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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE DRAFT REVISION OF THE ROMANIAN CONSTITUTION

Adopted by the Venice Commission
at its 51st plenary session
(Venice, 5-6 July 2002)

on the basis of comments by

Mr Gerard BATLINER (Liechtenstein, Member)
Mr Jacques ROBERT (France, Member)
Mr Vlad CONSTANTINESCO (France, Expert)
Mr Joan VINTRÓ (Spain, Expert)

Introduction

1. *At the 47th plenary meeting of the European Commission for Democracy through Law, the Romanian authorities submitted a request for the Commission's co-operation in the revision of the Constitution, particularly with a view to Romania's accession to the European Union.*

2. *Following the request and the visit by Ms Rodica Stăniou, Romanian Minister of Justice, to the Secretariat of the European Commission for Democracy through Law in February 2002, Venice Commission experts met with Romanian officials to discuss the process of revising the Constitution of Romania in Bucharest on 18 and 19 March 2002. MM. Gerard Batliner and Jacques Robert, members of the Commission, and MM Vlad Constantinesco and Joan Vintró, Commission experts, were able to meet the Romanian authorities and especially Mr Adrian Nastase, Prime Minister, Ms Rodica Stăniou, Minister of Justice, Mr Valer Dorneanu, Speaker of the Parliament, and the members of the parliamentary working party for the revision of the Constitution and the Judicial Service Commission.*

3. *This opinion concerns the proposal for revision of the Romanian Constitution entitled "Domaines et objectifs pris en considération pour la révision de la Constitution" (CDL(2002)85), presented by the Romanian Government. This was the text discussed on 18 and 19 March 2002. It is based on the individual opinions of:*

- *Gerard Batliner (CDL(2002)50)*
- *Jacques Robert (CDL(2002)61)*
- *Vlad Constantinesco (CDL(2002)52)*
- *Joan Vintró (CDL(2002)86).*

General remarks

4. Ten years after *the* adoption of the Romanian Constitution (adopted by the constituent assembly on 21 November 1991, coming into force after adoption by referendum on 8 December 1991), the Government has decided to undertake its revision in order to arrive at various improvements to the initial text that would remedy certain perceived malfunctions, and also with Romania's accession to certain international and European organisations in view. The draft put forward contains numerous proposed amendments to the text of the Constitution concerning many of its aspects and intended, for instance, to:

- consolidate protection of the right of property
- overhaul the egalitarian conception of bicameralism, a cause of sluggishness in the legislative procedure,
- reconsider certain aspects of the legislative procedure particularly as regards emergency orders
- strengthen the Government's position in the legislative procedure by instituting voting on whole texts
- adjust the censure motion machinery
- consolidate the Judicial Service Commission
- transform the Supreme Court of Justice into a Court of Cassation

- extend the scope for referral to the Constitutional Court and withdraw Parliament's power to overrule a declaration of unconstitutionality by a two-thirds majority in each house
- improve safeguards for the identity of national minorities
- facilitate Romania's inclusion in the structures of NATO and the European Union.

5. It is thus an extensive revision informed by the first ten years of operation of the Constitution, rectifying the drawbacks of some of the earlier options taken by the constituent assembly, and seeking to prepare Romania for confident entry into the international and European organisations to which it does not yet belong. Modernisation of the political system and adaptation of the Constitution are therefore the salient themes of the constitutional reform. The Government does not rule out the possibility that the revision may address other issues such as the election of the President.

6. The revision procedure is governed by Articles 146, 147 and 148 of the Constitution. The initiative lies with the President, at the proposal of the Government or at least a quarter of the Chamber of Deputies or Senate, or at least 500,000 citizens in possession of their electoral rights (Article 146.1). Obviously the first possibility applies, as the text forwarded to the Venice Commission is the Government's proposal.

7. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1). This is a difficult majority to attain; even the coalition supporting the government of Mr Nastase (PSD, UDMR) cannot achieve this figure. For the revision of the Constitution to be adopted, it will have to receive the approval of the opposition parties, such as the Liberal Party. That should induce the parties supporting the Government's action to open negotiations with the opposition in order to put forward a parliamentary proposal for revision if appropriate, as Article 146.1 permits. But at all events the initiative lies with the President. Nor is it certain that the Senate would agree to a reduction of its powers, at all events not by a two-thirds majority.

8. The revision will subsequently be approved by referendum (Article 147.3).

<u>TITLES I and II: General observation</u>

9. In Titles I and II (Articles 1-57) of the Constitution, the concept of "citizens" frequently occurs where the holders of rights and freedoms are concerned [see for example Articles 1.3; 15.1; 16.1; 20.1; 25.2; 31.2; 34.1; 35.1; 37.1; 43.2; 47.1; 49.1; 52.1; 53.1; 55.1]. Conversely, the other terms used are sufficiently clear ("Romanian citizens" [for example Articles 16.3; 17, 19.1; 52.2; 54], "aliens" and "stateless persons" [for example Articles 18.1; 19.2; 41.2; 54] or "every person" [for example Articles 21.1; 26.2] or "no one" [for example Articles 16.2; 22.1], but the concept of "citizens" (in the French version of the Constitution) can give rise to misunderstandings. The general clause of Article 18.1, at least in its French translation, seems somehow tautological. Admittedly it would be unsatisfactory not to grant a substantial part of "citizens'" rights [exceptions: for example Articles 25.2; 34.1; 35.1; 37.1; 52.1, etc.] to "every person" [see for example the terminology chosen in the ECHR or the European Union Charter of Fundamental Rights]. In the proposal relating to Article 114.5, and where Article 125.4 is concerned, the terminology used is sound, referring to "injured persons" not "citizens". On the other hand, the proposal relating to Article 145 para. 2 (new) employs the concept of "citizens".

TITLE II: Fundamental rights, freedoms and duties

CHAPTER I: Common provisions

Article 16 - Equality before the law

10. According to the current text, public offices or dignities are open solely to persons who have Romanian citizenship alone and reside in the country.

11. While it is appreciated that the new text has dropped the residence requirement, it is not clear how the fact of possessing another nationality in addition to Romanian citizenship could justify exclusion from public office. The draft does away with discrimination against dual nationals and thus warrants approval. It would be a different matter if the new text enabled aliens to qualify for public offices and dignities, but that is not the case. Romanians alone have this right, and so they should, whether or not they hold another nationality.

CHAPTER II: Fundamental rights and fundamental freedoms

Article 32 - Right to education

12. It is gratifying that Romania has taken steps which will ultimately enable the legislator to establish a constitutional guarantee for multicultural universities as well as those whose language of instruction is Romanian.

Article 41 - Protection of private property

13. The expression "guaranteed ownership" is better than "protected property". The effectiveness of protection may indeed vary according to the circumstances, whereas a guarantee is absolute.

14. The text uses impersonal wording in placing the state under an obligation (see also, for instance, Article 26.1). Conversely, in order to point up the subjective right of the individual (as a human right) in respect of the state, the ECHR (as well as the EU Charter) and numerous constitutions are worded subjectively ("every person is entitled …" or "nobody may be …"), as also in many articles of the Romanian Constitution (see Articles 15.1 and 2; 17.1; 19; 21.1; etc).

15. Aliens and stateless persons cannot acquire the right of ownership in respect of land (new wording). This innovation is questionable, especially in the context of an early accession to the European Union for Romania. Indeed, it is realised that the "European area" must become ever more free and ever more open to people, ideas, goods and investments. The reasons for this new article are understandable: averting a foreign minority's manipulation of this right for the purpose of taking over a geographically distinct area of Romanian territory so that all its members can congregate there.

16. Nonetheless, rather than lay down a general and absolute prohibition, the law might possibly provide for limitation of collective property acquisitions over a given portion of the territory.

17. Moreover, constitutional prohibition is not very effective insofar as it allows no restriction of acquisitions by Romanian corporate bodies with foreign-owned capital.

Restrictions (and derogations) in respect of rights and freedoms

18. The text contains restrictions or limitations of a specific nature on the rights granted (eg in Articles 27.2; 29.2 and 4; 30.6 and 7; 31.3 and 4; 41.6, etc) and of a general nature (eg in Articles 15.1; 49; 54).

19. The expediency of Article 54 has been queried since it governs the exercise ("must exercise") of rights and freedoms, as already does Article 49 ("the exercise of certain …"). Article 49 allows certain restrictions to be applied to the exercise of rights and freedoms in an appropriate manner (see for example Articles 8 to 11 ECHR or Article 52.2 of the EU Charter) by stipulating that any restriction (on the exercise of the right or freedom) must have a statutory foundation, pursue a legitimate aim and comply with the principle that any act restricting a right must not be disproportionate to its purpose. Lastly, the act must not affect the essence of the right (see for example Article 36 of the new Swiss Constitution). The text of Article 49 amply suffices for the legislator and, if necessary, for the administrative authority and the courts. On the other hand, Article 54 makes it possible and mandatory for secured constitutional rights (exercised "in good faith") to be directly weighed against any right held by another party, while it does not stipulate compliance with the principle of proportionality. This needlessly opens the door to an overly broad discretionary power both for the administrative authorities and for the judiciary. Article 54 waives a substantial part of the limitations that can be placed on the permissible restrictions to fundamental rights (known as "Schrankenschranken" in German).

TITLE III: Public authorities

CHAPTER I: Parliament

Section 1 - Organisation and functioning

Article 58 - Role and structure of Parliament

20. There is no real need for the maximum number of Deputies and Senators to be specified in the Constitution; this may prove awkward if the set numbers have to be altered upward or downward one day.

Article 59 - Election of the Chambers

21. The proposed new text provides that representation by Deputies and Senators shall be established by the electoral law in proportion to the national population. If it is stipulated that the number of seats must be in proportion to the population for both houses, there is no longer any real difference between them.

22. It is altogether reasonable for the procedures of the electoral system (polling method) not to be provided for in the Constitution itself, so that the alteration of the system, if required, will be easier. However, revision of the polling method certainly ought to be more difficult than revision of an ordinary law, and should not take place in the year preceding an election.

Section 2 - Status of Deputies and Senators

23. The text of the 1991 Romanian Constitution concerning the status of parliamentarians is in the mainstream tradition of free democratic constitutions. National sovereignty belongs

to the Romanian people and is exercised by them through their representative bodies and at referendum (Article 2.1). The members of Parliament derive their mandate and legitimacy from election by the people (Articles 34 and 35). They are elected by universal, equal, direct, secret and free suffrage (Article 59.1). The representative parliamentary mandate is exercised in the service of the people (Article 66.1). This mandate carries special protection (immunity: Article 69). The mandate is free of liability (Article 70) and independent (any imperative mandate is void: Article 66.2). The right to reasonable abstention from parliamentary votes is also secured in this context. No instructions may be issued by any person, and forfeiture of the mandate does not ensue from withdrawal of individual confidence while Parliament holds office. Cases of individual resignation are itemised exhaustively in the Constitution (Article 67.2).

Article 66 - Representative mandate

24. Proposed new text: "Deputies and Senators who have not taken part in Parliament's proceedings and activities shall be deemed to have resigned their mandates, in accordance with the conditions laid down by an organic law".

25. The purpose of this new provision is to combat member absenteeism. However, choosing to include it in the Constitution seems arguable, considering the theory of parliamentary mandates. By establishing such a presumption of resignation of elected office without specifying what kind of presumption (simple? irrefutable?) and by deferring to an organic law the implementation of this provision (principally the question of who certifies the failure to participate in proceedings), the Constitution apparently settles a question more in the ambit of the standing orders of the houses, which may provide for deductions from parliamentary pay where absences exceed a specified duration or proportion.

26. As set out in the Romanian Government's draft, the presumed resignation of an electoral mandate is akin to a presumption of loss of office rather than tacit or mandatory removal from office. As a rule, loss of office is certified by the assembly, though in the light of judicial rulings or documents proving an unworthiness or disability provided for by law. It cannot be used as a disciplinary measure, which seems to be the case here.

27. The further step of providing for removal from office is plainly excessive and even unworkable. The sole legitimate sanction which an elected member may incur must stem from the electorate. It is for the electorate not to return the member on expiry of his mandate if he has not conscientiously discharged it. In a democracy, elected representatives have command of the way in which they mean to discharge their electoral mandates. Political action may follow various paths, and attendance at sittings is not the sole form of action.

28. Lastly, such a provision is virtually inoperative. Above which threshold of absenteeism, and on what ground, will a member of parliament be deemed to have given up his mandate?

29. It would nevertheless be conceivable for the Constitution to lay down a rule of attendance and indicate the penalties which would be imposed on defaulting members, ranging for instance from partial or complete withdrawal of indemnity to withdrawal of the right to vote, but without providing for loss of office, as witness the examples taken from other fundamental instruments. Accordingly, Article 63.3 of the Greek Constitution stipulates:

"In the event of a deputy's absence for more than five meetings per month without good cause, one-thirtieth of his monthly compensation shall be deducted for each sitting missed." This solution is straightforward and does not affect the parliamentary mandate.

30. It is also appropriate to quote Articles 162 and 163 of the Portuguese Constitution, corresponding in certain respects to what is proposed in Romania but dealing differently with the problem.

"*Article 162 - Duties*

a. Deputies have the following duties: to attend the plenary sittings and the meetings of the committees of which they are members;
b. to perform their functions in the Assembly and functions for which they have been designated at the proposal of their parliamentary group;
c. to participate in voting."

"*Article 163 - Cessation and resignation of office*

1. Deputies cease to hold office if they:

a. become subject to any of the disabilities or disqualifications prescribed by law;
b. fail to take their seat in the Assembly or exceed the number of absences permitted under the standing orders;
…
d. are convicted by a court for membership of organisations with a fascist ideology.

2. Deputies may resign office by a declaration in writing."

31. The contrast with the Romanian proposal is that the duties of deputies are specified in the Portuguese Constitution and that the penalty for non-compliance is termination of office. This system seems more straightforward than the one involving presumed implicit resignation of the electoral mandate.

Article 69 - Parliamentary immunity

Article 70 - Independence of parliamentarians' opinions

32. According to tradition and legal dogma, parliamentary immunity is specifically intended to ensure the proper functioning of parliament. A member may not be prosecuted without the approval of parliament.

33. The projected constitutional reform proposes two variants as regards parliamentary immunity. The more radical of the two is to repeal the current Article 69 of the Constitution which provides for parliamentary immunity under the classic terms requiring the Chamber's authorisation, except if caught in the act of committing a crime, for a Deputy or Senator to be subjected to arrest, house search and prosecution. The other variant involves a few minor alterations to the current system along the lines of Article 59 of the Belgian Constitution. Of course parliamentary immunity is an embattled legal institution in most countries with well-established democratic systems. Two influential factors have helped bring about this situation: consolidation of and compliance with the principle of separation of powers, and the existence of an independent judiciary, have profoundly altered the historical and political

conditions which gave rise to parliamentary immunity; secondly, the risk of parliamentary immunity becoming an abusive privilege that might prevent justice from being administered on equal terms for all citizens. That accounts for the significant restrictions placed on the scope of parliamentary immunity in various democratic countries by means of constitutional or legislative reforms or through the incidence of constitutional court practice. Even so, parliamentary immunity may still be meaningful in the countries undergoing transition to democracy and having a long experience of authoritarian rule until recently, where interference by the executive with the normal functioning of parliament cannot be ruled out and the independence of the judiciary cannot be absolutely guaranteed. In these circumstances, it should be emphasised that parliamentary immunity is a prerogative of parliament as an institution, designed to secure its composition and normal running, not a prerogative of parliamentarians as individuals.

34. If the Romanian Constitution is to deal with this awkward question in its actual text, greater precision is needed. Indeed, a clear distinction needs to be drawn between freedom from liability attaching to opinions expressed and votes cast while in office - which must be absolute - and immunity from prosecution, which means that any Deputy prosecuted for committing a crime shall only answer for it before a special court.

35. Midway between these two propositions, there is the question of prosecuting or even arresting a member of an assembly during the parliamentary session (inviolability). At all events, in this case it is necessary to stipulate the consent of the Chamber, indicated by waiving the parliamentary immunity of the Deputy or Senator concerned.

36. The proposed variant relates strictly to inviolability. The Commission understands that it does not exclude other necessary features of parliamentary immunity. It would allow the authority and proper functioning of parliament to be secured, and an arrest or criminal proceedings could (or must) be postponed. The somewhat unwieldy current procedure (Supreme Court ruling) would be abolished.

37. Parliamentary immunity could be retained in the Romanian Constitution with the following legal specifics: protection as the aim, focusing on prohibition of parliamentarians' arrest except when caught in the act; a Chamber's refusal to institute judicial proceedings against a parliamentarian must be reasoned and can have no other effect but to suspend the proceedings for the duration of the session or parliamentary term only, and in no circumstances absolutely.

Section 3 - Legislative procedure

Article 74 new, paras. 4 and 5

Proposal:

"4. If the Government objects, the Chamber cannot pass an amendment unless it has previously been examined by a specialised parliamentary committee.

5. At the call of the Government, the Chamber shall vote on the whole or part of the text debated, and shall consider only those amendments to it which are proposed or accepted by the Government."

38. These provisions are reminiscent of Articles 44.2 and 45 of the French Constitution; they reflect a determination to rationalise parliamentary rule by increasing the Government's control over the proceedings of Parliament.

39. Article 74.4 enables the Government to oppose plenary session debate on an amendment not previously discussed by the appropriate committee pursuant to a request for an opinion, and this allows the Government to avoid being surprised during the sitting and having to discuss late amendments impromptu. This type of provision increases government control over Parliament during the legislative procedure and is intended to improve its celerity and effectiveness.

40. Article 74.5 establishes the "closed vote" or "single vote", equating to a motion of confidence not involving the responsibility of the Government. The Government chooses both the timing and the form of the text on which it calls for an overall vote: the Assembly is faced with the choice of either voting in favour of the text in its entirety or rejecting the whole of the Government's proposals.

41. The arrangement can prove useful not only where there is a coalition majority but also where the majority is held by a single political formation; it is an effective tool for keeping any type of parliamentary majority in order.

42. However, if we adopt the perspective of the pre-eminence of Parliament, such a rule may be thought to encroach on the normal distribution of powers by placing the Government above "the supreme representative body of the Romanian people and the sole legislative authority" (Article 58.1). The French precedent should not at all events be construed as an authoritative argument, because it is a solution not generally accepted by the constitutional law of countries with a long democratic tradition, and above all because some eminent French constitutional law specialists have taken the view that the provisions of the 1958 Constitution deprive Parliament of the right of amendment, an essential requirement for the exercise of its legislative function.

CHAPTER II: The President of Romania

Article 89

43. The new text provides that "the President of Romania may dissolve the Parliament, at the proposal of the Government, after consultation with the speakers of both Chambers and only after unsuccessfully attempting mediation between the parties represented in the Government and the Parliament".

Two remarks are called for:

44. The stipulation of a proposal by the Government seems dangerous. In the event of "cohabitation" between a right-wing President and a left-wing majority or vice versa, how will a serious crisis be resolved if the President wants dissolution and the Government does not? By the President's or the Government's resignation, or by a coup d'état?

45. Furthermore is it needful to stipulate that before deciding to dissolve Parliament the president must attempt mediation between the parties? If he is bent on dissolution anyway, he will always contrive to make sure the mediation miscarries!

46. If the retention of this provision is really desired, it might be reformulated as follows (drafting proposal): “The President of Romania may order the dissolution of Parliament only at the Government’s proposal, after consultation with the Speakers of the Houses, and after an unsuccessful attempt to mediate between the parties represented in the Parliament and the Government”.

CHAPTER IV: Relations between Parliament and Government

Article 112 - Motion of censure

Drafting proposal:

“(2) The motion of censure shall be admissible only if the parliamentarians who tabled it nominate a candidate for the office of Prime Minister.”

47. It is altogether appropriate for the new text to provide that a motion of censure is admissible strictly on condition that the parliamentarians who initiated it nominate a candidate for the office of Prime Minister.

48. This prevents the formation of purely negative opposition factions in Government which disagree on everything except the dismissal of the ruling government. Furthermore, it is vital to avoid creating conditions - as the proposed new text does - in which the candidate for the office of Prime Minister is appointed *ipso facto* through the passage of the motion of censure. He absolutely must be officially elected through a vote of confidence by Parliament. The new arrangement may add to the stability of the political system.

Article 114 - Legislative delegation

49. The proposed new text relating to exceptional situations does not fit easily into an article dealing with “legislative delegation”.

50. What is meant here is definitely not any kind of delegation by Parliament to the Government, but an autonomous power vested in the Government to adopt “in emergencies caused by the existence of an imminent public menace”, emergency orders to introduce the imperative measures for meeting the danger.

51. Now that the transitional period which commenced in 1991 is at an end, emergency orders should be restricted as effectively as possible. Legislative authority (separation of powers) is Parliament’s by right (Article 58.1).

52. In point of fact, despite the effort to arrive at a more stringently defined legal framework for emergency orders, the arrangement proposed in the constitutional reform concerning Article 114.4 is not entirely satisfactory. Firstly, the circumstances which may warrant the adoption of an emergency order are defined in a manner closely resembling the states of emergency in Article 49: “Emergencies caused by the existence of an imminent public menace”. Thus there is a confusion between emergency orders and actual emergencies. It should be observed in this connection that the constitutions which permit governments to issue emergency orders establish a separation between this statutory instrument and states of emergency as such. The terms used are “situation of extraordinary and urgent need” (Article 77 of the Italian Constitution and Article 86 of the Spanish Constitution), which constitutional case-law interprets as a situation of legislative urgency. In other words, if the Government is to be empowered to approve emergency orders, there

should not be an imminent public menace. Additionally and concurrently, the subject-matter of emergency orders must be limited with precision. Accordingly, it should be made absolutely clear whether the exclusion from the scope of organic laws - laid down in Article 114.1 with regard to normal orders – applies equally to emergency orders, possibly also introducing other substantive limits to emergency orders. This can be illustrated by Article 86 of the Spanish Constitution stipulating that decree-laws may not affect the regulation of the basic institutions of the state, the rights, duties and liberties of the citizens, the Autonomous Communities or electoral law.

53. The aforementioned new article provides that emergency orders shall come into force only after being brought before the appropriate Chamber to be approved within 30 days at the most, after which they are deemed to have been rejected.

54. How can the necessary urgency of these orders, issued under drastic crisis conditions, be reconciled with the unwieldiness of the proposed adoption procedure?

CHAPTER VI: Judicial authority

Section 1 - Courts of law

Article 123 - Administration of justice

55. Proposed new text: “Judges are forbidden to interpret and apply the law according to the interests of political parties.”

56. This text (in French translation) is by no means clear. What is the situation when the interests of the political parties correspond to a correct interpretation? There are also many other possible ways of influencing, biasing and fettering judges. Furthermore, such stipulations might perhaps appear in a code of procedure or other instrument with immediate effect where the parties are concerned.

Article 24 para. 1 (new) and Article 151 paras. 3 and 4 (new) (transitional provisions) - Status of judges

57. The repeal of the rule on appointment of Supreme Court judges for six years (renewable) is to be welcomed. Any possible renewal of a term of office could adversely affect the independence and impartiality of judges.

58. The new paragraphs 3 and 4 of Article 151 are construed as meaning that the power of the former Judicial Service Commission to propose (Article 133), during the transitional period, the new judges of the Supreme Court of Cassation and Justice and the State Counsel General attached to this institution are unaffected by the transitional clause.

Section 2 - The prosecution

Article 130 - Role of the prosecution

59. The exact definition of the nature and role of a prosecutor’s department is an infinitely complex question.

60. While the magistrates who try cases (judges) must be placed in a statutory position of complete independence, the same need not apply to prosecuting magistrates.

61. Like it or not, a country's judicial policy in the criminal and civil law spheres is determined, in a democratic context, by the government as an offshoot of the parliamentary majority. This policy has to be carried out by the government's representatives who are the members of the prosecution department.

62. Action in pursuance of a policy, however, in no way implies that prosecutors are personally issued with specific orders in a given case. Each prosecutor retains freedom of decision, though in the framework of ministerial circulars that determine the country's principal judicial policy aims. A country could not have multiple criminal law policies at the whim of prosecutors' opinions and beliefs; there must be only one such policy. In determining how it should be applied to individual cases, each prosecutor must nevertheless be independent.

Section 3 - The Judicial Service Commission

Article 133 - Tasks

63. This body is required to look after the appointment, career and discipline of all judges and prosecutors.

64. It seems quite natural that the Commission should comprise two separate sections for judges and prosecutors, and many ways of ensuring their satisfactory composition can be envisaged. There is no ideal model, but each state can find something to suit it in the array of legal techniques for appointment of members.

65. The main thing is that all countries should adopt a system for constituting the Commission which harmoniously blends the two imperatives of resisting corporatism and keeping the institution apolitical.

66. Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches).

67. To guard against political bias, the political power should not control either appointments, or promotions, or possible sanctions.

68. The law provides a wide range of procedures which are perfectly suitable for achieving this aim, for instance in requiring that appointments or promotions can be carried out only on the "proposal" or with the "approval" of the Judicial Service Commission.

69. This does not mean it is absolutely necessary to bar the President of the Republic or the Minister of Justice from the Commission, where they have an altogether natural place.

70. In many constitutions, the President of the Republic is assigned the function of upholding the independence of the Judicial Service Commission which, precisely, is required to assist him in that function.

71. As to the Minister of Justice, it is his department which administers justice, keeps all the files of candidates for judicial office, and controls the progression of their careers. For every career advance in the judiciary, it is in fact the sole authority capable of giving the Commission the names of judges who fulfil the statutory requirements for taking up a given

post. Consequently, it is inconceivable that the Minister of Justice should not sit beside the head of state on this Council as its vice-president.

TITLE V: The Constitutional Court

Article 144 - Responsibilities

New sub-paragraph a[1:]

72. Why should constitutional review of treaties be left for the Senate alone to initiate? Since the ratification of a treaty must be authorised by both houses (Article 11.2 of the Constitution), it seems reasonable that the Speaker of each (or a proportion of the Deputies or Senators) should be entitled to apply to the Constitutional Court. Moreover, since a treaty is concluded by the President (Article 91.1 of the Constitution), it does not appear inexpedient for the President, together with the Prime Minister (who will implement the treaty) to ask the Constitutional Court whether an international treaty is compatible with the Constitution.

73. The Constitution does not directly state what happens to a treaty which the Constitutional Court has found incompatible with the Constitution. Apparently there could be two alternatives in this case:

- either there is a resolve to authorise the ratification of the agreement, which will necessitate prior revision of the Constitution: why not say so explicitly?
- the finding of unconstitutionality leads to the non-ratification of the agreement, there being no intention (or possibility) of revising the Constitution, at the cost of involving Romania's international responsibility towards another contracting party.

74. The Constitution will clarify the procedure in respect of treaties whose constitutionality has been certified, since it is also proposed to amend Article 145 in the following terms: "(…) The treaty or international agreement whose constitutionality has been certified in accordance with Article 144a cannot be challenged on the ground of unconstitutionality." This means that thereafter the Constitutional Court cannot receive any further application contesting a treaty whose conformity to the Constitution has been certified. The presumption of conformity with the Constitution is absolute and irrefutable *(juris et de jure*), which is good for the legal certainty of international transactions. But this does not elucidate on what happens to treaties found inconsistent with the Constitution.

New sub-paragraph c[1]:

75. The newly instituted jurisdiction of the Constitutional Court (over disputes between authorities) is to be welcomed. It consolidates rule of law and contributes to the proper function of the political system.

Article 145 - Constitutional Court rulings

76. In the new Article 145 para. 2, it is recommended to replace the term "citizens" with "natural persons", to delete the word "others" and partly change the order of the parties to whom rulings are applicable. The text might read as follows: "For all public authorities and natural or legal persons".

NEW TITLE V[1]: Integration into the European Union

77. The proposed text for Article 145[1], particularly in the second variant, has four main components:

- a provision expressly concerning Romania's integration into the European Union;
- a provision in which only accession is explicitly referred to;
- an accession procedure under a law adopted by a two-thirds majority in each Chamber;
- the precedence of the provisions of the treaties founding the EU over contrary provisions in the Constitution and other domestic enactments.

78. Regarding the expression "joint exercise of certain attributes of sovereignty" (first variant of Article 145[1]) and the qualified majority for the adoption of the law on accession, it should be pointed out that these are solutions which occur in various constitutions of European states and present no problems.

79. Nonetheless, the phrase "attributes of sovereignty" could be advantageously replaced by the term "jurisdiction" which is more politically neutral and legally accurate. If attributes of sovereignty are transferable this surely implies that sovereignty is divisible[1]. A country's accession to the Union is made possible by taking part in the joint exercise[2] of certain powers which the state authorities have either conferred on the Union and the European Community or transferred to them[3]. It is therefore suggested that Article 145[1].1 be worded as follows:

"Romania's accession to the treaties on which the European Union is founded, for the purposes of exercising the powers established by these treaties jointly with the other Member States, shall be subject to the adoption of a law passed by a majority of two-thirds of each Chamber."

80. This text would concern only the accession law as such. This points to two drawbacks. Firstly, although the formula of an express provision concerning the EU has been adopted by some European countries, it must be admitted that this solution does not allow attributes of sovereignty to be transferred to other international or supranational organisations. Furthermore, if the constitutional provision refers only to "accession", any future amendments to the EU treaties affecting the powers of the European institutions will call for a further revision of the Romanian Constitution. In fact successive transfers of powers will necessarily occur following accession as European unification proceeds. In that case, it is possible to envisage a solution which is highly contestable considering the

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[1] Article 23 of the German Basic Law and Article 9.2 of the Austrian Constitution do admittedly use the expression "Hoheitsrechte" = rights of sovereignty, close to "attributes of sovereignty". The concept "limitations of sovereignty" is used in the preamble to the 1946 French Constitution, whose full constitutional value was acknowledged in the Constitutional Council's ruling of 16 July 1971, as well as in Article 11 of the Italian Constitution. The concept of "restrictions on the exercise of national sovereignty" is used in Article 28.3 of the Greek Constitution.

[2] This expression is found in Article 88.1 of the French Constitution. Article 7.6 of the Portuguese Constitution mentions "(…) joint exercise of the powers necessary to establish the European Union".

[3] The expression "transfer of powers" is found in Article 93 of the Spanish Constitution and Article 88.2 of the French Constitution; according to Article 92 of the Netherlands Constitution, "legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty".

importance of the area concerned; it would involve approving the instruments for amending the EU constituent treaties under the ordinary procedure without a special majority. Another solution would be to provide that, at each further step in the European process causing powers to be transferred from Member States to the European bodies, a new enabling law must be passed according to the same arrangements. Lastly, one might suggest a solution also adopted by several European countries which is more open, flexible, and generally authorises the conclusion of treaties for transferring the exercise of the prerogatives of the state to an international or supranational organisation. Nonetheless, if an article dealing strictly with the EU is to be retained, it should be drafted so as to take in accession and amendments to the EU constituent treaties. In that instance, a more general article like Article 24 of the German Basic Law, would also be necessary for concluding other treaties which involve transfers of sovereignty (NATO, Eurocontrol).

81. The provision on the precedence of the EU constituent treaties over contrary provisions of the Constitution and domestic law raises some comments. It should firstly be pointed out that issues relating to principles of correspondence between Community law and domestic law do not, strictly speaking, form an object of domestic constitutional law but rather of European law. Secondly, in accordance with the principles of Community law laid down chiefly by the case-law of the CJCE, it can be observed that the precedence or pre-eminence of European law is valid not only for the constituent treaties but also for Community law, which would render Article 145^1.2 incomplete or inadequate. Thirdly, it could be inferred that Article 145^1.2 confers force of domestic constitutional law on the primary Community law, something which no constitution of an EU member state has introduced hitherto, particularly in view of the problems which it would be likely to entail for review of constitutionality. Indeed, the constituent treaties and the national constitutions have neither the same characteristics nor the same object. As a result of adopting a provision like Article 145^1.2, it would be no longer possible to verify the constitutionality of subsequent revisions of the Community treaties. It is in fact very difficult, indeed well-nigh impossible, for the force of European law, in its various forms, to be condensed into a plain constitutional declaration.

82. Conversely, it would not be inexpedient for the Constitution to establish the precedence of Community law over domestic law, particularly subsequent law, as the main difficulties met by the courts of the Member States have been raised by the existence of a subsequent law inconsistent with Community law.

83. It can therefore be asked whether the Constitution need really state the principle of precedence of Community law (whether primary or secondary) over national law, the Constitution included. Note that not one present Member State of the Union has an article like this in its constitution. The Romanian Constitution already contains a provision on the relationship between international treaty law and domestic law (Article 11); now, Community law, despite its peculiarities, remains a body of law founded on and derived from treaties. Only if, at some as yet undetermined future date, it became possible to draft a European constitutional instrument, would it be advisable to specify, and then only in that instrument, the precedence of Community law over the Constitution of a Member State.

84. Moreover, the variant of the draft text states that the precedence (pre-eminence) of Community law is established "under the conditions laid down by the act of accession". Yet the purpose of the act of accession is to lay down, in the light of the treaties constituting the European Union and the European Communities, the specific conditions under which the candidate state acquires the status of a member of the Union. To the best of our knowledge,

there is no example of an act of accession which contained a stipulation as to the authority of Community law over the Constitution of the new Member State. If the principle of pre-eminence was to be set down, it should preferably be done in the originating law, namely the treaty[4].

85. Two significant omissions from the provisions of Article 145[1] are also observed. Firstly, there is no rule on the Romanian institutions (Government and Parliament) responsible for ensuring compliance with all Community law in Romania (see for example Article 93 of the Spanish Constitution). Secondly, the participation of Parliament alongside the Government in the process of framing Romania's European policy is not mentioned. Article 23 of the new German Constitution forms a good legal solution for regulating the necessary parliamentary participation in the bottom-up phase of political decisions on European affairs.

86. Lastly, it should be mentioned that if the main aim of the constitutional revision is adaptation to the requirements of European law, for the sake of consistency some changes should be made to Articles 16, 34 and 35 of the Constitution in order that European Union citizens resident in Romania may exercise the right to vote in and stand for municipal elections and European Parliament elections in accordance with the provisions of the 1992 Treaty on European Union. On that score, it is quite justifiable to consider that the matter is settled by the precedence given to the EU constituent treaties over contrary provisions of the national constitution in the proposal for constitutional reform (Article 145[1].2). Nonetheless, foreigners' exercise of a political right as important as that of political participation should be explicitly recognised and carry all appropriate guarantees.

Conclusion

87. The constitutional revision draft tabled by the Romanian Government has two main aims: adapting the Romanian Constitution to European Union law; revising other provisions, particularly with regard to the legislature, on the basis of the experience gained since the adoption of the Constitution.

88. Regarding the first point, the European Commission for Democracy through Law is pleased to note that the draft for the revision of the Romanian Constitution put forward by the Romanian authorities recommends the addition to the Romanian Constitution of a general provision allowing transfer of powers to the European Union. This provision would afford a satisfactory solution to the main constitutional problems raised by Romania's eventual accession to the European Union; certain adjustments would nevertheless be desirable, as explained below, to ensure full adaptation of the Constitution to European Union law.

89. Nonetheless, upon accession, it would be desirable to make express provision for the conferment on EU citizens of political rights for municipal and European elections in

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[4] It may be noted that Article 2 of the protocol on the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam provides that the application of the principles of subsidiarity and proportionality *"(…) shall not affect the principles developed by the court of justice regarding the relationship between national and Community law (…)"*. This provision may be regarded as tantamount to incorporating into the originating law the principle of pre-eminence (like that of direct enforceability), as formulated by the Court. (Cf. Article 311, ex. 239 of the Treaty establishing the European Community: "*The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.*").

Romania, and to reconsider the general ban on the acquisition of real property rights by foreigners and stateless persons.

90. For the remainder, the Commission notes that in the articles dealing with the Parliament, the proposed revision of the Constitution seeks to rationalise the organisation and operation of the Romanian bicameral system in a way which is generally deserving of a favourable opinion.

91. The Commission, however, stresses the need to guarantee effective parliamentary immunity. It also disapproves of a provision on presumptive resignation of office by habitually absent parliamentarians.

92. The vote on whole texts, proposed as part of the legislative procedure, would have the advantage of effectiveness but would undermine Parliament's role. The introduction of the constructive censure motion, on the other hand, may contribute to the stability of the political system.

93. The question of emergency orders ought to be reconsidered.

94. Where the judiciary is concerned, the repeal of Supreme Court judges' renewable appointment is to be welcomed.

95. As to the Judicial Service Commission and the different treatment of judges and prosecutors, there is no ideal model but the chief concern is to adopt a system that harmoniously weds the two imperatives of resisting corporatism and keeping the judiciary apolitical.

Additional remarks on certain other problems raised during the visit of 18-19 March 2002 to Bucharest

1. Should the election of the President of Romania by universal suffrage be reconsidered?

96. Alteration of the procedure for electing the President is discreetly mentioned in the Government's text but reflects a request by the Liberal Party; the idea is to signal more distinctly the parliamentary character of the political system by having the President elected by the Chambers instead of by direct universal suffrage.

97. This is an essentially political problem of relevance primarily to the Romanians and the balance they want to achieve in their Constitution. Two general remarks are all that need be made here:

a. The election of the head of state by universal suffrage necessarily gives him the legitimacy and importance which are essential to the state. If elected on the strength of a programme, the President will have to try and carry it out and must therefore have the constitutional means of doing so. A President of the Republic is not elected by universal suffrage if he is merely to be confined to a role of pure representation. It must therefore be ascertained whether the Romanians want the presidential office to be strong or weak.

b. It is always politically difficult to withdraw from the people a political power granted to it. The citizens of a country who have been granted the right to elect their own

President by direct universal suffrage can hardly be expected to renounce such a prerogative.

2. Should the Senate be retained?

98. The problem of the second chamber is always a delicate one to resolve in the framework of unitary democracies. If indeed the existence of a second chamber is perfectly plausible in a federal state (in which case the Senate represents all the federate entities on an equal footing) or in a parliamentary monarchy (where the second, aristocratic, chamber comprises the country's dignitaries and celebrities), its usefulness is more difficult to substantiate in the context of a unitary state.

99. Thus its justification here is to enhance law-making or to keep the legislature better balanced. In France people like to call the Senate the wise head of the Republic, a more mature, level-headed chamber, less prone to excesses than the other.

100. In Romania it is perfectly conceivable for each chamber to moderate the other through an equal division of their respective powers.

101. In the Commission's opinion, parliamentary rule works better, as history readily proves, with two chambers than with one.

102. Nonetheless, to avoid stalling the legislative process or the constitutional revision machinery, care must be taken to give the lower house the last word in all cases. Indeed, the Senate must not acquire a kind of right of veto with which to obstruct the action of the government and the assembly.

103. Extradition raises two comments:

a. It is perfectly justifiable that a state should not wish - in principle - to extradite its nationals because surrendering a national impinges on the ruling prerogatives of a sovereign state and the state may itself wish to try before its own courts the national whose surrender is demanded. In this respect, there are many states which refuse to give up their nationals.

b. However, within a "European judicial area" which must of necessity be constituted in the long run to fight crime and terrorism in Europe effectively, the Member States of the Union must co-operate closely in prosecuting criminals and voluntarily hand over any of their nationals who have committed criminal or unlawful acts.

104. In this connection, one cannot but approve the Romanian proposal for revision of the Constitution to the effect that (Article 19) "extradition of Romanian citizens can be approved only on the basis of the international treaties to which Romania is party, as provided by law and under mutual arrangements".

105. This text leaves state sovereignty intact without hampering the necessary European legal co-operation.