Court, in the operative part of the judgment, ordered the applicant's reinstatement in his previous post of the judge at the earliest possible date, which eventually happened in February 2015. In the meantime, the long-awaited constitutional reform on the judiciary had been adopted.

11. In the judgment *Báka v. Hungary*,<sup>13</sup> the Court found a violation of Article 6§1 of the ECHR due to the fact that the term of office of the President of the Hungarian Supreme Court had been brought to an end before its normal date of expiry through the entry into force of the new constitution, which provided for the creation of the highest court in Hungary, the Kúria, to succeed and replace the Supreme Court. The applicant had not enjoyed the right of access to a court, since the termination of his term of office resulted from the transitional measures of new constitutional legislation that was not subject to any form of judicial review. Interestingly, in the case of *Erményi v. Hungary*,<sup>14</sup> concerning the premature termination of the applicant's mandate as Vice-President of the Supreme Court on the basis of the same legislation, the Court found a violation of the right to respect of private life, which also includes the development of relationships of a professional nature (Article 8 of the ECHR).

12. In cases against “the former Yugoslav Republic of Macedonia”,<sup>15</sup> the Court examined complaints brought by judges who had been dismissed from office for professional misconduct. The Court found violations of Article 6§1 of the ECHR, since the bodies that had considered their cases - the Supreme Judicial Council or an appeal panel set up within the Supreme Court - had lacked the requisite independence and impartiality.

13. Concerns as to the effectiveness of investigations in light of the lack of the independence and impartiality of the relevant authorities have already been raised in cases brought before the Court, such as in *Kolevi v. Bulgaria*<sup>16</sup> concerning the inability to prosecute, and supervision of the investigation by a chief public prosecutor suspected by the family of masterminding the victim's murder, where the Court found a procedural violation of Article 2 of the Convention (right to life). In the judgment *S.Z. v. Bulgaria*,<sup>17</sup> the Court stated that the lack of effective investigations was a structural problem and called upon the Bulgarian authorities to take the necessary general measures to solve this problem.

### 2.3. The work of Venice Commission

14. The Venice Commission has been actively involved in assisting member States in drafting legislation related to the independence of the judiciary, as well as in issuing opinions with regard to draft laws submitted to it concerning the judiciary. Albania, Armenia, Bosnia and Herzegovina, the Republic of Moldova, Montenegro, Serbia and Ukraine were the most recent to receive opinions of the Venice Commission regarding draft legislation concerning this matter.<sup>18</sup> In 2013, the Venice Commission issued an important

<sup>10</sup> *Sylvester v. Austria*, applications No 36812/97 and No 40104/98, judgment of 24 April 2003, paragraph 63, and *P.P. v. Poland*, application No 8677/03, judgment of 8 January 2008, paragraph 88.

<sup>11</sup> See the case law guides on Article 6 (civil and criminal limbs) at <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#> and the report of Research Division of the ECtHR Registry, [The role of public prosecutor outside the criminal law field in the case law of the European Court of Human Rights](#).

<sup>12</sup> *Oleksandr Volkov v. Ukraine*, application No. 21722/11, judgment of 9 January 2013.

<sup>13</sup> *Báka v. Hungary*, application No. 20261/12, judgment of 23 June 2016. The Court also found a violation of Article 10 in this case.

<sup>14</sup> *Erményi v. Hungary*, application 22254/14, judgment of 22 November 2016.

<sup>15</sup> Judgments of 7 January 2016: *Gerovska Popčevska v. “The former Yugoslav Republic of Macedonia*, application No. 48783/07; *Jakšovski and Trifunovski v. “The former Yugoslav Republic of Macedonia*, applications Nos. 56381/09 and 58738/09 and *Poposki and Duma v. “The former Yugoslav Republic of Macedonia*, applications Nos. 69916/10 and 36531/11.

<sup>16</sup> *Kolevi v. Bulgaria*, Application no. 1108/02, judgment of 5 November 2009, see, in particular, paragraphs 201-215.

<sup>17</sup> *S.Z. v. Bulgaria*, Application no. 29263/12, judgment of 3 March 2015, paragraphs 54-58.

<sup>18</sup> See, in particular, *Moldova* - Draft Law on Disciplinary Liability of Judges [CDL-AD\(2014\)006](#); Law on professional integrity Testing No. 325 of 23 December 2013 (Lustration Law) [CDL-REF\(2014\)041](#); *Ukraine* – Draft Law on Independence of Judges [CDL-AD\(2013\)034](#); *Armenia* - Draft law amending and supplementing the judicial code [CDL-](#)

opinion on controversial constitutional reforms in Hungary.<sup>19</sup> It has also issued thematic studies on criteria for ensuring the independence of the judiciary (see, in particular, *Report on the Independence of the Judicial System. Part I: the Independence of Judges*<sup>20</sup> and *Judicial Appointments*<sup>21</sup>) and on the role of prosecutors (*Report on European standards as regards the independence of the judicial system – Part II: The prosecution service*<sup>22</sup> and *Compilation of Venice Commission Opinions and Reports concerning Prosecutors*<sup>23</sup>).

15. Following the Assembly's [Resolution 1594 \(2007\)](#) on "The principle of the Rule of Law",<sup>24</sup> the Venice Commission was invited to reflect in depth on the concepts of "rule of law" and the French *prééminence du droit*, more often replaced by *Etat de droit*. The Committee's former chairman Mr Serhiy Holovaty (Ukraine/ALDE) had repeatedly warned the Assembly against misunderstandings caused by the interpretation of the rule of law in former communist countries as "dictatorship of the laws". Consequently, in March 2011, the Venice Commission embarked upon a study on the notion of the rule of law. It found that "rule of law in its proper sense is an inherent part of any democratic society" and it "requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures". The Venice Commission did not support a purely formalistic concept of the rule of law, merely requiring that any action of a public official be authorised by law. It also noted that the notion of the rule of law was often absent "in former socialist countries which experienced the notion of *socialist legality*".<sup>25</sup>

16. In March 2016, the Venice Commission adopted the [Rule of Law Checklist](#), which has already been endorsed by the Committee of Ministers, the Congress of Local and Regional Authorities and should soon be endorsed by the Assembly (see the recent report of our Committee colleague Mr Philippe Mahoux, Belgium, SOC<sup>26</sup>). The Venice Commission found that there was consensus as to the core elements covered by the terms *Rule of Law*, *Rechtsstaat* and *État de droit* (although these three terms have a different historical background<sup>27</sup>), namely: legality, legal certainty, the prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law, and it translates these core principles into concrete questions. Moreover, it provided two concrete examples of challenges to the rule of law: 1) corruption and conflict of interest and 2) collection of data and surveillance. Thus, the Rule of Law Checklist defines the "rule of law" by its contents. It is a tool that can be used by every interested stakeholder (national authorities, international organisations, NGOs, academics or ordinary citizens). The Venice Commission stressed, however, that the implementation of the rule of law does not have to be identical in all States despite their concrete juridical, historical, political, social and geographical context. While the main "ingredients" of this concept are constant, their implementation may vary from one country to another (see paragraph 32 of the Rule of Law Checklist).

#### 2.4 The work of the Commissioner for Human Rights

17. Although in his work the Council of Europe Commissioner for Human Rights mainly focuses on human rights issues, on several occasions he has drawn attention to the independence of the judiciary or the proper administration of justice, in particular with respect to Albania, Georgia, Hungary, Poland, the Republic of Moldova, the Russian Federation, Turkey and Ukraine.<sup>28</sup>

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[AD\(2014\)21](#) ; *Bosnia and Herzegovina* – Draft Law on the High Judicial and Prosecutorial Council [CDL-AD\(2014\)008](#); *Georgia* – Draft Law on Disciplinary Liability and Disciplinary Proceedings of Judges [CDL\(2014\)045](#); *Serbia* - Draft amendments to the Law on the High Judicial Council [CDL\(2014\)041](#); *Montenegro* - Draft Law on the Rights and Duties of Judges and on the Judicial Council [CDL-REF\(2014\)044](#).

<sup>19</sup> [CDL-AD\(2013\)012](#), Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013. See also the Assembly's work on this issue: [Doc. 13229](#) (2013) of the Monitoring Committee and [Resolution 1941 \(2013\)](#).

<sup>20</sup> [CDL-AD\(2010\)004](#), adopted at its 82<sup>nd</sup> Plenary Session, Venice, 12-13 March 2010.

<sup>21</sup> [CDL-AD\(2007\)028](#), adopted at its 70th Plenary Session, Venice 16-17 March 2007.

<sup>22</sup> [CDL-AD\(2010\)040](#) adopted at its 85th plenary session, Venice, 17-18 December 2010.

<sup>23</sup> [CDL-PI\(2015\)009](#), Strasbourg, 30 June 2015.

<sup>24</sup> See the report by our former Committee colleague Mr Erik Jurgens (the Netherlands, SOC), [Doc. 11343](#) of 6 July 2007.

<sup>25</sup> [CDL-AD\(2011\)003rev](#). "Report on the Rule of Law", Study No. 512/2009, adopted by the Venice Commission at its 86th plenary session on 25 and 26 March 2011, paragraphs 15-16 and 33.

<sup>26</sup> [Doc. 14387](#) of 17 July 2017.

<sup>27</sup> The « rule of law » stems from the English legal culture, while the French and the German terms have a continental background.

<sup>28</sup> For instance, CommDH (2014)1 [Corruption and political interference burden Albania's judicial system](#), 16 January 2014; [Georgia should continue strengthening the independence and impartiality of judges](#), Visit

## 2.5. Other Council of Europe's bodies' work

18. Although there is no specific mechanism for monitoring respect for the rule of law in Council of Europe member States, besides the above-mentioned advice of the Venice Commission, there are a number of tools and mechanisms aimed at assisting member States in implementing reforms of their legal systems, namely the [Consultative Council of European Judges \(CCJE\)](#), the [Consultative Council of European Prosecutors \(CCPE\)](#), the [Group of States Against Corruption \(GRECO\)](#) and the [European Commission for the Efficiency of Justice \(CEPEJ\)](#).

19. Furthermore, the Committee of Ministers has also made a number of recommendations concerning the functioning of the judiciary and the prosecution services, including Recommendation [CM/Rec\(2010\)12](#) on judges: independence, efficiency and responsibilities, Recommendation [CM/Rec\(2012\)11](#) on the role of public prosecutors outside the criminal justice system and Recommendation [\(2000\)19](#) on the role of public prosecution in the criminal justice system. It also prepared a document entitled "The Council of Europe and the Rule of Law: an overview" ([CM\(2008\)170](#)).

20. In April 2016, the Committee of Ministers adopted the [Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality](#), which is aimed at guiding and supporting Council of Europe member States in the implementation of concrete measures needed to strengthen judicial independence and impartiality, while recognizing the diversity of their legal systems.

21. Issues related to the functioning of the judiciary and member States' other democratic institutions have also been examined in the annual reports of the Secretary General of the Council of Europe on "State of democracy, human rights and the rule of law", and more recently in his (fourth) 2017 report "[Populism – How strong are Europe's checks and balances?](#)".

## 2.6. Overview of the Parliamentary Assembly's previous work on the matter

22. Besides the Assembly's work on the notion of "rule of law" (see above), a series of resolutions and recommendations have been issued on strengthening the rule of law and reinforcing the independence of judges and prosecutors, in particular Resolutions [1685 \(2009\)](#), [1645 \(2009\)](#), [1950 \(2013\)](#), [2040 \(2015\)](#), [1703 \(2010\)](#), [2098 \(2016\)](#), [1943 \(2013\)](#) and Recommendations [1856 \(2009\)](#), [1896 \(2010\)](#), [2087 \(2016\)](#) and [2019 \(2013\)](#).

23. In [Resolution 1685 \(2009\)](#) on *Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member States* (rapporteur: Ms Sabine Leutheusser-Schnarrenberger, Germany, ALDE, [Doc. 11993](#)), the Assembly recommended that prosecutors be allowed to perform their tasks without interference from the political sphere and that they shall be shielded from instructions pertaining to individual cases, at least where such instructions would prevent an investigation from proceeding to court. The role of judicial councils with regard to recruitment, promotion and the disciplinary regime of judges and prosecutors was also emphasized. The Assembly noted that the criminal justice systems of all member States were potentially exposed to politically-motivated interferences, though to very different degrees, and called for further efforts in strengthening the independence of the judiciary. Two other reports by Ms Leutheusser-Schnarrenberger on *The circumstances surrounding the arrest and prosecution of leading Yukos executives* ([Resolution 1418 \(2005\)](#) and [Doc. 10368](#)) and on the *Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine – the Gongadze case as an emblematic example* ([Resolution 1645 \(2009\)](#) and [Recommendation 1856 \(2009\)](#), and [Doc. 11686](#)) identified and condemned specific cases of political interference. A report approved by the Assembly on 28 June 2013 on *Keeping political and criminal responsibility separate* (Rapporteur: Pieter Omtzigt, the Netherlands, EPP) developed a number of principles for distinguishing political decision-making from criminal acts, in the light of an opinion our Committee had requested from the Venice Commission ([Doc. 13214](#) and [Resolution 1950 \(2013\)](#)).

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Observations, 12 January 2016; [Hungary: Legislative changes threaten democracy and human rights](#), 12 January 2012; [Judicial reform needs to be accelerated in the Republic of Moldova](#), 30 September 2013; [Poland has a duty to preserve judicial independence](#), article in *Open Democracy*, 17 July 2017; [As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain](#), article in *Kommersant*, 25 February 2016; [Russia must strengthen the independence and the impartiality of the judiciary](#), 12 November 2013; [Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey](#), CommDH(2016)39, 7 October 2016; [Ukraine: Crucial to pursue police and judicial reforms and address needs of displaced persons](#), 20 June 2014; [Ukraine: Fight against impunity and judicial reforms are necessary to improve human rights protection](#), 4 March 2014. See also Human Rights Comment: "[Government leaders distort justice when they interfere in individual court cases](#)", 20 March 2012.



24. The implementation of the recommendations made by the Assembly on the basis of the above-mentioned reports was followed up in a report by Ms Marieluise Beck (Germany/ALDE) on *Threats to the rule of law in Council of Europe member States: asserting the Parliamentary Assembly's authority* approved by the Standing Committee on 6 March 2015. Noting that a number of its relevant recommendations had not yet been implemented (namely by France, Germany, the Russian Federation and Ukraine), the Assembly urged member States to ensure that the judiciary is fully independent to resist politically-motivated prosecutions of political opponents, journalists and civil society activists (see [Doc. 13713](#) and [Resolution 2040 \(2015\)](#)).

25. In its [Resolution 1703 \(2010\)](#) and [Recommendation 1896 \(2010\)](#) on *Judicial Corruption* (based on a report by Mr Kimmo Sasi, Finland, EPP; [Doc. 12058](#)), the Assembly stressed the need to ensure the highest levels of professionalism and integrity of the judiciary and to restore public confidence in the judicial system. It called on member States to create safeguards ensuring the accountability (including penal) of judges, without impairing their independence and impartiality. It examined again the same issue in another report on *Judicial Corruption: urgent need to implement the Assembly's proposals* (Rapporteur: Mr Kimmo Sasi, Finland/EPP; see [Doc. 13824](#), [Resolution 2098 \(2016\)](#) and [Recommendation 2087 \(2016\)](#)).

26. In its [Resolution 1943 \(2013\)](#) and [Recommendation 2019 \(2013\)](#) on *Corruption as a threat to the rule of law* (Rapporteur: Ms Mailis Reps, Estonia, ALDE; [Doc. 13228](#)) the Assembly called on national parliaments to contribute to the implementation of the recommendations made by the GRECO, in particular those resulting from its fourth evaluation round which has a focus on corruption within the judiciary and parliaments.

### 3. Selected examples of new threats to the rule of law in Council of Europe member States

#### 3.1. Bulgaria

27. The Assembly is still engaged in a post-monitoring dialogue with Bulgaria; its latest assessment of the reforms in this country dates from January 2013 ([Resolution 1915\(2013\)](#)).<sup>29</sup> Since then, the co-rapporteurs of the Monitoring Committee have undertaken several fact-finding visits to this country (the latest one took place in June 2016).<sup>30</sup> Bulgaria is still subject to a monitoring process launched when it acceded to the European Union in 2007, i.e. the Co-operation and Verification Mechanism (CVM), focusing on the independence and the efficiency of the judiciary, integrity and the fight against corruption and organised crime (six benchmarks).

28. Whilst the EU's most recent CVM report,<sup>31</sup> published on 25 January 2017, i.e. ten years after Bulgaria's accession to the EU, notes that, in 2016, Bulgaria made significant progress in the implementation of judicial reform strategy, over the past ten years the overall pace of reform has not been as fast as expected, notably due to periods of political instability. During this time, Bulgaria has amended its Constitution twice; firstly, shortly after its accession to the European Union on 2 February 2007, to give more powers to the Supreme Judicial Council (SJC) and to create an Inspectorate to the Supreme Judicial Council (ISJC) to uphold standards of integrity of the judiciary, and then, on 16 December 2015, to reform both institutions.<sup>32</sup>

29. The 2015 constitutional amendment sought to improve the functioning of the judiciary and the SJC, but failed to implement many of the recommendations included in the opinion of the Venice Commission.<sup>33</sup> Consequently, the former Minister of Justice, Mr Hristo Ivanov, submitted his resignation, considering that the reform did not go far enough. The SJC, whose composition is regulated by Article 130 of the

<sup>29</sup> Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), *Post-monitoring dialogue with Bulgaria*, rapporteur: Mr Luca Volontè (Italy, EPP/CD), [Doc. 13085](#) of 4 January 2013.

<sup>30</sup> See their latest information note: Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), *Post Monitoring dialogue with Bulgaria, Information note on a fact-finding visit to Sofia (8-9 June 2016)*, AS/Mon(2016)28 declassified of 20 September 2016, co-rapporteurs: Mr Frank Schwabe (Germany, SOC) and Mr Zsolt Németh (Hungary, EPP/CD).

<sup>31</sup> European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism*, COM(2017)43 final, 25 January 2017, p. 2.

<sup>32</sup> European Commission, *Commission Staff Working Document. Bulgaria: Technical Report*, SWD(2017)24 final, 25 January 2017, pp. 4-5.

<sup>33</sup> Venice Commission, *'Opinion on the Draft Act to Amend and Supplement the Constitution (in the Field of the Judiciary) of the Republic of Bulgaria'*, adopted at 104<sup>th</sup> Plenary Session, 23-24 October 2015, [CDL-AD\(2015\)022](#).

Constitution, was divided into two chambers for prosecutors and judges, alongside the establishment of the “one magistrate, one vote” principle in elections to the SCJ, and the transparency in its decision-making was improved. However, continued tension among members of the SCJ and allegations of a lack of objectivity remain an issue, and the SCJ “has not been able or willing” to drive reforms in sensitive areas such as restructuring courts and prosecutors’ offices, which resulted in a workload imbalance for larger courts in the country; there has also been little progress in establishing fairness and transparency in the disciplinary proceedings of the SCJ.<sup>34</sup> As recently stressed by GRECO, representatives elected by the National Assembly are members of both chambers, with their number equaling that of elected judges and prosecutors (there are 11 members elected by the National Assembly, six elected by judges, four – by prosecutors, one – by investigating magistrates and three *ex officio* members: the presidents of the Supreme Court of Cassation and the Supreme Administrative Court as well as the Prosecutor General). This poses a risk of politicisation of decisions concerning judges’ and prosecutors’ careers<sup>35</sup> (although following 2016 amendments to the Judicial System Act, they are elected by 2/3 of the National Representatives).

30. Two packages of amendments to the Judicial Systems Act were passed on 31 March and 26 July 2016; they are currently being examined by the Venice Commission (which has been seized for opinion by the Monitoring Committee). The amendments aim at improving the legislation concerning the SCJ, the internal governance of courts and the decentralization of the prosecutor’s office.<sup>36</sup>

31. It should be recalled that in numerous cases against Bulgaria, the ECtHR found that the length of proceedings before Bulgarian courts was excessive. Therefore, the Committee of Ministers is still examining the implementation of such judgments in the framework of the *Kitov* and *Djangozov* group of cases.<sup>37</sup> This problem has already been noted by the Assembly in its rapporteurs’ work on the implementation of ECtHR judgments (see in particular [Resolution 2178 \(2017\)](#)).

32. According to the European Commission, the reform of the prosecution service has also proven highly sensitive. Whilst the Prosecutor’s Office forms part of the judiciary and is therefore independent of the executive, it plays an important role in monitoring the administration, raising suspicions of undue political influence and a lack of overall accountability. It has been at the centre of the debate over the lack of a convincing track record of convictions for high-level corruption and serious organised crime.<sup>38</sup> The General Prosecutor, who exerts influence over the whole service, is allegedly not integrated into the system of checks and balances,<sup>39</sup> although he is now obliged to annually report to the National Assembly and the SCJ about his activities.<sup>40</sup> In 2016, Bulgaria requested the assistance of the European Commission’s Structural Reform Support Service (SRSS); in December 2016, a group of independent and experienced prosecutors from certain EU member States presented an independent analysis of the Bulgarian prosecution service. According to this study, there is a need for better internal supervision of cases by management in order to ensure accountability for decisions taken, as well as for more mechanisms for overall accountability of the Prosecutor’s Office as a whole to the public, for example via the creation of a specialized parliamentary committee and a system of external inspections.<sup>41</sup> As mentioned above (see section 2.2), ineffective criminal investigation in sensitive cases has also been identified as a systemic problem by the European Court of Human Rights and is currently being examined by the Committee of Ministers.<sup>42</sup>

33. In July 2017, the National Assembly began to examine a proposal for an amendment of the Judicial System Act, which would restrict the funding of professional organisations of judges and prosecutors only to domestic sources and prohibit their participation in scientific and academic activities funded by a foreign state or foreign entity.<sup>43</sup> Following public criticism, it has been withdrawn. On 11 August 2017, new amendments to the Judicial System Act were promulgated; they require, *inter alia*, the SCJ to automatically remove from office any magistrate charged with criminal accusations, without any judicial review.

<sup>34</sup> European Commission, CVM report, *supra* note 31, pp. 4-5.

<sup>35</sup> Group of States against Corruption (GRECO), Compliance Report on Bulgaria, ‘*Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors in Bulgaria*’, adopted at 76<sup>th</sup> Plenary Meeting, 19-23 June 2017, paragraphs 28, 73 and 106.

<sup>36</sup> Monitoring Committee, AS/Mon(2016)28, *supra* note 30, paragraph 32.

<sup>37</sup> See [Status of Execution](#) in HUDOC-EXEC.

<sup>38</sup> European Commission, CVM report, *supra* note 31, p.5.

<sup>39</sup> Monitoring Committee, AS/Mon(2016)28, *supra* note 30, paragraph 33.

<sup>40</sup> European Commission, CVM Technical report, *supra* note 32, p. 14.

<sup>41</sup> *Ibid.*, pp. 14 and 24- 25.

<sup>42</sup> *Kolevi v. Bulgaria*, *supra* note 16, and *S.Z. v. Bulgaria*, *supra* note 17. See [Status of Execution](#) at HUDOC-EXEC.

<sup>43</sup> <http://www.bghelsinki.org/en/news/press/single/joint-statement-proposed-amendment-judicial-system-act/>.

34. The fight against corruption has been a long-standing issue in Bulgaria. The country is still perceived to have the highest level of corruption amongst EU member States and ranks 75<sup>th</sup> out of 176 countries around the world.<sup>44</sup> Corruption is still perceived as an important problem by citizens and businesses. The Bulgarian Center for the Study of Democracy openly speaks of “state capture”, due to the high level of political and administrative corruption.<sup>45</sup> According to the European Commission, there have been very few final convictions in court regarding high-level corruption and progress remains limited in this regard. In 2015 and 2016, the government began to implement a national anti-corruption strategy, including the creation of a unified anti-corruption body with powers to conduct administrative investigations and conflict of interest checks. However, Parliament has not yet reached an agreement on the legislation establishing this agency.<sup>46</sup>

35. In its 2017 Compliance Report, GRECO concluded that Bulgaria had satisfactorily implemented twelve of the nineteen recommendations made in its Fourth Evaluation Round on “corruption prevention in respect of members of parliament, judges and prosecutors”. GRECO welcomed, in particular, the creation of a Public Council, within the National Assembly, for the involvement of civil society in the legislative process, the setting up of a procedure to tackle breaches of ethical rules by MPs, the obligation for members of the judiciary to present regular asset declarations, the principle of random allocation of cases in respect of both judges and prosecutors and the additional powers granted to the ISCJ. Nevertheless, GRECO requested that “further significant material progress is necessary to demonstrate an acceptable level of compliance with the recommendations within the next 18 months”.<sup>47</sup>

### 3.2. Romania

36. On 24 May 2016, I visited Bucharest, where I met the Minister of Justice, the President of the Court of Law, the President of the Constitutional Court, the Chief Prosecutor of the National Anti-corruption Directorate (DNA), the Presidential advisor on institutional and constitutional reforms, the Romanian delegation to the Assembly and representatives of NGOs. Following my visit, I praised the work of the DNA and stressed that the government was issuing too many emergency ordinances, which created confusion as to the separation of powers (see my [statement of 27 May 2016](#)).

37. Like Bulgaria, Romania has been under the CVM monitoring since its accession to the EU. The CVM addresses four benchmarks related to judicial independence and efficiency, integrity and the fight against corruption. Whilst the most recent CVM report, published on 25 January 2017, recognises major progress in the areas of judicial independence and the fight against corruption over the ten years since Romania’s accession to the EU, a number of key issues remain unresolved.

38. The CVM report indicates that, overall, there has been substantial progress on issues concerning the independence, impartiality, transparency and accountability of the judicial system. This was due to the commitment shown by many judges and prosecutors, the implementation work of the Ministers of Justice, the good cooperation between the Romanian authorities and the European Commission and the strong involvement of civil society.<sup>48</sup> Since 2012, the Superior Council of Magistracy (SCM) “has established itself as a manager of the judicial system” and has continued to fulfill its constitutional function of defending the independence of the judiciary; this entailed a strong public perception of judicial independence and trust in the judiciary, but political and media attacks on individual magistrates and judicial institutions continued. However, progress has been slow on issues concerning the workload balance between and within courts, and the full implementation of court decisions.<sup>49</sup> The CVM report<sup>50</sup> and the 2016 GRECO report<sup>51</sup> also

<sup>44</sup> Transparency International, [Corruption Perceptions Index 2016](#).

<sup>45</sup> Center for the Study of Democracy, [State Capture Unplugged: Countering Administrative and Political Corruption in Bulgaria](#), 2016.

<sup>46</sup> European Commission, CVM report, supra note 31, pp. 6-7.

<sup>47</sup> Group of States against Corruption (GRECO), Compliance Report on Bulgaria, supra note 35, paragraphs 102-107.

<sup>48</sup> European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism*, 25 January 2017, COM(2017) 44 final, pp. 2 and 6.

<sup>49</sup> *Ibid.*, p.4. See also European Commission, *Commission Staff Working Document. Romania: Technical report*, SWD(2017) 25 final, 25 January 2017, p. 14. The SCM is composed of 19 members, including 9 judges and 5 prosecutors, elected by the general assemblies of judges and prosecutors, 2 representatives of the civil society and 3 members de jure – the President of the High Court of Cassation and Justice (HCCJ), the Minister of Justice and the General Prosecutor.

<sup>50</sup> European Commission, CVM report on Romania, supra note 48, pp. 5 and 9, and its technical report, supra note 49, p. 6.

<sup>51</sup> GRECO, *Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Romania*, adopted at its 70th Plenary Meeting, 30 November – 4 December 2015, paragraphs 3 and 130.

criticized the lack of an open and transparent procedure for the appointment of senior prosecutors (who are part of a unified body of magistrates, along with judges).

39. In the last few years, new Civil and Criminal Codes have been adopted. The Civil Code entered into force in 2011, the Code for Civil Procedures in 2013 and the new Criminal Codes in 2014; the transition to the new codes has been gradual. Although their implementation has shown some reduction in the length of court proceedings (see also the status of implementation of ECtHR judgments from the group *Nicolau v. Romania*<sup>52</sup>), the finalization of the reform has been difficult in practice. As regards the Civil Code, provisions requiring new infrastructure had been postponed. The Criminal Code and the Code of Criminal Procedure had to be amended following numerous judgments of the Constitutional Court referring to the ECtHR and the principle of balance of powers (only in 2016, the Constitutional Court delivered 12 such decisions) or other urgent developments. In many cases, the government adopted emergency ordinances, but the Parliament was slow in approving them.<sup>53</sup> Moreover, in numerous cases Romania has been criticized by the ECtHR for the ineffectiveness of the mechanism set up to afford restitution or compensation for properties nationalised during the communist period and, despite a new law of 2013, administrative authorities and courts still have an unacceptable backlog of cases concerning former owners' claims.<sup>54</sup>

40. As regards integrity issues and the fight against corruption, the CVM report also highlights the progress made in the confiscation of assets as a means of tackling corruption, noting the establishment of the new national agency for the management of seized assets (ANABI) in January 2017, alongside the Government's adoption of a new National Anti-Corruption Strategy for 2016-2020.<sup>55</sup> Corruption is still a major issue in Romania,<sup>56</sup> despite the good track record of the institutions involved in its investigation, prosecution and adjudication (the DNA, prosecutors and the High Court of Cassation). In 2016, 403 cases were sent to trial by the DNA, involving 1271 defendants, including numerous high-level officials, deputies and senators. 339 conviction decisions were ruled in court against 879 defendants. Despite the fact that there has been an increase in the length of prison sentences, approximately in two-thirds of convictions the execution of sentences was suspended. The lack of significant progress in eradicating corruption is mainly due to the media and political attacks on the DNA (which were particularly intense in 2016 and were voiced by high officials and public figures), constant attempts to soften up the laws criminalizing corruption (including the Criminal Code)<sup>57</sup> and systematic refusals to lift parliamentary immunity to enable investigations MPs'. Concerning the latter, it should be stressed that the criteria on the basis of which Parliament accepts or rejects the lifting of parliamentary immunity remain unclear or are not communicated to the public or the prosecution.<sup>58</sup> This is due to a misinterpretation of Article 72 of the Romanian Constitution, which might give a false impression that MPs have absolute immunity. In its 2015 Evaluation Report, GRECO recommended a review of the system of MPs' immunities, to improve the transparency of the legislative process and develop a code of conduct for MPs (paragraph 155 items i), ii) and viii)). Moreover, clear recommendations on the lifting of immunity have been issued by the Venice Commission.<sup>59</sup>

41. The abuse of government emergency ordinances (GEOs), allowing the executive to legislate disregarding parliament, remains a longstanding issue in Romania, which was examined by the Venice Commission in 2012<sup>60</sup> and was recently criticized by GRECO.<sup>61</sup> According to Article 115 Section 4 of the

<sup>52</sup> Application No. 1295/02, judgment of 12 January 2006, [Status of execution](#) at HUDOC-EXEC.

<sup>53</sup> European Commission, CVM report on Romania, *supra* note 48, p. 6, and its technical report, *supra* note 49, p. 16.

<sup>54</sup> See Status of execution of the group of cases [Strain and Others and Maria Atanasiu](#) at HUDOC-EXEC.

<sup>55</sup> European Commission, CVM report on Romania, *supra* note 48, pp. 8-9.

<sup>56</sup> According to Transparency International, Romania ranks 57th out of 176 countries in the [Corruption Perceptions Index 2016](#).

<sup>57</sup> According to GRECO, „Romania has a tendency to adopt and pile-up numerous rules and pieces of legislation dealing with integrity and the prevention of corruption which are often inconsistent or redundant (...)", *supra* note 51, paragraph 1.

<sup>58</sup> European Commission, *Romania: Technical Report*, *supra* note 49, pp. 11 and 37-38. However, as regards starting investigations against former ministers who are no longer MPs, consent is needed from the President of the Republic; so far, all Presidents have accepted launching investigations in such cases. However, this has not been the case of former ministers who are still MPs; one third of requests for starting investigation against them have been rejected by the competent chamber of the Parliament.

<sup>59</sup> [CDL-AD\(2014\)011](#), *Report on the scope and lifting of parliamentary immunities*, adopted at its 98th plenary session (Venice, 21-22 March 2014).

<sup>60</sup> Venice Commission, *Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania in respect of other State Institutions and on the Government Emergency Ordinance on Amendment to the Law No. 47/1992 Regarding the Organisation and Functioning of the Constitutional Court and on the Government Emergency Ordinance on Amending and Completing the Law No. 3/2000 Regarding the Organisation of a Referendum of Romania*, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), [CDL-AD\(2012\)026](#).



Romanian Constitution, GEOs can only be adopted in “exceptional cases”, the regulation of which cannot be postponed; the Government has the obligation to give the reasons for the emergency. In my view, GEO’s should be seen as administrative documents and should respect the law. Unfortunately, the government acts more and more as a legislative body. The use of GEOs should be forbidden at least for some time in order to allow the Parliament to fulfill its tasks. One should also establish a deadline for the verification of GEOs by the Parliament.

42. A recent example of such misuse of GEOs is related to two draft emergency ordinances, on pardon and amending the Criminal Code and the Code of Criminal Procedure respectively, put forward for consultation by the newly elected Government on 18 January 2017. Whilst the ordinance on pardon was passed to Parliament,<sup>62</sup> the other emergency ordinance, OUG 13/2017,<sup>63</sup> was approved by the Cabinet of Prime Minister Sorin Grindeanu on 31 January 2017. This emergency ordinance, *inter alia*, redefined and effectively decriminalised some lower-level corruption offences, including abuse of public office offences where the damage involved was less than 200,000 lei (€44,000).<sup>64</sup> According to the government, both ordinances were needed to tackle the problem of prison overcrowding, pointed out in many ECtHR judgments. This attracted widespread international criticism<sup>65</sup> and sparked country-wide protests in Romania. The ordinance was repealed by the Government on 5 February 2017<sup>66</sup> and the Minister of Justice, Florian Iordache, announced his resignation. As regards the draft bill elaborated on the basis of the emergency ordinance on pardon, the Senate’s Legal Committee has proposed controversial amendments, which would allow pardons for a number of corruption offences. However, following new country-wide protests, it reversed its decision. Nevertheless, on 8 May 2017, the Senate refused to pass the bill and sent it back to its Legal Committee.<sup>67</sup> On 21 June 2017, the ruling Social Democrats (PSD) voted out their own government in a no-confidence vote; consequently, Prime Minister Sorin Grindeanu was replaced by Mihai Tudose. It is believed that this was due to Mr Grindeanu’s failure to relax anti-corruption laws.<sup>68</sup>

### 3.3. *The Republic of Moldova*

43. On 25-26 May 2016, I carried out a fact-finding visit to Chisinau, where I met the Prime Minister, former Prime Minister Iurie Leanca, the Minister of Justice, Judge Aurel Baiesu of the Constitutional Court, the Chairwoman of the Standing Committee on Legal Affairs, Appointments and Immunities, the Moldovan delegation with the Assembly and representatives of NGOs. Following my visit, in a [statement of 27 May 2016](#), I expressed serious concern over issues of corruption, the lack of judicial independence and the effective separation of powers.

44. The Republic of Moldova is under the Assembly’s monitoring procedure (see [Resolution 1955 \(2013\)](#) of 2 October 2013). The EU-Moldova Association Agreement entered fully into force on 1 July 2016 after being applied provisionally since September 2014. It commits the country to ambitious reforms in a number of key areas such as justice and the fight against corruption.

45. The fight against corruption remains one of the major issues in this country. Despite some positive measures, corruption remains wide-spread and the perception of corruption remains high,<sup>69</sup> with the judiciary

<sup>61</sup> Group of States against Corruption (GRECO), Evaluation Report on Romania, ‘Third Evaluation Round, Addendum to the Second Compliance Report on Romania’, adopted at 75<sup>th</sup> Plenary Meeting, 20-24 March 2017.

<sup>62</sup> <http://www.romania-insider.com/govt-passes-pardoning-parliament-may-approve-penal-code-changes-emergency-ordinance/>.

<sup>63</sup> See (in Romanian)

[http://www.dreptonline.ro/legislatie/oug\\_13\\_2017\\_modificare\\_lege\\_286\\_2009\\_codul\\_penal\\_lege\\_135\\_2010\\_codul\\_procedura\\_penala.php](http://www.dreptonline.ro/legislatie/oug_13_2017_modificare_lege_286_2009_codul_penal_lege_135_2010_codul_procedura_penala.php).

<sup>64</sup> Which would have overturned the criminal convictions of many politicians, including the ruling Social Democrat PSD party leader Liviu Dragnea; see <https://www.theguardian.com/world/2017/jan/27/european-commission-criticises-romania-prisoner-pardon-plan>.

<sup>65</sup> Pertaining to the fact that such an ordinance clearly undermined the rule of law and the fight against corruption; see e.g. European Commission, ‘Joint Statement of President Juncker and First Vice-President Timmermans on the fight against corruption in Romania’, Brussels, 1 February 2017. See also my [statement of 2 February 2017](#).

<sup>66</sup> <http://gov.ro/en/news/the-government-emergency-ordinance-no-13-2017-has-been-abrogated>.

<sup>67</sup> <http://www.balkaninsight.com/en/article/romanian-senators-approve-toned-down-pardon-bill-05-08-2017-1>.

<sup>68</sup> <http://www.euronews.com/2017/06/26/romania-s-ruling-social-democrats-have-chosen-mihai-tudose-as-prime-minister>

<sup>69</sup> The Republic of Moldova ranked 123<sup>rd</sup> out of 176 countries in Transparency International’s Corruption Perception Index 2016.



perceived as the branch most affected by this phenomenon.<sup>70</sup> Excessive politicization of State institutions and close links between politics and business are important issues of concern in this context.

46. Prior to the parliamentary elections of November 2014, 1 billion USD “disappeared” from three of the country’s main banks in a major bank fraud scandal, which saw protestors call for the resignation of the government, the Prosecutor General and the Head of the National Anti-Corruption Centre. On 29 October 2015, Parliament passed a vote of no confidence in the government and a new coalition government was formed in January 2016. Despite the conviction of former Prime Minister Vlad Filat and the criminal proceedings launched against some other individuals, the bank scandal has yet to be investigated. Following the Moldovan Central Bank’s emergency aid to replace the money “stolen” from the currency reserves of the three banks, in June 2016, the government decided to issue special bonds, which was widely perceived as shifting the financial burden onto the citizens.<sup>71</sup>

47. During my visit to Chisinau, some of my interlocutors, mainly from NGOs, referred to the notion of ‘captured State’, due to the alleged illegal influence of private interests on government bodies. This is apparently due to the concentration of powers in the hands of a businessman Mr Vladimir Plahotniuc, whose assets are estimated at 2-2.5 billion dollars, i.e. around 30% of the country’s GDP, and who owns a major part of the Moldovan media. It is believed that Mr Plahotniuc, who does not hold any high public office, is close to many members of the government and exerts influence over the heads of law enforcement and judicial bodies.<sup>72</sup> These allegations are in line with GRECO’s conclusion stating that “in the absence of public funding, parties themselves are weak and under the influence of a narrow circle of private individuals”.<sup>73</sup>

48. In its latest report, GRECO identified a number of problems in the fight against corruption, such as inconsistent application of the existing anti-corruption legislative and policy framework and the weak capacities and lack of independence of the major institutions in charge of fighting corruption, including the Prosecutor General, the National Anti-Corruption Centre and the National Integrity Commission. Corruption-related sanctions are weak and impunity is widespread. There has been little progress in this respect, despite some efforts taken by the authorities such as the [2011-2015 National Anti-Corruption Strategy](#), which was extended to 2016 and 2017.<sup>74</sup>

49. According to GRECO, regarding members of Parliament, more needs to be done to ensure proper parliamentary debate, allow for meaningful public consultation and to regulate how parliamentarians interact with third parties seeking to influence the legislative process. The GRECO report also recommended the adoption of a code of conduct for members of Parliament and measures to ensure that the procedures for lifting parliamentary immunity do not prevent investigations in respect of corruption-related offences.<sup>75</sup>

50. According to the GRECO report, top positions within anti-corruption institutions such as the Prosecutor General, the National Anti-Corruption Centre and the National Integrity Commission were “distributed along political allegiance lines following deals between political parties.” In particular, the National Integrity Commission needed to be significantly strengthened to ensure independent and effective control of compliance with the rules on conflicts of interest and integrity by members of Parliament, as well as judges and prosecutors.

51. The Moldovan judiciary is affected by negative public perception and “perceived political interference in the judiciary and law enforcement is a systemic impediment to social and economic development”.<sup>76</sup> Some judges have been prosecuted for their decisions (for example, judge Domnica Manole, who annulled the decision of the Central Election Commission rejecting the holding of a referendum on amending the

<sup>70</sup> Group of States against Corruption (GRECO), Evaluation Report on Republic of Moldova, ‘Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors in Republic of Moldova’, adopted 1 July 2016, para 16.

<sup>71</sup> Monitoring Committee, Information note by the co-rapporteurs on their fact-finding visit to Chisinau and Tiraspol (27-29 June 2016), Co-rapporteurs: Ms Valentina Leskaj (Albania, SOC) and Mr Ögmundur Jónasson (Iceland, Groupe of the United European Left), AS/Mon(2016)27 declassified, 14 September 2016, paragraphs 7-9.

<sup>72</sup> *The Captured State: Politically Motivated Prosecution in Moldova And Usurpation of Power by Vladimir Plahotniuc*, Open Dialog, 22 May 2017, pp. 4-5.

<sup>73</sup> GRECO, Evaluation Report on Republic of Moldova, supra note 70, paragraph 15.

<sup>74</sup> Ibid. See also European Commission, *Joint Staff Working Document. Association Implementation Report on the Republic of Moldova*, 10 March 2017, p. 6.

<sup>75</sup> GRECO, Evaluation Report on Republic of Moldova, supra note 70, paragraphs 15, 32, 77 and 83.

<sup>76</sup> European Commission, supra note 74, p.3.

Constitution requested by a political party) and the same has happened to lawyers engaged in high-profile cases (see cases of Ana Ursachi, Veaceslav Turcan and Maxim Belinschi).<sup>77</sup>

52. GRECO recommended that the composition and operation of the Superior Council of Magistracy (SCM) be reviewed, in particular by abolishing the *ex officio* participation of the Minister of Justice and the Prosecutor General, by allowing for more diverse profiles among lay members and by ensuring transparent procedures for electing both judicial and lay members of the SCM.<sup>78</sup> It also concluded that the reasoning of the SCM's decisions should be improved and made subject to judicial review (not only on procedural grounds, but also on the merits), especially as regards the recruitment, promotion and disciplinary liability of judges. GRECO also recommended taking measures to inform judges better about the rules on ethics, integrity as well as on gifts and other advantages and the revision of the legal and operational framework for the disciplinary liability of judges.

53. The government is still implementing the [Justice Sector Reform Strategy 2011-2016](#), while preparing a new strategy for the justice reform. A new Law on the Prosecution Service entered into force on 1 August 2016, in line with recommendations of GRECO. It creates an Office of the Anti-Corruption Special Prosecutor and an Office for Fighting Organised Crime and Money Laundering and aims to strengthen prosecutors' professionalism and independence, establish clear criteria for their appointment and promotion and to build the capacity of the Superior Council of Prosecutors. However, it remains to be seen how the law will be implemented in practice. GRECO report also called for further measures regarding the composition and operation of the Superior Council of Prosecutors and the awareness of prosecutors of rules on ethics and integrity.<sup>79</sup>

54. More recently, concerns have been raised regarding proposals made by the Moldovan government to change the electoral system of the country from a proportional to a mixed system in advance of the parliamentary elections in 2018. The reform envisages that 50 MPs shall be elected by a proportional closed-list system in a single constituency, whilst 51 MPs shall be elected by a plurality system in single-member constituencies. According to an opinion of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights, the proposed reform raises "significant concerns", potentially risking business influence over candidates and imposing excessive thresholds for the proportional component. While the choice of an electoral system is a sovereign decision of a State, such a fundamental change is "not advisable at this time."<sup>80</sup> The law was adopted by the Parliament on 21 July 2017. It is believed that it is intended to favour the interests of the Democratic Party (PDM) led by Mr Plahotniuc and the Socialist Party (PSRM), both dominant in the current parliament.<sup>81</sup>

55. The President of the Republic, Mr Igor Dodon, has also proposed to amend Article 85 of the Constitution to expand the powers of the President to dissolve Parliament. The Venice Commission concluded that adding a broad discretionary power of the President to dissolve Parliament is "ill-advised", risking provoking unnecessary constitutional and political conflicts, and could be interpreted as giving the President the power to use dissolution as a tool for "party politics", which is incompatible with the President's role as *pouvoir neutre* in a parliamentary regime.<sup>82</sup>

### 3.4. Turkey

56. On the basis of its [Resolution 2156 \(2017\)](#), the Assembly decided to reopen the monitoring procedure of Turkey. It is not my intention to repeat the findings of the Monitoring Committee, but to focus on the main

<sup>77</sup> *The Captured State: Politically Motivated Prosecution in Moldova And Usurpation of Power by Vladimir Plahotniuc*, Open Dialog, supra note 72, pp. 9-10 and 16-17, and Monitoring Committee, AS/Mon(2016)27 declassified, supra note 71, paragraph 29.

<sup>78</sup> GRECO, Evaluation Report on Republic of Moldova, supra note 70, paragraphs 89, 92-93, 115, 119 and 135. The SCM is composed of 12 members, including the President of the Supreme Court, the Minister of Justice, the Prosecutor General, three lay members – who must be law professors – elected by the Parliament and six members elected by the General Assembly of Judges.

<sup>79</sup> GRECO, Evaluation Report on Republic of Moldova, supra note 70, paragraphs 141, 148 and 164, and European Commission, supra note 74, p. 5.

<sup>80</sup> Venice Commission and OSCE Office for Democratic Institutions and Human Rights, *Republic of Moldova: Joint Opinion on the Draft Laws on Amending and Completing Certain Legislative Acts (Electoral System for the Election of the Parliament)*, adopted at 111<sup>th</sup> Plenary Session, 16-17 June 2017 CDL-AD(2017)012, paragraphs 14-15 and 29.

<sup>81</sup> *Electoral reform in Moldova likely to benefit larger parties and reduce government instability*, HIS Global Insight Daily Analysis/UK, 25 July 2017.

<sup>82</sup> Venice Commission, Republic of Moldova 'Opinion on the Proposal by the President of the Republic to Expand the President's Powers to Dissolve Parliament', adopted at 111<sup>th</sup> Plenary Session, 16-17 June 2017, CDL-AD(2017)014, para 58.

threats to the rule of law in this country, namely in relation to the situation of the judiciary, the emergency decree laws and the constitutional amendments approved in the referendum of 16 April 2017. I sincerely regret that my fact-finding visit to Ankara was cancelled by the Turkish authorities.

57. Following the failed coup d'Etat of 15 July 2016, on 20 July 2016, President Erdoğan declared a three-month long state of emergency (which was approved by Parliament on the same day, despite the summer recess), giving extraordinary powers to the Government. The state of emergency has since been extended four times, most recently on 18 July 2017. On 21 July 2016, the Turkish authorities notified the Council of Europe of its derogation from the European Convention on Human Rights, under Article 15 of the Convention (this issue is currently being examined by our Committee colleague Mr Raphaël Comte from Switzerland, ALDE<sup>83</sup>). The Turkish authorities attributed the coup attempt to the "Gülenist movement" and launched a vast purge of people apparently linked to the conspiracy, including collective dismissals and arrests of numerous civil servants, judges, prosecutors, soldiers, academics, closing down of associations and media outlets, confiscation of assets, etc.<sup>84</sup>

58. Following the declaration of a state of emergency, the Turkish Government may legislate by way of emergency decree laws, without prior authorisation of the Parliament, in "matters necessitated by the state of emergency" (Article 121 of the Constitution). Since then, 21 emergency "Decrees with Force of Law" have been published. The procedure governing emergency rule is regulated by the Law on State of Emergency of 1983. Emergency decree laws need to be approved by Parliament (the Grand National Assembly), but, according to the Venice Commission, due to the delays involved, its control lost some of its effectiveness. Thus, the government legislated without Parliament's and the Constitutional Court's control for over two months.<sup>85</sup>

59. In the view of the Venice Commission, by issuing emergency decree laws, the Government has "interpreted its extraordinary powers too extensively" and the measures have gone "beyond what is permitted by the Turkish Constitution and by international law". The measures taken were permanent ones, as they "went beyond a temporary state of emergency" and "the Government made a number of structural changes to the legislation, which should normally be done through the ordinary legislative process outside of the emergency period". The Venice Commission recommended that the Constitutional Court review the constitutionality of the emergency decree laws, once they have been approved by the Parliament, *in abstracto* and *in concreto*. It also expressed concern about the apparent lack of access to justice for the public servants dismissed directly by the decree laws and supported the idea of the Secretary General of the Council of Europe to create an independent *ad hoc* body for the examination of such cases.<sup>86</sup> By way of Decree Law no. 685 of 23 January 2017, an Inquiry Commission on State Emergency Measures was created on 17 July 2017 and it has just started receiving applications. The executive appoints 5 of its 7 members of the commission, the decisions of which are subject to judicial review.<sup>87</sup>

60. The judiciary was perceived as one of the most "penetrated" State institutions. On 16 July 2016, the High Council of Judges and Prosecutors (HSYK) held an extraordinary meeting and decided to dismiss 2,745 judges and 5 members of the HSYK itself.<sup>88</sup> Further dismissals were decided pursuant to Article 3 of Decree Law no. 667 of 23 July 2016. On this basis, two Constitutional Court judges, Mr Alparslan Altan and Mr Erdal Tercan, have been dismissed (having been taken into custody on 16 July 2016), as well as numerous other judges working at all levels of jurisdiction. It is estimated that more than 4000 judges and prosecutors, i.e. a quarter of them, have been dismissed, while around 2400 have been arrested; some of them are now detained in overcrowded prisons or held in solitary confinement.<sup>89</sup> The Association of Judges and Prosecutors (YARSAV, a member of the International and European Association of Judges) was also dissolved by a governmental order and many of its board members arrested, including President Murat Arslan, who was taken into custody on 19 October 2016. In December 2016, the General Assembly of the European Network of Councils for the Judiciary (ECNJ) suspended the observer status of the HSYK.

<sup>83</sup> See [AS/Jur \(2017\)03](#), *State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights*, Information note of 27 February 2017.

<sup>84</sup> According to numerous sources, nearly 50,000 people have been arrested and 150,000 dismissed from their jobs.

<sup>85</sup> Venice Commission, *Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016*, adopted at 109<sup>th</sup> Plenary Session, 9-10 December 2016, [CDL-AD\(2016\)37](#), paragraphs 51 and 53-54.

<sup>86</sup> *Ibid*, paragraphs 226, 228 and 277. See also [the statement](#) I made in this respect along with Mr Comte, 24 May 2017.

<sup>87</sup> Monitoring Committee, *The functioning of democratic institutions in Turkey*, Co-rapporteurs: Ms Ingebjørg Godskesen, Norway, European Conservatives Group, and Ms Marianne Mikko, Estonia, [Doc. 14282](#) of 5 April 2017, paragraphs 54-55.

<sup>88</sup> Monitoring Committee, *Post-monitoring dialogue with Turkey, The failed coup of 15 July 2016: some facts and figures*, Co-rapporteurs: Ms Ingebjørg Godskesen, Norway, European Conservatives Group, and Ms Marianne Mikko, Estonia, Socialist Group, [AS/Mon/Inf \(2016\)14rev 3](#), 12 December 2016, paragraph 4.

<sup>89</sup> According to a letter from the European Association of Judges of 17 July 2017 sent to the Assembly.

According to some sources between 800 and 900 newly appointed judges have direct links with the ruling Justice and Development Party (AKP).<sup>90</sup>

61. The mass dismissals and arrests of judges often took place without any individualized accusations. Many judges were dismissed and then detained by decisions of criminal judges of the peace who can only supervise the protective measures taken at the stage of investigation and do not have jurisdiction to detain other judges.<sup>91</sup> As stressed by the Venice Commission, any dismissals within the judiciary or its regulatory bodies “should be subjected to particularly exacting scrutiny, even in times of a serious public emergency”, since “judges represent a special category of public servants, whose independence is guaranteed at the constitutional and international levels”. Such dismissals may weaken the judiciary as a whole, whilst creating a “chilling effect”, resulting in other judges being “reluctant to reverse measures declared under the emergency decree laws out of fear of becoming subjects of such measures themselves.”<sup>92</sup>

62. In its decision of 10 March 2017 in the case *Çatal v. Turkey*<sup>93</sup> concerning the dismissal of the applicant, a former judge, by a decision of the HSYK, the ECtHR stated that the applicant should have complained to the State Council (on the basis of decree law No 685 of 2 January 2017) and, had this been unsuccessful, to the Constitutional Court. Therefore, the Court declared her application as inadmissible due to the non-exhaustion of domestic remedies. It will be interesting to follow the future case law of the Court concerning similar applications.

63. On 21 January 2017, the Turkish Grand National Assembly adopted a text of constitutional amendments, which was submitted to a referendum for voters’ approval on 16 April 2017. The result of the referendum was tightly contested. Even beforehand, the Venice Commission expressed concern about the circumstances in which the constitutional amendments were adopted by the Parliament: the President of the second-largest opposition party HDP and 10 other MPs were in detention on remand, the immunity of numerous MPs had been lifted in May 2016, the secret ballot rule was not fully respected during the vote and debates were lengthy but resulted in a very quick completion of the procedure, the amendments being adopted within twelve days. Moreover, the adoption of the constitutional amendments, and indeed the referendum itself, has taken place during the prolonged state of emergency. The Venice Commission considered it to be “highly doubtful that the constitutional referendum scheduled for 16 April 2017 could and would meet the democratic principle of the European democratic tradition.”<sup>94</sup>

64. The amendments, the majority of which will enter into force after the next presidential election in 2019, bring about a very extensive constitutional reform, moving from a parliamentary system to what the Turkish authorities have themselves described as a “Turkish-style” Presidential system. According to the Venice Commission, “they are not based on the logic of separation of powers, which is characteristic for democratic presidential systems” and “lead to an excessive concentration of executive power in the hands of the President and the weakening of parliamentary control of that power.”<sup>95</sup> The Venice Commission enumerated a number of concerns in this respect, in particular.<sup>96</sup>

- the President will have the power to appoint and dismiss ministers and high-officials on the basis of criteria established by him or her alone (there will be no Prime Minister and no collegiate government);
- he or she would be empowered to choose one or more Vice-presidents;
- the President, Vice-presidents and ministers will be accountable only by the procedure of impeachment (there will be no possibility of interpellations; only written questions will be allowed);
- there will be a compulsory synchronization of presidential and parliamentary elections;
- the President will have the power to dissolve parliament, on any grounds whatsoever;
- the President will have the opportunity to obtain a third mandate, under certain conditions, and
- he/she will be allowed to issue presidential decrees on matters relating to executive powers, without the need to have them approved by the Parliament and be given the exclusive power to declare a state of emergency.

<sup>90</sup> <http://www.theglobepost.com/2017/05/11/top-judge-defends-purge-state-of-emergency-measures/>

<sup>91</sup> See Venice Commission, ‘*Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships*’, adopted at 110<sup>th</sup> Plenary Session, 10-11 March 2017, [CDL-AD\(2017\)004](#), paragraphs 16-18 and 100.

<sup>92</sup> Venice Commission, *Opinion on Emergency Decree Laws ...*, supra note 85, paragraph 148.

<sup>93</sup> Application no. 2873/17.

<sup>94</sup> Venice Commission, ‘*Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*’, adopted at 110<sup>th</sup> Plenary Session, 10-11 March 2017, [CDL-AD\(2017\)005](#), paragraphs 21-26, 29 and 41.

<sup>95</sup> *Ibid.*, paragraphs 126 and 47.

<sup>96</sup> *Ibid.*, paragraph 127.



65. The amendments also enhance the executive's control over the judiciary, by granting the President the power to appoint six out of thirteen members of the High Council of Judges and Prosecutors, including the Minister of Justice and his/her undersecretary. The remaining seven members will be appointed by the Parliament. Thus, no member will be elected by peer judges anymore. The Venice Commission recalled that "at least a substantive part of the members of a High Judicial Council should be judges appointed by their peers." As a result of the amendments, "if the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council." This places the independence of the judiciary in "serious jeopardy", because the HSYK is the "main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors."<sup>97</sup> The amendments provide for elections to the HSYK within 30 days of their entry into force. Subsequently, on 7 June 2017 new members of the HSYK – four appointed by the President and seven by the Parliament - were sworn.<sup>98</sup>

### 3.5. Poland

66. Following general elections held on 25 October 2015, the Law and Justice party (PiS) got 37.6% of the vote, which gave it 235 out of 460 seats, in the Sejm (lower chamber of the Polish Parliament), and 61 seats out of 100 in the Senate. Since the start of the democratic transformation in 1989, it was also the first election in Poland, in which a party won an absolute majority in the Sejm. The general elections were preceded by the presidential elections in May 2015, in which PiS candidate, Mr Andrzej Duda, won. PiS considered that the election victory gave it a clear mandate to reform the political system and also the judiciary. Very soon, some of the reforms launched by the new majority raised the concern of the EU, which Poland had joined in May 2004, and of the Council of Europe. Within the Assembly, the situation in Poland is currently examined by the Monitoring Committee, whose co-rapporteurs are preparing a report on "the functioning of democratic institutions in Poland". It is not my intention to duplicate their work, but I feel obliged to point out a number of issues, which, in my view, are not in the line with the principles of rule of law in a democratic State. Therefore, I refer to the "constitutional crisis" and the reform of the judiciary.

67. Shortly after the parliamentary election, PiS contested the election of five judges (out of 15) of the Constitutional Court (CC) elected on 8 October 2015 by the previous Sejm, following an amendment adopted by the previous parliamentary majority led by the Civic Platform party (PO), which allowed the outgoing Sejm to replace the CC judges whose mandates expired in November and December 2015. This led to a so-called "constitutional crisis", the details of which have been thoroughly explained in the information note of the Monitoring Committee's rapporteurs<sup>99</sup> and in the report by our Committee colleague Mr Philippe Mahoux (Belgium, SOC) on "Venice Commission's "Rule of Law Checklist"<sup>100</sup>. On two occasions, the Venice Commission issued opinions on the consecutive changes to the Law on the Constitutional Court voted by the new Parliament.<sup>101</sup> The Venice Commission's recommendations were not fully followed by the Sejm, which modified the Law on the CC three times between November 2015 and July 2016. During the "crisis", the Prime Minister refused to publish two judgments of the Constitutional Court (of 9 March and 11 August 2016), although, according to Article 190 Section 2 of the Polish Constitution, judgments of the CC must be published in the Official Journal. Eventually, new legislation on the CC (the law on the organisation and procedure before the CC, the law on the status of judges of the CC of 30 November and the law on transitional provisions of 13 December 2016) entered into force on 13 December 2016; it has not been assessed by the Venice Commission. The constitutional crisis led to a situation in which the five judges elected by the previous Sejm ("October judges") have been replaced by judges elected by new Sejm ("December judges"). Although the Sejm had also annulled the election of the "October judges", the CC found that only two of them had been elected in violation of the Constitution. Nevertheless, the three other "October judges" have not been allowed to take up their duties, due mainly to the refusal of the President of the Republic to accept their oaths, despite the criticism of the Venice Commission.<sup>102</sup> Three "December judges" were allowed to adjudicate in December 2016 by the new President of the CC, Ms Julia Przyłębska, whose election had been boycotted by seven judges. Thus, the current composition of the CC raises issues as to the validity of its judgments and the principle of legal certainty. Since the beginning of the crisis, the

<sup>97</sup> *Ibid*, paragraphs 94, 116 and 119.

<sup>98</sup> See [statement by the Commissioner for Human Rights](#), 7 June 2017.

<sup>99</sup> Information note by the co-rapporteurs on their fact-finding visit to Warsaw (3 to 5 April 2017), co-rapporteurs: Mr Yves Cruchten, Luxembourg, SOC, and Mr Thierry Mariani, France, EPP, AS/Mon (2017)14 declassified, 9 May 2017, section III.

<sup>100</sup> [Doc. 14387](#), Section 4.1.

<sup>101</sup> Venice Commission, *Opinion on the Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland*, adopted at its 106<sup>th</sup> plenary session on 11-12 March 2016, [CDL-AD\(2016\)001](#) and *Poland. Opinion on the Act on the Constitutional Tribunal*, adopted at its 108<sup>e</sup> session on 14-15 October 2016, [CDL-AD\(2016\)026](#).

<sup>102</sup> CDL-AD(2016)001, *supra* note 101, paragraphs 108-109.



number of legal questions posed by ordinary courts to the CC has drastically decreased and the National Council of the Judiciary (*Krajowa Rada Sądownictwa* – KRS) has decided not to use this legal avenue.<sup>103</sup>

68. It must be stressed that under the current Constitution of Poland of 1997 (Article 194 Section 1) judges of the CC are elected by the Sejm by a simple majority, which, in a situation where one party has a majority, creates a risk of politicisation of these elections. The Venice Commission recommended that “the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism”.<sup>104</sup> As stressed at the hearing on 27 April 2017 by Mr Jean-Claude Scholsem, alternate member of the Venice Commission, who took part in the drafting of the two opinions, the work on this file was one of the most complicated from the legal, political and human point of view. Due to the constitutional crisis in Poland, the European Commission triggered, for the first time, its new mechanism under the 'Rule of Law Framework' and, in its Recommendations of 27 July 2016 and 21 December 2016, it found that there was a “systemic threat to the rule of law”.<sup>105</sup>

69. Excessive length of proceedings has been a chronic problem in Poland for nearly two decades, with over 400 such findings made by the ECtHR since 1998.<sup>106</sup> The Polish authorities' efforts to tackle it have been constantly monitored by the Committee of Ministers under Article 46 paragraph 2 of the Convention.<sup>107</sup> However, the recently proposed reform of the justice system, pushed by the ruling party purportedly to improve the courts' efficiency and enhance public trust in the judiciary, which has not been deeply reformed since the fall of the communist regime, has caused numerous controversies. On 12 July 2017, the Parliament passed two laws – a law amending the Law on Ordinary Courts Organisation and a law amending the Law on the National Council of the Judiciary (KRS). On 20 July 2017, upon an initiative of a group of PiS MP's, it adopted a new law on the Supreme Court. This attracted widespread national<sup>108</sup> and international criticism<sup>109</sup> and sparked big protests in Warsaw and in many Polish cities. President Duda signed the first law on 25 July 2017, but a day earlier he announced that he would veto the remaining two. Both laws are now back in the Sejm and the legislative process is suspended, awaiting the President's proposals, which should be ready in two months.

70. There are several reasons for which the laws vetoed by the President have been criticised. The amendments to the Law on the National Council of the Judiciary, are, first of all, deemed contrary to the Constitution. Article 187 of the Constitution regulates clearly the composition of the KRS, stipulating that out of its 25 members, 15 are elected by judges. According to the new law, the power to appoint the 15 judicial members of the KRS will be transferred from the judiciary to the Sejm. The new KRS would be composed of two assemblies, one composed of judges and another one composed of political appointees; all decisions on judges' appointments would require the agreement of both assemblies and no anti-deadlock mechanism has been foreseen. Moreover, the law also foresees the end of the term of all judges currently sitting on the KRS.

71. The new Law on the Supreme Court, which mainly aims at restructuring this jurisdiction and establishing a disciplinary chamber for judges, contains a provision on the basis of which all current judges of the Supreme Court would be transferred into retirement on the day following the entry into force of the law, except those who would be arbitrarily indicated by the Minister of Justice.

72. As regards the law amending the Law on Ordinary Courts Organisation, which entered into force on 12 August 2017,<sup>110</sup> it contains provisions aimed at disciplining judges, regulating their retirement and introducing random allocation of cases. It allows the Minister of Justice to appoint presidents and vice-presidents of all ordinary courts without obtaining opinions on candidates from the general assemblies of these courts. Furthermore, the Minister of Justice will be entitled to dismiss them on a new ground of “ascertainment of particularly ineffective performance of a president's administrative supervision or work

<sup>103</sup> Article by Małgorzata Kryszkiewicz, *Temida radzi sobie bez TK*, 'Dziennik Gazeta Prawna', 27 June 2017, p. B6.

<sup>104</sup> CDL-AD (2016) 001, supra note 101, paragraph 140.

<sup>105</sup> European Commission, Recommendations (EU) 2016/1374 of 27 July 2016 and 2017/146 of 21 December 2016.

<sup>106</sup> *Podbielski v. Poland*, Application No. 27916/95, judgment of 30 October 1998.

<sup>107</sup> See [Status of Execution](#), *Majewski v. Poland*, HUDOC-EXEC.

<sup>108</sup> See, for example, [the opinion of the KRS of 30 January 2017](#) (in Polish).

<sup>109</sup> See, in particular, OSCE/ODIHR, [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary of Poland](#); [Opinion of the Bureau of the Consultative Council of European Judges \(CCJE\) of 7 April 2017](#), [Opinion of the CCJE Bureau of 17 July 2017](#); [UN Special Rapporteur on the independence of judges and lawyers statement of 26 July 2017](#); [Statement by the Venice Commission's President of 18 July 2017](#); [Statement by the Secretary General of Council of Europe of 18 July 2017](#), [Statement by the co-rapporteurs of the Monitoring Committee and my statement of 17 July 2017](#).

<sup>110</sup> Published on 28 July 2017, Official Journal (*Dziennik Ustaw*) of 2017, item 1452.

organisation in the court over which they preside or in the courts' subordinate thereto" (according to Article 27 paragraph 1 item 3 of the amended law); any dismissal should be based on an opinion of the KRS, but the latter will be binding only if it has been adopted by a majority of 2/3. However, within six months after the law enters into force the Minister of Justice will be allowed to dismiss presidents and vice-presidents of courts without consulting the KRS.<sup>111</sup> These new provisions have also been widely criticised, as the Minister of Justice is also the Prosecutor General, according to the new law on the Prosecution Service of 28 January 2016, which is currently being assessed by the Venice Commission. Moreover, as the new law provides for a different retirement age for female judges (60 years) and male judges (65 years), on 29 July 2017, the European Commission launched infringement proceedings against Poland.<sup>112</sup>

73. This initiative comes in addition to the above-mentioned Rule of Law Dialogue launched by the European Commission in January 2016, including the latest Rule of Law Recommendation of 26 July 2017, adopted by the European Commission in reaction to the planned reform of the judiciary. The European Commission was particularly concerned about the planned dismissal of all judges of the Supreme Court, considered that the reform "amplifies the systemic threat to the rule of law" and requested the Polish authorities to address the problem within one month.<sup>113</sup>

#### 4. Conclusions

74. Although the Council of Europe has developed many recommendations on respect for the rule of law and in particular judicial independence, its bodies have always taken into account the diversity of legal systems and approaches to the separation of powers. As stressed in the Venice Commission's Rule of Law Checklist, the "contextual elements of the Rule of Law are not limited to legal factors" and one should take into account factors such as the presence (or absence) of a shared political and legal culture within a society.<sup>114</sup> Therefore, it is not always so obvious to conclude whether the principle of rule of law is violated or not in a given country. Nevertheless, the examples examined in this report show that there have been some new developments in certain member States of the Council of Europe, which show that threats to the rule of law have become very serious, and its components such as legality, legal certainty, prohibition of arbitrariness and access to justice are especially at risk. This is mainly due to tendencies to limit the independence of the judiciary made through attempts to politicize the judicial councils and the courts (mainly in Bulgaria, Poland and Turkey), massive revocation of judges and prosecutors (Turkey) or attempts to do so (Poland). There are also tendencies to limit the legislative power of the parliament (the Republic of Moldova, Romania and Turkey) and corruption, which is a major challenge to the rule of law, remains a wide-spread phenomenon in Bulgaria, the Republic of Moldova and Romania.

75. I would like to recall some basic principles stemming from the work of Council of Europe bodies. In its opinion on "Judicial Appointments", the Venice Commission noted that in some older democracies there are systems in which the executive power has a strong influence on judicial appointments; these systems work, however, because the executive is restrained by a long-standing legal culture and traditions. In new democracies, there should be explicit constitutional provisions to prevent political abuse by other state powers in the appointment of judges. Many European States have introduced a judicial council with a role in judicial appointments. Although there is no standard model for such a body, the Venice Commission stressed that "a substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself". In its Recommendation CM/Rec(2010)12, the Committee of Ministers went even further, by requiring that "not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary (...)" (paragraph 27). The Venice Commission also recommended that members of a judicial council should not be active MPs and was strongly in favour of a qualified majority for the election of its parliamentary component.<sup>115</sup>

76. As regards judges' dismissal, Recommendation CM/Rec(2010)12, in its paragraphs 49 and 50, recalled that "security of tenure and irremovability are key elements of the independence of judges" and that "judges should have guaranteed tenure until a mandatory retirement age"; their terms of office should be established by law and can be terminated only "in cases of serious breaches of disciplinary or criminal provisions established by law", "where the judge can no longer perform judicial functions" or in cases of early retirement, decided under certain conditions.

<sup>111</sup> Article 17 of the Law amending the Law on Ordinary Courts Organisation.

<sup>112</sup> [http://europa.eu/rapid/press-release\\_IP-17-2205\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2205_en.htm).

<sup>113</sup> Commission Recommendation of 26.7.2017 regarding the rule of law in Poland, C(2017) 5320 final.

<sup>114</sup> Venice Commission, Rule of Law Checklist, paragraph 42.

<sup>115</sup> CDL-AD(2007)028, supra note 21, paragraphs 6, 49 and 31. See also CDL-AD(2010)004, supra note 20, paragraph 82.

77. As regards prosecutors, their 'independence' is not of the same nature as that of judges and there is no common standard that would call for it; however, in its report of 2010 on the prosecution service, the Venice Commission gave some indications on how to shield prosecution services from external influences.<sup>116</sup>

78. I am particularly worried about the situation in Turkey, where the recent developments do not only threaten the principle of rule of law, but also undermine democracy and violate the human rights of numerous individuals. This shows flagrant incompatibility with Council of Europe values. I exhort the Turkish authorities to comply with the Council of Europe's norms in this respect, and in particular to reconsider the latest constitutional amendments, lift the state of emergency, ensure that the decree laws have been approved by the Parliament, review the dismissals of judges and prosecutors in line with Article 6 of the Convention and the above-mentioned recommendations of the Venice Commission and Recommendation CM/Rec(2010)12 (see paragraphs 75-76), release opposition MPs and continue its cooperation with the Organisation through its statutory organs and specialized bodies.

79. As regards Poland, I call on the Polish authorities to refrain from any reform which would put at risk the respect for the rule of law, and in particular the functioning of the KRS, the independence of the judiciary and of prosecutors. I also encourage them to make use of the Council of Europe's relevant standards including Recommendation CM/Rec (2010)12, to fully cooperate with its bodies, and to implement the VC recommendations (see paragraphs 75-76). The current situation of the CC should also be revisited in light of the international bodies' recommendations in order to ensure full respect of the principles of legality and legal certainty. I also invite the Polish Parliament and all political forces to further reflect on amending the 1997 Constitution, which is currently in force.

80. As regards Bulgaria, the Republic of Moldova and Romania, I invite the authorities to strengthen their efforts to combat corruption, ensure the separation of powers and reinforce the independence of the judiciary in light of the above-mentioned recommendations of the Venice Commission and Recommendation CM/Rec(2010)12. They should continue to make use of the expertise of Council of Europe's relevant bodies, such as GRECO and the Venice Commission. Bulgaria and Romania have made a great effort to comply with the Council of Europe's standards and the benchmarks established by the EU in the framework of the CVM and they should remain on this path. Similarly, the Republic of Moldova should continue to implement the comprehensive reforms stemming from the requirements of its membership in our Organisation and its Association Agreement with the EU. A 'captured State', by definition, does not comply with the principles of rule of law and democracy.

81. The Assembly should remain vigilant about any new threats to the rule of law in Council of Europe member States and rapidly react, if need be, using the monitoring procedure or any other procedure deemed appropriate. It should also encourage all member States of the Council of Europe to promote a legal and political culture conducive to the implementation of the rule of law concept.

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<sup>116</sup> CDL-AD(2010)040, supra note 22, paragraphs 84-86.