



Esteemed Mr. President of the European Commission for Democracy through Law, Gianni Buquicchio,

Esteemed Mr. Director, Secretary General of the Venice Commission, Thomas Market,

The National Liberal Party, in our capacity of initiator, at the level of the Parliamentary Assembly of the Council of Europe, of the undertakings which resulted in the request addressed to the Venice Commission by the Monitoring Commission of PACE with respect to the amendments brought to the Laws of Justice in Romania, we consider ourselves morally entitled to bring to your attention the following aspects regarding the evolution of the legislative amendments in our country, operated through an Emergency Ordinance of the Government (92/2018), initiated by the Minister of Justice, Tudorel Toader.

First of all, please note that Mr. Tudorel Toader, currently the Minister of Justice in Romania, repeatedly used – both himself, as well as the representatives of the governing majority – his capacity of member of the Venice Commission in order to publicly legitimize legislative solutions which are, at least, controversial.

In a similar manner, with respect to GEO 92/2018 as well, the Minister of Justice, Tudorel Toader, justified the issuance of the emergency ordinance by the fact that he had had prior discussions with representatives of the Venice Commission. In this respect, the Minister of Justice implied that there was an agreed form of the amendments that he would operate in the Laws of Justice by Emergency Ordinance, using, for this purpose, the prestige of the Venice Commission in order to accredit, at the level of the Romanian public opinion, the fact that the proposed amendments would not affect the judiciary system,



but would implement recommendations of the Venice Commission made in its preliminary report published on July 13th, 2018.

Moreover, even in the preamble of the Emergency Ordinance no. 92/2018, as justification of the issuance of the normative deed, the implementation of the recommendations of the Venice Commission in the Romanian legislation is specified.

It is important to note that, as per the legislative procedure in Romania, the normative deeds regarding the judiciary system must be subject to the opinion of the Superior Council of Magistracy (CSM), even more so when they concern this institution. Or, the issuance of GEO 92/2018 was made before having received the opinion of the CSM, either negative or positive, considering that the normative act was forwarded to the CSM on Friday, October 12th, and the GEO was issued by the Government on Monday, October 15th. Furthermore, this type of conduct of the Government, as well as of the governing majority, is recurrent in its relationship with the Superior Council of Magistracy.

The Emergency Ordinance no. 92/2018 actually addresses only two of the recommendations of the Preliminary Report of the Venice Commission, namely the mechanism of early retirement of magistrates, the enforcement of which has been postponed with 1 year, and the granting of a voting right in the plenum sessions of CSM to the members who are not magistrates – the representatives of the civil society. With respect to the other recommendations, either no legislative adjustments have been operated, or the recommendations of the Venice Commission have been altered (e.g.: the mechanism of appointment of high rank prosecutors, the set-up of a special section for investigating magistrates, the revocation of CSM members by means of withdrawal of support, restrictions related to the freedom of speech of magistrates, the invalidation of prosecutors' solutions due to reasons of groundlessness).



In addition to the above, without any justification in the preamble of the GEO and in absence of any impact study, the normative act increases the seniority necessary for the prosecutors to work at the level of DNA (*National Anti-Corruption Department*) or DIICOT (Department of Investigation of Organized Crime and Terrorism), from 8 years to 10 years. Furthermore, without any explanation, the act increases the seniority necessary to hold management positions at the level of the General Prosecutor Office, DNA and DIICOT from 10 years to 15 years. At the same time, additional restrictions are set, which question the continuation of the activity of the prosecutors currently working with the DNA and DIICOT. In this respect, with regard to the Law no. 303/2004 on the statute of judges and prosecutors and Law no. 304/2004 on judiciary organization, contradictory transitory norms have been adopted which generated a high level of uncertainty with respect to the status of the prosecutors within the structures where they currently work. The effect of this situation is likely to result in an invalidation of pending investigations, in case such investigations would continue.

The Emergency Ordinance provides that a significant number of prosecutors will need to withdraw from DIICOT, DNA or the General Prosecutor's Office, as they fail to meet the new conditions provided by the law in order to work within these prosecutor's offices. At the same time, the Government has not identified any solution in order to ensure the continuity of the activity within these prosecutor's offices during the period when they would be severely under-staffed. Moreover, the act does not take into consideration the time necessary for the handover and takeover of complex files from the prosecutors who will no longer be able to work within these offices, to the prosecutors who would be replacing them. We must emphasize the real risk of blockage of the judicial activity at the level of the above-mentioned prosecutor's offices.



The Emergency Ordinance strengthens and does not restrict, the political authority of the Minister of Justice on the prosecutors in Romania, as the Minister of Justice becomes the sole actor, from outside the judiciary system, who may notify the Judiciary Inspection and may trigger the disciplinary actions against prosecutors.

At the same time, GEO 92/2018 raises suspicions of non-constitutionality, considering that provisions have been included, which have recently been declared to be non-constitutional by the Constitutional Court (e.g. the transfer of magistrates to public dignitary functions). However, as per the constitutional mechanism in Romania, only one institutional body may notify the Constitutional Court with respect to the Government Emergency Ordinances, namely the Ombudsman who, up to this moment, has refused, without any justification, to proceed with the numerous requests of notifying the Constitutional Court with respect to the emergency ordinances. This failure to comply with its responsibilities is even more severe considering that, as per the regulations in force, emergency ordinances cannot be subject to the constitutional control prior to the moment they produce their legal effects.

Not lastly, we must emphasize the fact that, through a previous Emergency Ordinance (no. 90/10.10.2018), in contradiction with the recommendations of the Venice Commission, the Government issued immediate measures for rendering operational a special section of pursuit of magistrates' crimes within the General Prosecutor's Office. By the same normative act, the Government established that the head prosecutor of the section would be appointed by the President of CSM, and not by its plenum. Finally, please note that similarly to the GEO no. 92/10.10.2018, the Government used the recommendations of the Venice Commission as a pretext.



This letter has been addressed for information purposes to the distinguished members of the Venice Commission, prior to the communication of the final report on the amendments brought to the Laws of Justice in Romania.

Thank you for considering this letter.

Respectfully yours,

Ludovic Orban,

President of the National Liberal Party



18 october 2018