



Strasbourg, 22 October 2002

CDL-AD (2002) 21
Or. fr.

Opinion no. 169/2001

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**SUPPLEMENTARY OPINION
ON THE REVISION OF THE CONSTITUTION
OF ROMANIA**

**Adopted by the Venice Commission
at its 52nd plenary session
(Venice, 18-19 October 2002)**

on the basis of comments by

**Mr Gerard BATLINER (member, Liechtenstein)
Mr Jacques ROBERT (former member, France)
Mr Jean-Pierre MASSIAS (expert, France)**

Introduction

1. *At the 47th plenary session 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. *On 18 and 19 March 2002 Messrs Gerard Batliner and Jacques Robert, members of the Commission, and Vlad Constantinesco and Joan Vintró, Commission experts, had meetings with the Romanian authorities. They then commented on the proposal for revision of the Constitution presented by the Romanian authorities, entitled "Domaines et objectifs pris en considération pour la révision de la Constitution" (see documents CDL (2002) 50, 52, 61, 85 and 86). On that basis the Venice Commission adopted an opinion on the draft revision of the Romanian Constitution (CDL-AD (2002) 12) at its 51st plenary session (Venice, 5-6 July 2002).*
3. *In June 2002 a Parliamentary Committee on the Revision of the Romanian Constitution was established.*
4. *On 1 and 2 October 2002 a Venice Commission delegation, including Messrs Gerard Batliner, Jacques Robert and Jean-Pierre Massias, a Commission expert, visited Bucharest to discuss the work on revision of the Constitution with the Romanian authorities. It had meetings, inter alia, with members of the parliamentary committee, Mrs Rodica Stănoiu, Minister for Justice, and members of the Constitutional Court and of the Judicial Service Commission (see programme).*
5. *During this visit the delegation examined the constitutional reform provisions already adopted by the parliamentary committee and those still under discussion (see document CDL (2002) 128). It is on that basis that the Commission wishes to make the following observations, focussing on the most significant elements of the proposed reform.*

A. Integration into the Euro-Atlantic organisations

6. The Commission is pleased to note that the Committee on the Revision of the Romanian Constitution has adopted the provisions of relevance to the primary aim of the constitutional reform process - accession to the Euro-Atlantic organisations and the European Union.
7. The Commission also welcomes the adoption of provisions on EU citizens' rights to vote in and stand for local and European elections. It nonetheless notes that, in connection with accession to the EU, the Constitution must still be amended concerning the purchase of land (Article 41.2) and access to public office, which under Community law cannot be reserved for nationals (Article 16.3).
8. Some of the observations concerning the earlier revision proposal, in particular on the advisability of adding a provision to the Constitution regarding the precedence of Community law, remain valid (see CDL-AD (2002) 12, paragraph 77 et seq.).
9. A new provision (Article 145¹) clearly provides that accession to the constituent treaties shall require an Act passed by Parliament with a two-thirds majority.

10. The possibility of preventive constitutional review of international treaties (Article 144) is to be welcomed, as it should circumvent the extremely sensitive issue of relations between international law and constitutional law. In that case, it would be strongly advisable to rule out preliminary constitutional review of treaties, since preventive review would be quite broadly available (in particular to a group of opposition members of the lower or upper chambers of Parliament). It is also recommended that express recognition be given to the precedence of international law over domestic law.

B. Other matters

11. Most of the provisions aimed at amending the Constitution so as to take account of experience gained since its entry into force are still being discussed.

12. The Commission wishes to point out that, in this respect, a distinction should be drawn between matters raising a question of conformity with the principles of the European constitutional heritage and other matters where various solutions in keeping with those principles are possible. It will focus primarily on the former.

Amendments thrown out

13. The Commission is pleased to note that a number of proposals for amendments set out in document CDL (2002) 85 ("Domaines et objectifs pris en considération pour la révision de la Constitution"), which it had identified as problem areas in its opinion (CDL-AD (2002) 12), have not been approved. These include in particular:

- the presumption that absenteeism equates with resignation from office (CDL-AD (2002) 12, paragraph 24 et seq.);
- the clause prohibiting members of the judiciary from interpreting and applying the law in accordance with the interests of political parties, which was ambiguous (CDL-AD (2002) 12, paragraphs 55 and 56).

Parliamentary immunity

14. Firstly, the Commission wishes to stress the importance of parliamentary immunity, in particular for new democracies (CDL-AD (2002) 12, paragraph 32 et seq.). It reiterates that emphasis must be laid on the fact that immunity is a prerogative of Parliament as an institution, with the aim of securing its composition and normal running, not of parliamentarians as individuals. There must be complete freedom from liability for opinions expressed and votes cast while performing the duties inherent in parliamentary office.

Legislative and executive powers

15. As regards emergency orders, the Commission wishes to reiterate that a clear distinction should be drawn between this issue and delegation of legislative powers (CDL-AD (2002) 12, paragraph 49 et seq.). This matter should be re-examined so as to clarify the conditions in which such orders can be issued.

16. The European constitutional heritage offers a range of solutions regarding other matters of relevance to relations between the two chambers of Parliament or between Parliament and the Government. Here we have in mind, in particular, the question whether to maintain

perfect bicameralism and the introduction of a constructive vote of no confidence. The Commission reiterates that a constructive vote of no confidence can add to the stability of the political system (CDL-AD (2002) 12, paragraph 48); it may also be a means of rationalising the functioning of Parliament. Furthermore, it should be pointed out that there is no system where the powers and responsibilities of the two chambers of Parliament are completely different.

The judiciary and the Constitutional Court

17. As regards the judiciary, the Commission is in favour of indefinite terms of office for all judges of the ordinary courts, including the Supreme Court (which could become the Supreme Court of Cassation and Justice) (CDL-AD (2002) 12, paragraph 57). To guarantee the independence of the Constitutional Court, its members' terms of office should remain non-renewable and sufficiently long. The Commission regards as a retrograde step the proposal to amend the Constitution so as to reduce the term of office of judges in the Constitutional Court to six years and make their appointment renewable. It should be said, in particular, that the current status of members of the court guarantees their independence, and any doubt about the court's independence, even if unwarranted, would harm this institution, which must be independent not only in fact but also in appearance.

18. It must further be stressed that the possibility for Parliament to overturn a decision of the Constitutional Court, even by a qualified majority, constitutes an exception in comparative law and may prove detrimental to the standing of the Court and the Constitution itself. It is therefore desirable to repeal the second sentence of Article 145.1 of the Constitution.

19. Extending the Constitutional Court's jurisdiction to settling disputes between State bodies is a welcome measure, but must be confined to disputes of a legal, not a political, nature.

20. It would also be advisable to make express provision for decisions of the Constitutional Court to be binding *erga omnes* and, in particular, for any law deemed unconstitutional to be inapplicable.

Judicial Service Commission

21. As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation (CDL-AD (2002) 12, paragraph 63 et seq.).

22. The best safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists) on the Commission, whereas politicisation can be avoided if Parliament is solely required to confirm appointments made by the judges.

The prosecution service

23. The Commission reiterates that the prosecution service does not necessarily have to be independent, since to guarantee consistency in crime policy, as defined by the Government in a democratic context, it is preferable that the prosecution service be attached to the Ministry of Justice, although each prosecutor retains full discretion to deal with individual cases as he or she sees fit (CDL-AD (2002) 12, paragraph 59 et seq.).

Rights and freedoms

24. The question who holds rights and freedoms should be clarified. These should as a general rule be conferred on everyone, not just citizens (CDL-AD (2002) 12, paragraph 9).

25. On the issue of extradition, the Commission stresses that the possibility of extraditing Romanian nationals, under the terms of an international treaty and on the basis of mutual arrangements, could be justified in connection with the emergence of a European judicial area (CDL-AD (2002) 12, paragraph 103 et seq.). The Commission will not comment here on the conformity of such a revision with Article 148 of the Constitution. Handing an individual over to the International Criminal Court does not qualify as extradition.

26. In conclusion, one general comment can be made: the right to a fair trial, mentioned at several points in the proposal (Articles 23, 48, 125, 125¹), should preferably be dealt with in the section on fundamental rights and freedoms.