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PRELIMINARY REMARKS ON THE DRAFT CONSTITUTION OF ROMANIA

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1 INTRODUCTORY REMARKS

Firstly, I would like to affirm that I fully concur in the views presented by Mr. Scholsem in his "remarques préliminaires" concerning the prerequisites of the work on this report as well as concerning its general design and the appropriate way to go forward with the task. I regret not having had the time to get the text checked by somebody more familiar with the English language, but hopfully it is nevertheless possible to understand the meaning of it.

This part of the report is mainly dealing with titles I and II of the draft Constitution of Romania. I have, however, in certain respects found it necessary to adopt a somewhat broader perspective. On the other hand, I have not considered it possible at this stage to examine systematically and in detail the particular provisions on freedoms and rights.

2 GUIDELINES FOR THE INTERPRETATION

The regulation of the draft Constitution concerning the fundamental freedoms and rights is of considerable value and creates a sound basis for further evaluations. The proposals are obviously inspired by varying international declarations and conventions in the field. As a member of the United Nations, Romania has accepted the general declaration on human rights (New York 1948) and it has also adopted the international conventions on economic, social and cultural rights and on human and political rights (New York 1966). In title I, point 15, it is established as one of the fundamental principles of the Constitution that "the Romanian State pledges to respect its international commitments as such, and to execute, in good faith, the treaties it has ratified"; from the second paragraph it seems to follow, however, that an international treaty is regarded as an integral part of internal Romanian law only if it is transformed into such a law through a special act of legislation (the dualistic principle). Further more, in title II, chap. 1, point 5, it is laid down that "constitutional dispositions concerning the rights and liberties of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Romania".

In the introductory title on "fundamental principles" it is stressed that, among other things, the principles of democracy, political pluralism, the rights and liberties of the citizens and the rule of law shall be applied in Romania. Moreover, the principles of market economy and free enterprise are adopted. The intention must be that the other provisions of the Constitution - as well as regulation based thereon - shall be interpreted in accordance with these fundamental principles. This, too, is an important factor.

3 STRUCTURAL IMPERFECTIONS?

The basic structure of the draft Constitution is somewhat difficult to survey and on certain fundamental points there is obviously a need for clarifications. Attention should be paid to the following problems:

a) In the introductory titles of the draft Constitution some of the freedoms and rights are regulated on different levels - in title I on fundamental principles, in the general provisions in chap. I of title II and in the more detailed account of particular freedoms and rights in chap. 2 of title II. Occasionally, the same or similar rules are to be found in yet another context; the principle of taxation by law, for example, is laid down as a right in title I, point 12, and title II, chap. 2, point 22, and as a duty in title II, chap. 3, point 3, and also in title III, chap. 1, point 6, concerning the Parliament. It might be possible to rationalize and synchronize the texts.

b) Pure political purposes and economic, social and cultural rights, formulated in general terms, are - sometimes in one and the same provision - mixed with concrete, direct enforcable directives which the citizens can refer to in an appeal case. Among the rules that are at first hand directed towards the norm-giving organs - and not to those who have to implement the law - some accurately specify strict criteria for the law-making, while others contain instructions formulated in general terms which provide the legislator with a lot of freedom and thus give the citizens less protection. It might be preferable if at least the provisions which are of the nature of being pure political desires could be separated from the immediately enforcable directives.

c) The means to supplement the Constitution through other types of legislation and - which is specially important -

to restrict the fundamental rights and liberties need some clarifications. The problems are partly due to the fact that the term "law" and other elements of the terminology seem to be somewhat ambiguous, and the same imperfection applies to the issues of the norm hierachy, the division of the norm-making power on varying organs and the possibilities of delegation. The problems indicated are dealt with more in detail in point 4 below.

d) The system of legal protection against encroachments upon the freedoms and rights should perhaps be given a more concrete and complete wording in the Constitution. See point 5 below.

4 THE NORM-MAKING POWER

The manner in which the Constitution, now the subject of consideration, shall be adopted is clear from the mandate given to the present Parliament. The procedure for amendments is laid down in title V of the draft Constitution.

Varying provisions of the draft Constitution show, however, that beside the Constitution there are supposed to be other, more permanent organic laws. Nowhere there is a comprehensive account of the subjects which are meant to be regulated in such organic laws. It seems uncertain whether regulation concerning other subjects, not explicitly mentioned, could also be given the form of an organic law.

On several points the draft Constitution prescribes that the subject in question shall be regulated by law. According to title III, chap. 1, point 6, "the law is the normativ act passed by the Paliament", which - according to point 1 of the same chapter - is "the only legislative power of the State". Here, a number of subjects are enumerated - including those concerning "the rights and duties of the

citizens and the guarantee thereof" - which may be regulated "only by law". The same expression is sometimes used in the provisions on freedoms and rights in titles I and II in order to state in which way the regulation may be supplemented or how restrictions may be introduced. In most of these provisions, however, there are references just to regulation "by law", "by law or the grounds of law" or to actions "in accordance with (the provisions of) the law". It seems doubtful whether or not the varying ways of expression are the result of a deliberate consideration. The question arises, if the Parliament can use its power to approve "the legislative delegation" according to title III, chap. 1, point 7, in cases where the word "only" is not used. If so, the word "law" is not always to be understood according to the definition in title III, chap. 1, point 6, but is occasionally used in a more indefinitive sense to describe normative acts by an organ - not necessarily the Parliament - entrusted with norm-making power. The wording of other provisions - for example title IV, point 6 a), according to which the Constitutional Council has to "make pronouncements upon the constitutionality of the laws and ordinances issued by the Government on the ground of legislative delegation" - indicates that this might be the case.

According to title III, chap. 3, sec. 1, points 6-7, the prerogatives of the Government shall be established "only by law". The norm-making power of the Government seems in no case to be based directly on the Constitution but on an ordinary act of law issued by the Parliament. In that sense, the Government has no norm-making power of its own; as was noted above, the Parliament is "the only legislative power of the State". Concerning the types of norms which - according to authorization by law - can be issued by the Government (see title III, chap. 3, sec. 1, point 7), the following pattern occurs:

Decisions mean norms decided by the Parliament on the ground of laws whereby the Parliament entrusts the Government to issue certain types of regulation. (That also "decisions" are normative acts follows from title III, chap. 1, point 18, concerning the control exercised by the Legislative Council.) So, it seems to be a matter of delegation of norm-making power, though - as indicated - is is uncertain to what extent such a delegation can be applied. Attention should be paid to the fact that the term "decision", not "law", is used in spite of the fact that the power which can be exercised by the Government originates from and in principle rests with the Parliament; cf. title IV, point 6 a), which refers to "laws... issue by the Government on the grounds of legislative delegation".

Regulations mean only norms for the application of laws, that is supplementary regulation of an administrative character which does not add any substancially new elements to the law, issued by the Parliament.

Ordinances mean a special type of legislation, reserved for exceptional situations. This variant means that the Government - on the basis of a capacitating law, adopted by a majority of two thirds in each House - interferes with areas normally exclusively reserved for parliamentary action. This is the only type of governmental norm-making for which the Constitution provides the Parliament with a clear authorization to delegate.

In my opinion, there is an obvious need for some clarifications concerning delegation of norm-making power. It also for practical reasons seems necessary to provide the Government with some kind of residual competence. As far as the central agencies and the local councils are concerned, there are no references at all to norm-making at these levels. It can hardly be possible to do without such regulation.

I have presumably misunderstood some features of the system, but my conclusion - though based on a rather quick examination - is that there is need for a thorough reconsideration. It might be preferable to collect all the provisions on norm-making in a seperate chapter and thus be able to give a complete and clear picture of the entire system of norm-making at all levels.

5 THE SYSTEM OF ENFORCEMENT OF THE FREEDOMS AND RIGHTS

There is no means of lodging appeals with a Constitutional Court. The general provision concerning the citizen's right to appeal in justice for the defence of his rights and liberties - title II, chap. 1, point 7 - is rather vague but is supplemented by the rules laid down in chap. 2, point 25. The more precise design of the appeal system will be conclusive for the evaluation of the protection of the law. As there are no references in the Constitution to the organization of administrative authorities, to the possibilities of complaining within the administrative hierarchy or to the responsibilities of the officials, it is hard to form an opinion of the system in its entirety. Appealing to the courts of justice can hardly be the sole means of reacting on encroachments on freedoms och rigths.

6 REMARKS ON SOME SPECIFIC FREEDOMS AND RIGHTS

Retroactive legislation. Is the meaning of the second paragraph of title II, chap. 1, point 1 - "The law can only make dispositions for the future" - that there is a ban on the introduction of all kinds of retroactive legislation, not only of penal legislation of such a character? If that is the case, the clause provides a notably extensive protection.

Property. As Romania has been a State based on strict socialistic principles, there are reasons to believe that most property of any significance is in the hand of the State. It could therefore be put into question if the regulation laid down in title I, point 9, prescribing that "the public estate assets are inalienable" isn't an obstacle to such actions of privatization that are necessary for the creation of a market economy.

Political parties. The omnious clause "The only criterion underlying the constitution and recognition of political parties is the political one" (title I, point 10) should in my opinion be eliminated according to the alternative noted. It should be read in the light of the regulation laid down in title II, chap. 2, point 15, which hardly is consistent with the basic idea of establishing a State built on the principle of political pluralism. To reach that goal it is in my opinion necessary to eliminate the ground for non-constitutionalism regarding "the parties founded exclusively on ethnical, religious or language criteria". It should be added that substantial risks are connected with any system that at all prohibits the existence of certain types of political parties. - In this connection the need for denying certain categories of officials to be members of political parties might be questioned.

Protection of homes. It might be of value to include explicitly a ban on electronic surveillance?

7 THE DEFENDER OF THE PEOPLE

It might be useful to make a brief comparison between the main features of the Nordic Ombudsman institution and those of the proposed office of the Defender of the people.

There are some similarities but also quite significant differences.

The characteristics of the Swedish institution of the Ombudsman, having been in existence continuously since 1809, are briefly as follows: He is elected - not appointed by the Riksdag (Parliament) at a plenary session. In his activities he is completely independent in relation to the Riksdag as well as to the Government. He appoints his own staff and the office gets its money directely from the Riksdag without intervention from the Ministry of Finance. In his investigatory activities the Ombudsman, however, does not have to rely only on his own staff. In the Constitution it is specifically prescribed that every public procecutor is obliged to assist the Ombudsman on request. That means that the police, too, can be engaged in the Ombudsman's investigations. The Constitution also prescribes that all officials are obliged to provide the Ombudsman with such information and reports as he may request. The Ombudsman may also be present at the deliberations of a court or an administrative authority. He has access to all official files and documents. So, no document is so secret that it may be kept from the Ombudsman, and no official has such autonomy that he may refuse to answer the questions of the Ombudsman or otherwise decline to give him assistance in an investigation. The jurisdiction of the Ombudsman is wide; it includes the courts of law and all civil and military authorities as well as every official in the country. The Ombudsman has power to take initiatives of his own - that includes the right to undertake inspections. He alone decides whether or not to investigate a complaint. The Ombudsman's ultimate means is his right as a procecutor to initiate legal proceedings against negligent officials before an ordinary court of law; of great importance in this respect is the fact that there is a special provision in the Swedish Penal Code

concerning "breach of duty". The Ombudsman's main weapon, however, is his power - backed by the just mentioned competence to procecute - to admonish or criticize officials found at fault. He may also directly approach the Riksdag or the Government with proposals for changes of the law.

From the text of the draft Constitution of Romania it is quite clear that the Defender of the people has a rather weak position and that he is not supposed to be entrusted with any real powers. He is not elected by the Parliament but appointed by one of its chambers under the control of which he works. He cannot act on his own initiative bu' only on petitions from the citizens. He has no power of decision, only a right to notify the competent authority about his findings and to make recommendations for the elimination and prevention of any acts or deeds of injustice.

The conclusion that the proposed institution is not, as far as position and powers are concerned, at the same level as the Ombudsman institution (in its original shape) does of course not necessarily mean that the Defender of the people could not at all be benificial as a means for the protection of the citizens. The efficiency of such an institution seems, however, doubtful if the Defender is not entrusted with at least some of the Ombudsman's powers mentioned above.

On the other hand, I fully agree to the proposal set out in point 3 of chap. 4, title II, that the Defender - like the Ombudsman - should be acting outside the ordinary judicial and administrative processes; the institution should be an extraordinary one. It is important to stress that the protection of the rights and freedoms of the individual cannot of cource be left exclusivly or even

in the main to such an institution. This institution can in no way replace but only supplement such law-preserving agencies as the courts of law and the public procecutors.