Council of Europe
Conseil de l'Europe

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

LETTER OF 3 MARCH 1992 FROM THE PRESIDENT TO MR RUMJANTSEV, FORWARDING THE OPINIONS OF CERTAINS MEMBERS OF THE TASK FORCE ON THE DRAFT CONSTITUTION OF THE FEDERATION OF RUSSIA

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

European Commission
for Democracy through Law

Commission européenne
pour la démocratie par le droit

Mr Oleg Germanovich Rumjantsev
Otveststvennyj Sekretar
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Rome, 3 April 1992

Dear Oleg Germanovich,

I have tried to reach you by phone several times, to no avail. I imagine that you are quite busy with the Russian Federation draft constitution. The Council of Europe received your request to have the Commission for Democracy through Law comment on the draft before the debate and eventual vote in the Supreme Soviet. I was told soon after this request that a new draft was under way, and I now understand that a third may be forthcoming.

Under the circumstances, the Commission was and is hard pressed to produce a proper evaluation of the constitutional draft, as our next plenary meeting is not due until 8 May. I have nevertheless made a special effort to convene a working group and have gathered the comments offered by its members. These comments are being forwarded formally by the Secretary General of the Council of Europe to the Minister of Foreign Affairs of Russia, Mr Kozyrev.

You may find that some of the points we have raised refer to articles eventually superseded by later drafts. The first text submitted to us was the draft of 24 October, the second was of 2 March. To be sure, no comprehensive or organic advice can be given until we receive a text with a certain degree of stability.

I should also note that our comments are based on a French translation, the exactness of which we could not assess.

You will find that some of our observations are not meant as a commentary on the draft, but illustrate institutions tested by the experience of Western countries. It seemed to us that such information could be of interest to you in the development of comparable structures. This is the case, for example, with Mr Ragnemalm's note on the powers of the Ombudsman. It was felt that the Parliamentary Commissioner for Human Rights, provided for in Articles 47 and 90(h) of the 2 March RF draft Constitution, might perform a similar role in your country. Since you are adopting a constitutional court we are also enclosing a report by Professor Steinberger which concerns constitutional justice in general and which the Venice Commission has adopted and used as the basis of its work in this field.

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It also occurred to us that you might be interested in normative texts and other material that can be taken into account during the final elaboration of your draft. You will accordingly find enclosed material on the state of emergency as articulated in the Spanish constitution and law, perhaps the most careful treatment of the subject on our continent.

Otherwise, our commentary touches upon provisions which raise doubts, or for which alternative approaches might be contemplated. These are listed according to the numerical order of the Articles in which they appear.

Again, without an up-to-date draft, there was not point in covering all the ground included in the provisional versions. You will understand, therefore, that, helpful as I hope our work may prove, this is only an interlocutory letter. Not to lose time, I am sending you the materials now available and will shortly follow up with any additional contributions I may receive.

I suggest that you send the final text as soon as possible, either to the Council of Europe (Dr. Buquicchio fax: (33) 88 41 27 94) or care of Dr. Rogati in the Italian Chamber of Deputies (fax: 39.6.6789910). You may send a Russian text if there is no English or French version available, as Dr. Rogati may, if indispensable, avail himself of a Russian translator. I may add that the Commission, or at least a working group, cold conceivably come to Moscow if proper arrangements were made in time. The work in which you are engaged commands the highest level of attention on the part of our body. In any event, a minimum period of time before the mission's arrival in Moscow would be needed to evaluate the text you produce in order to ensure a fruitful dialogue.

Meanwhile, please feel free to direct any enquiries as to the material we have sent either to Dr. Buquicchio (tel: (33) 88 41 22 05) in Strasbourg or to me personally in Rome. You can count on our keenness to assist you as much as we possibly can.

With warm regards

Yours sincerely

Antonio La Pergola

Antonio LA PERGOLA
President

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW [1]

Articles 3 and 4

- Cross-reference to Articles 2(2), 19(2) and 109.

Article 3(4) states that generally recognised principles and rules of international law and treaties concluded by the Russian Federation form "part" of its internal law. It is further established that international treaties prevail over conflicting internal provisions. Nothing is said, however, as far as recognised principles of international law are concerned. Do they too rank above federal law? Is the constitutional court empowered under Article 109 to review questions arising from incompatibility of a) treaties and principles of international law with the Russian Federal constitution; and b) federal law with treaties and principles of international law? It would be best to resolve these questions by clear provisions in the constitutional text. Otherwise, the whole matter is left open and a shadow of uncertainty is cast on Russia's ability to observe international law, which may affect her external relations and standing in the international community. The point is of obvious importance and reflects on the provisions of Article 2 (2) with reference to human rights and freedoms and under 19(2) with specific reference to the right of refuge.

Article 9(3)

The subjects of the Russian Federation are indicated under paragraphs 2 and 3 as being endowed with a legal constitutional statute, which must be laid down by the constitution itself. This is a new formula to describe membership in a federation, and it may have the advantage of placing under the same roof different entities. Yet a classification is given in Article 89 with reference to the Federal Assembly which is composed of three deputies for every republic, territory and region and one deputy for each autonomous district. So the issue may be raised whether there may be subjects of the Russian Federation other than those listed for the specific purpose of composing the Federal Assembly. A related issue is that of parity among the different classes of constituent subjects which are entitled to equal suffrage in the Federal Assembly. Are they on an even keel from all points of view? The question is addressed in Article 78 as well as in other provisions devoted to the federal structure in Title IV. Here again, however, we find that there are different classes of territorial bodies, the powers of which seem to be identical. If there is a parity of attributions and constitutional status, what is the point of this classification? All that can be deduced from Article 9(3) is that all subjects of the Russian Federation are autonomous, equally bound to guarantee rights

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[1] *This report, prepared by the President of the Commission, Prof. La Pergola, is based on contributions by Dr. Rogati, Professors Bartole, Malinverni, Mazziotti di Celso and Ragnemalm. Contributions by Professors Helgesen, Niemivuo and Steinberger and by Messrs Triantafyllides and Reuter, which could not be integrated into this report, are enclosed herewith.*

and freedoms of the ethnic communities within their respective boundaries, and are all committed to a constitutional regime that cannot run contrary to that of the Russian Federation. This last reference ought to be spelled out more clearly; does it refer to the actual form of government in requiring that it conform to that of the central system? The history of federalism shows that these knots had better be untied by the constitution maker.

Article 10

In Article 10 it is not expressly said that the Russian Federation has the right to leave [or secede from] the union which the said Article permits it to enter. Even though such a right may be implied in the position of Russia as a sovereign state, unions established by agreement have in some cases been considered as perpetual unions. If the present draft wishes to exclude perpetual unions, it should say so clearly.

Article 12

- Cross-reference to Articles 109, 139 and 140

The principles laid down in Article 12 are defined as immutable by paragraph 1. All the same, Article 12(2) admits the possibility of revising the provisions, those of Article 12 included, contained under Title I [Fundamental Principles of the Constitutional Regime of the Russian Federation]. The revision of such provisions must be made by referendum of the entire people of the Russian Federation and can in no case depart from the basic principles. These basic principles are obviously meant as the highest ranking source of constitutional law, which cannot be legally removed. Two problems would have to be addressed for clarity's sake: a) should the referendum called for under Article 12(2) be co-ordinated with the amending process listed under Articles 139 and 140, so that the referendum is added to the other procedural requirements, or is the referendum used as an alternative to the procedure laid down in the appropriate title concerning the revision of the constitution?; b) should the question of whether or not proposed amendments violate any of the basic principles be reserved for the constitutional court? If so, an explicit provision granting the court jurisdiction over this matter should be included in Article 109, either under paragraph 3 or 5.

Article 79 (3)

- Cross-reference to Article 82(e).

How is the consent of the inhabitants of the territorial units involved to be expressed, by referendum or otherwise? Furthermore, does the term "inhabitant" mean here resident, population in a technical sense, or citizens of the republics as defined in Article 82(e)?

Article 80(1)

What is the point of saying in letter "a" that the adoption of federal laws comes within the scope of the federation? The adoption of laws is not a field of action. The essential thing is to list the subject matters. It goes without saying that the federation can adopt laws on all subject matters that are listed as reserved for its competence.

Article 80(2)

This paragraph envisages a right of participation in the exercise of federal attributions on the part of the subjects -- territories, republics and regions -- in conformity with the federal constitution and federal laws. The formula used is none too clear. These rights of participation should be defined unless the underlying intent is to empower federal law to create them by delegation as occasion may require. But, again, if this is the intent it would be best to make it manifest.

Article 82(a)

- Cross reference to Article 80 (1.a)

The same remarks made for Article 80 (1.a) apply here with reference to the adoption and review of the constitutional laws of the Republic.

Article 83 (a)

- Cross-reference to Article 80 (1.a)

The same remarks made for Article 80 (1.a) apply here with reference to the adoption and review of statutes in territories or regions.

Article 86 (1)

The principle established here is basic to federalism, and is commonly known as the supremacy clause. The federal constitution and law will apply when ever republics, territories and regions have invaded the field reserved for the competence of the Russian Federation. The same principle is adopted when enactments of the constituent members contradict federal laws concerning matters that fall within the joint competence of the Russian Federation and its republics, territories and regions.

Thus formulated, the supremacy of federal law does not cover the case where the enactments of the constituent members of the Russian Federation regulate matters exclusively reserved for all these territorial bodies, and that is correct. It may be added that the supremacy of federal law is not impaired by even the constitution of the Russian Federation's constituent units.

Apart from the above observations, some general remarks are in order. Is the system established in Title IV without gaps? Have all possible fields of intervention been exhausted by the three-fold enumeration: matters falling within the competence of a) the Russian Federation exclusively, b) constituent members exclusively, or c) of the Russian Federation and its constituent units concurrently?

What criterion should be applied if a given subject matter arises which does not figure in any of the categories laid down in the draft? This could in fact occur in both the case where a subject matter has been neglected and where a new one arises. It would seem that, from a technical point of view, what is needed is a sort of general clause, designed to close all

possible gaps. Such a clause would have to provide that all matters not listed must be taken to fall within one of the three categories provided, to the exclusion of the other two. One example of a subject matter which has not been included here might be the relation between church and state, for which no provision has been made.

Another general remark on the entire title is that certain problems which experience indicates as likely to arise have not been taken into account. Suffice it to indicate three groupings of such problems.

A) Federal Immunities: can the Russian Federation, for example, engage in public works on the territory of republics without availing itself of immunities?

B) Federal execution: if a constituent unit of the Russian Federation fails to implement federal law when it should, can the Federation act in its place? The problem here is to define the fields in which Article 85(1) applies.

C) The Federal constitution might, in keeping with current trends, contemplate a mechanism for the fair allocation of federal grants, aid and other subsidies according to standards based on the level of economic development of each republic. The system would be aimed at reducing disparities among constituent units. This is an important aspect of co-operation, the importance of which is known both to federal states and the European Community.

Article 90

- Cross-reference to Articles 6, 9(5), 79(2) and 98(h).

The separation of powers as proclaimed in Article 6(1) and the parallel principle of balance in the exercise of powers as stated in Article 6 (2) would seem to call, by their very nature, for a genuine plurality of centres of attributions. Yet the powers bestowed upon the Supreme Soviet are such that, formally at least, the legislative body continues to act as the central organ, not only in the sphere of legislation but also in the exercise of political power at large.

Article 90(b) states the Supreme Soviet decides to organise referenda. Article 98(h) gives the same power to the President of the Russian Federation, although only after consultation with the presidents of both chambers of the Supreme Soviet. The two provisions need to be co-ordinated.

Article 90(c-e), read in conjunction with Article 9(5), covers territorial adjustment as well as the admission of new members to the Russian Federation. The Supreme Soviet has thus been empowered to preside over territorial regrouping. A point worth mentioning in connection with this topic, however, is that no provision establishes a right to secede. The authors of the draft may have regarded the right to leave the federation as incompatible with a federation possessing as highly developed a centre as this text describes. If this is so, however, the meaning of Article 79(2) which calls for a Federation-wide referendum before any part of RF territory may be released, should be clarified. On the face of it, it can be taken to imply that, while not a right *per se*, secession is permitted under Article 79(2) on the condition of popular approval by the Federation as a whole.

Territorial regrouping is a matter which affects the composition of Parliament and more generally the balance between the centre and the individual components of the Russian Federation. The growth or modification of membership is an important change and calls for a special procedure: if not the same procedure envisaged for constitutional amendment, then at least appropriate requirements such as a qualified majority in the vote of the Supreme Soviet of the Russian Federation and some form of consent on the part of the territorial bodies whose status or powers are involved in the proposed changes.

Paragraph g, at least in the French text, does not clarify whether the Supreme Soviet's assent for the appointment of the President and members of the government, federal judges, and other high federal officials must in every case be given after the president nominates a candidate for the post. Despite the ambiguity of the text, the answer should clearly be that the President's nomination is necessary for all such appointments.

More generally, the wisdom of conferring an exclusive right to appoint such a wide circle of office holders may be questioned. The power of appointment, as practised elsewhere, has typically been divided among several organs. Thus, for example, in Italy (where the number of constitutional court judges is equal to that of the Russian Federation) five constitutional court judges are appointed by the head of state, five by parliament and the remaining five co-opted from the highest courts of the land. This type of distribution seems to work well.

Article 92(4)

It might be advisable to extend automatically the powers of parliament in the case of an emergency, whereas the present text makes such an extension dependent on a decision of the chambers themselves, which may come too late under the exceptional circumstances justifying the state of emergency.

Article 93(4)

To avoid the danger of creating a far-reaching but ineffective parliamentary power of enquiry, it would be best if the Supreme Soviet summoned public functionaries for parliamentary hearings through the appropriate ministers, whose consent should be sought beforehand.

Article 94(1)

The Constitutional and Supreme Courts of the Russian Federation have been given the power to initiate legislation. This power seems hardly consonant with their functions, except in cases of direct interest to judicial bodies. Their power of legislative initiative should be limited accordingly.

Article 95(1)

The Supreme Soviet's joint sessions should be restricted if the parity between the two chambers of parliament and their mutual independence are to be guaranteed. A broader restriction prohibiting more than just law making at joint session should be articulated in order to prevent an undesirable proliferation of such meetings. The significant difference between the Duma and the Federal Soviet in terms of size and composition involve major

problems at joint sessions. Although the Federal Soviet's broad function is to ensure a balanced representation of constituents, it is certain to be overwhelmed by the larger lower body at any such meeting.

Article 98(e)

- Cross-reference to Article 90(g)

See commentary on Article 90(g).

Article 98(g)

- Cross reference to Article 104(4)

This paragraph is crucial to the form of government. Can the President of the Russian Federation dismiss Ministers who enjoy the confidence of the Supreme Soviet? This question cannot be solved without a clear view of the President's role as conceived by the overall constitutional plan. The solution embodied in the draft does not agree with either the presidential regime (exemplified by the USA) or the semi-presidential regime (exemplified by France). In the American variant of the presidential model, the constitution defines the president as not only the highest but the exclusive executive organ, the cabinet is the President's cabinet. No government exists which can be dismissed by the houses, and there is no Prime Minister to head that body. The form of government is thus based on a strict separation of powers under which Congress has no title to interfere in the domain of the executive, although the Senate is called upon to consent to the appointments to the Cabinet and other chief federal offices.

Under the semi-presidential scheme of France, the Prime Minister and government must enjoy the confidence of the National Assembly, and their powers are defined in the constitution. The head of state is, because of his direct election, empowered to oversee broad policy and mediate between institutions, but the actual conduct of the cabinet is in the hands of the Prime Minister. Both in the United States and in France, the President can in no event be dismissed from office, although he may be impeached for anti-constitutional behaviour. The Prime Minister in France in always liable to a vote of confidence, but once the support of the Assembly has been secured, he cannot be dismissed by the President. On the other hand, the President of France has the power to dissolve the house and call early elections.

The President of the Russian Federation as described in the draft of 2 March, despite his ample mandate, enjoys comparatively little protection in the tenure of his office. In addition to being impeachable, he can, according to Article 104(4), be dismissed by a two-thirds majority of each chamber. He may also be involuntarily deprived of the chief officers of his executive departments, for they too are subject to a parliamentary vote of no confidence, and he is obliged to remove them if they are censured by the houses. Moreover, as he cannot dissolve the houses, he lacks a countervailing instrument of persuasion or pressure, such as the French President can exercise vis-à-vis the other organs of government.

On balance, his position should be strengthened, if not through the provision of more powers, then by some effective guarantee that his authority balances that of the legislative body. The power to dissolve the Supreme Soviet may be crucial to creating a semi-presidential government of the French type. Equally important would be a clear discipline of the vote of no confidence, and Mr Cheinis' amendment, submitted along with the French text to the Council of Europe, goes a long way towards a rational system of responsible government. If, instead, a presidency of the American variety is desired, then the vote of confidence should not exist. The essential point in the American-type system is that the President is the sole depository of executive power. In either case, the scheme of government should be consistent with the type of presidential regime desired. The hybrid system sketched out in the present draft does not seem consistent with either one. To judge from models tested by experience, it could hardly work.

Article 108

- Cross reference to Articles 82(a) and 83(a)

The judicial powers are vested exclusively in tribunals by the federal constitution and federal law. Does this mean that no judiciary is established for each of the constituent units? Federations normally allow the establishment of state as well as federal courts, it being understood that the jurisdiction of criminal and civil courts in each member will be limited to cases arising from the application of the member's own law, as distinguished from the law of the federation.

Another possible field for state courts is constitutional justice. Provisions like those in Articles 82(a) and 83(a), vest in republics, territories and regions the competence to control the respect of the constitutions and laws of each of these localities. Could a case then be made on the basis of these provisions for the creation of constitutional courts, not only at the centre, but on the periphery of the federal system? Separate constitutional courts have been created in the west where the rest of the judiciary is centralised. Of course, such a configuration is entirely optional.

Article 109(1)

- Cross-reference to the Russian Federation Treaty

The Constitutional Court of the Russian Federation is the highest organ of judicial power exercised in constitutional proceedings. In other words, it is an integral part of the federal judiciary. It must be assumed, however, that since it can iron out disputes between federal organs of state concerning competences, it is empowered to adjudicate even disputes in which it may be involved as an interested party. This is not expressly said in the constitutional text. It remains to be seen what use could be made of the conciliation procedure envisaged under Article VI of the Russian Federation Treaty initialled on 14 March 1992. It would seem that conciliation would have to be tried before taking the matter before the constitutional court for judicial settlement.

Article 109(3)

- Cross-reference to Articles 12(3) and 139

All enactments subject to judicial review of constitutionality by the constitutional court are listed. The enumeration would seem to be exhaustive. If that is so, it might be well to clarify that federal laws subject to judicial review include amendments to the constitution, adopted in conformity with Article 139, as there are immutable principles that no amendment can transgress. Also, the constitutional court should be empowered to review the conformity of the provisions of even the federal constitution with the basic principles proclaimed under Title I. This is imposed by the express wording of Article 12(3).

According to letter g, the constitutional court's jurisdiction covers the practice of the application of law. What controversies are envisaged under this heading? Does it cover administrative acts and judicial decisions, as well as legislation?

Article 109(4)

The controversies which the constitutional court can settle under this heading are those arising among or between federal organs and organs of member units. Does this mean that organs empowered to raise disputes of this kind must be not just any organ, but the highest that can express the will of the power they constitute with no interference by a superior body?

Article 109(5)

- Cross-reference to Article 101(2)

Three cases are listed here where the constitutional court can adopt conclusions. Despite the wording used, conclusions ought to constitute judgements, even though of a declaratory nature, which once rendered are obligatory, like all other decisions. This may know one exception, however, the procedure for the removal of the President: Article 101(2) requires that, after the initiative of either chamber of the Supreme Soviet, the constitutional court adopt a conclusion on the presence or absence of the reasons for removal, whereupon the other chamber can by a two-thirds vote of its members remove the President from office. The text is such that the interpreter is led to believe that the conclusions reached by the court are not binding on the chamber which makes the final decision on the President's removal. Impeachment is in fact a choice that can be motivated by political as well as legal considerations, and is best left to the discretion of the Supreme Soviet.

Article 109(7)

Enactments and their provisions declared unconstitutional by the constitutional court lose their validity. This is a commonly recognized principle. To what extent, however, does it apply in the case of the Constitutional Court of the Russian Federation? Paragraph 7 seems to restrict the court's power to strike down unconstitutional acts to cases listed under Article 109(3a-d). Unless there is a defective wording of the French text, there does not seem to be a rational justification for this limitation.

Article 114(2)

The principle state here is that, where a law applicable to a given case conflicts with a constitutional provision, the judge will resolve the controversy by applying only the latter. The judge must, however, petition the constitutional court with a request to recognise the law in question as unconstitutional. This is in substance a diffuse judicial review. Judges are empowered to apply the constitution directly and discard conflicting ordinary law when they deem it unconstitutional. Yet the power to declare the law unconstitutional resides exclusively in the constitutional court. It would make more sense, therefore, if the original proceedings were suspended until after the constitutional court settles the matter. Otherwise the ruling on constitutionality is bound to come after the lower court has decided the case. If the constitutional court disagreed with the petitioning judge, the judgment already rendered on the case would have to be overturned, with all the ensuing complications this entails. The certainty of law would be impaired as a result.

Article 130

This Article contemplates a whole class of felonies and establishes that they are the most serious of offenses. What does "most serious" effectively mean? If the word is to be related to the punishment, then the crimes to which Article 130 refers should receive the harshest sanctions allowed by Russian Federation law, presumably life imprisonment or capital punishment. The principle of legality, however, requires that sanctions and punishments be clearly set out in advance.

Article 132(2&4)

A state of emergency can be introduced in a limited area by decision of either the national or the local authorities. While it is said that the local authorities must act in conformity with the laws and constitution of the Federation, no rule is laid down to co-ordinate decision-making where local and national authorities differ in their assessment of the need for a declaration of emergency.

Article 132(3)

- Cross-reference to the European Convention on Human Rights

The advent of war is not listed as a justification for a state of emergency, although Article 15 of the European Convention for Human Rights establishes it as a primary justification according to international law. It is possible that war merits a separate procedure for the authorisation of broader executive powers and restriction of freedom. In any case, the topic of war should either be included in this paragraph or be treated in a new clause.

Article 135(2)

- Cross-reference to Articles 23, 34-36, 41, 42 and 47

A vital question from the viewpoint of the rule of law is "which rights may be suspended during a state of emergency?" It has been noticed that the 2 March draft considerably

narrows the number of rights which were entitled to protection under the 24 October draft. The right to property and inheritance (Art. 35), freedom from forced labour (Arts. 34 & 36), the right to economic activity (Art. 34), access to education (Art. 41), the right to participate in cultural life (Art. 42), the right to participate in public life (Art. 28), and the right to protection by the parliamentary commissioner for human rights (art. 47) can now all be suspended or otherwise infringed. These restrictions should be contemplated with the greatest of care, as the possibility of unnecessary violations of individual rights exists. Thus for example, it might be argued that the function of oversight vested in the parliamentary commissioner, for human rights should not be suspended or weakened in an emergency.

CONSTITUTION OF THE KINGDOM OF SPAIN
(27 December 1978)

TITLE V CONCERNING THE RELATIONS BETWEEN THE GOVERNMENT AND THE CORTES GENERALES

Article 116

1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding powers and restrictions.

2. A state of alarm shall be proclaimed by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply.

3. A state of emergency shall be proclaimed by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and proclamation of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements.

4. A state of siege (martial law) shall be proclaimed by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.

5. Congress may not be dissolved while any of the states referred to in the present Article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation.

In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee.

6. Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law.

TIT. V.1.1. LEY ORGANICA 4/1981, DE 1 DE JUNIO, DE LOS ESTADOS DE ALARMA, EXCEPCION Y SITIO

(BOE núm. 134, de 5 de junio de 1981)

A todos los que la presente vieren y entendieren,
Sabed: Que las Cortes Generales han aprobado y
Yo vengo en sancionar la siguiente Ley Orgánica:

CAPITULO PRIMERO

Disposiciones comunes a los tres estados

Artículo 1.° 1. Procederá la declaración de los Estados de alarma, excepción o sitio cuando circunstancias extraordinarias hiciesen imposible el mantenimiento de la normalidad mediante los poderes ordinarios de las Autoridades competentes.

2. Las medidas a adoptar en los estados de alarma, excepción y sitio, así como la duración de los mismos, serán en cualquier caso las estrictamente indispensables para asegurar el restablecimiento de la normalidad. Su aplicación se realizará en forma proporcionada a las circunstancias.

3. Finalizada la vigencia de los estados de alarma, excepción y sitio decaerán en su eficacia cuantas competencias en materia sancionadora y en orden a actuaciones preventivas correspondan a las Autoridades competentes, así como las concretas medidas adoptadas en base a éstas, salvo las que consistiesen en sanciones firmes.

4. La declaración de los estados de alarma, excepción y sitio no interrumpe el normal funcionamiento de los poderes constitucionales del Estado.

Art. 2.° La declaración de los estados de alarma, excepción o sitio será publicada de inmediato en el «Boletín Oficial del Estado» y difundida obligatoriamente por todos los medios de comunicación públicos y por los privados que se determinen, y entrará en vigor desde el instante mismo de su publicación en aquél. También serán de difusión obligatoria las disposiciones que la Autoridad competente dicte durante la vigencia de cada uno de dichos estados.

Art. 3.° 1. Los actos y disposiciones de la Administración Pública adoptados durante la vigencia de los estados de alarma, excepción y sitio serán impugnables en vía jurisdiccional de conformidad con lo dispuesto en las leyes.

2. Quienes como consecuencia de la aplicación de los actos y disposiciones adoptados durante la vigencia de estos estados sufran, de forma directa o en sus personas, derechos o bienes, daños o perjuicios por actos que no les sean imputables, tendrán derecho a ser indemnizados de acuerdo con lo dispuesto en las leyes.

CAPITULO II

El estado de alarma

Art. 4.° El Gobierno, en uso de las facultades que le otorga el artículo 116.2 de la Constitución podrá declarar el estado de alarma, en todo o parte del territorio nacional, cuando se produzca alguna de las siguientes alteraciones graves de la normalidad:

a) Catástrofes, calamidades o desgracias públicas tales como terremotos, inundaciones, incendios urbanos y forestales o accidentes de gran magnitud.

b) Crisis sanitarias, tales como epidemias y situaciones de contaminación graves.

c) Paralización de servicios públicos esenciales para la comunidad, cuando no se garantice lo dispuesto en los artículos 28.2 y 37.2 de la Constitución, y concurra alguna de las demás circunstancias o situaciones contenidas en este artículo.

d) Situaciones de desabastecimiento de productos de primera necesidad.

Art. 5.° Cuando los supuestos a que se refiere el artículo anterior afecten exclusivamente a todo o parte del ámbito territorial de una Comunidad Autónoma, el Presidente de la misma podrá solicitar del Gobierno la declaración de estado de alarma.

Art. 6.° 1. La declaración del estado de alarma se llevará a cabo mediante decreto acordado en Consejo de Ministros.

2. En el decreto se determinará el ámbito territorial, la duración y los efectos del estado de alarma, que no podrá exceder de quince días. Sólo se podrá prorrogar con autorización expresa del Congreso de los Diputados, que en este caso podrá establecer el alcance y las condiciones vigentes durante la prórroga.

Art. 7.º A los efectos del estado de alarma la Autoridad competente será el Gobierno o, por delegación de éste, el Presidente de la Comunidad Autónoma cuando la declaración afecte exclusivamente a todo o parte del territorio de una Comunidad.

Art. 8.º 1. El Gobierno dará cuenta al Congreso de los Diputados de la declaración del estado de alarma y le suministrará la información que le sea requerida.

2. El Gobierno también dará cuenta al Congreso de los Diputados de los decretos que dicte durante la vigencia del estado de alarma en relación con éste.

Art. 9.º 1. Por la declaración del estado de alarma todas las Autoridades civiles de la Administración Pública del territorio afectado por la declaración, los integrantes de los Cuerpos de Policía de las Comunidades Autónomas y de las Corporaciones Locales, y los demás funcionarios y trabajadores al servicio de las mismas, quedarán bajo las órdenes directas de la Autoridad competente en cuanto sea necesario para la protección de personas, bienes y lugares, pudiendo imponerles servicios extraordinarios por su duración o por su naturaleza.

2. Cuando la Autoridad competente sea el Presidente de una Comunidad Autónoma podrá requerir la colaboración de los Cuerpos y Fuerzas de Seguridad del Estado, que actuarán bajo la dirección de sus mandos naturales.

Art. 10. 1. El incumplimiento o la resistencia a las órdenes de la Autoridad competente en el estado de alarma será sancionado con arreglo a lo dispuesto en las leyes.

2. Si estos actos fuesen cometidos por funcionarios, las Autoridades podrán suspenderlos de inmediato en el ejercicio de sus cargos, pasando, en su caso, el tanto de culpa al Juez, y se antificará al superior jerárquico, a los efectos del oportuno expediente disciplinario.

3. Si fuesen cometidos por Autoridades, las facultades de éstas que fuesen necesarias para el cumplimiento de las medidas acordadas en ejecución de la declaración de estado de alarma podrán ser asumidas por la Autoridad competente durante su vigencia.

Art. 11. Con independencia de lo dispuesto en el artículo anterior, el decreto de declaración del estado de alarma, o los sucesivos que durante su vigencia se dicten, podrán acordar las medidas siguientes:

a) Limitar la circulación o permanencia de personas o vehículos en horas y lugares determinados, o condicionarlas al cumplimiento de ciertos requisitos.

b) Practicar requisas temporales de todo tipo de bienes e imponer prestaciones personales obligatorias.

c) Intervenir y ocupar transitoriamente industrias, fábricas, talleres, explotaciones o locales de cualquier naturaleza, con excepción de domicilios privados, dando cuenta de ello a los Ministerios interesados.

d) Limitar o racionar el uso de servicios o el consumo de artículos de primera necesidad.

e) Impartir las órdenes necesarias para asegurar el abastecimiento de los mercados y el funcionamiento de los servicios y de los centros de producción afectados por el apartado d) del artículo 4.º

Art. 12. 1. En los supuestos previstos en los [illegible] la Autoridad competente podrá adoptar por sí, según los casos, además de las medidas previstas en los artículos anteriores, las establecidas en las normas para la lucha contra las enfermedades infecciosas, la protección del medio ambiente, en materia de aguas y sobre incendios forestales.

2. En los casos previstos en los apartados c) y d) del artículo 4.º el Gobierno podrá acordar la intervención de empresas o servicios, así como la movilización de su personal, con el fin de asegurar su funcionamiento. Será de aplicación al personal movilizado la normativa vigente sobre movilización que, en todo caso, será supletoria respecto de lo dispuesto en el presente artículo.

CAPITULO III

El estado de excepción

Art. 13. 1. Cuando el libre ejercicio de los derechos y libertades de los ciudadanos, el normal funcionamiento de las instituciones democráticas, el de los servicios públicos esenciales para la comunidad, o cualquier otro aspecto del orden público, resulten tan gravemente alterados que el ejercicio de las potestades ordinarias fuera insuficiente para restablecerlo y mantenerlo, el Gobierno, de acuerdo con el apartado 3 del artículo 116 de la Constitución, podrá solicitar del Congreso de los Diputados autorización para declarar el estado de excepción.

2. A los anteriores efectos, el Gobierno remitirá al Congreso de los Diputados una solicitud de autorización que deberá contener los siguientes extremos:

a) Determinación de los efectos del estado de excepción, con mención expresa de los derechos cuya suspensión se solicita, que no podrán ser otros que los enumerados en el apartado 1 del artículo 55 de la Constitución.

b) Relación de las medidas a adoptar referidas a los derechos cuya suspensión específicamente se solicita.

c) Ambito territorial del estado de excepción, así como duración del mismo, que no podrá exceder de treinta días.

d) La cuantía máxima de las sanciones pecuniarias que la Autoridad gubernativa esté autorizada para imponer, en su caso, a quienes contravengan las disposiciones que dicte durante el estado de excepción.

3. El Congreso debatirá la solicitud de autorización remitida por el Gobierno, pudiendo aprobarla en sus propios términos o introducir modificaciones en la misma.

Art. 14. El Gobierno, obtenida la autorización a que hace referencia el artículo anterior, procederá a declarar el estado de excepción, acordando para ello en Consejo de Ministros un decreto con el contenido autorizado por el Congreso de los Diputados.

Art. 15. 1. Si durante el estado de excepción, el Gobierno considerase conveniente la adopción de medidas distintas de las previstas en el decreto que lo declaró, procederá a solicitar del Congreso de los Diputados la autorización necesaria para la modificación del mismo, para lo q[illegible] utilizará el procedimiento que se establece en los artículos anteriores.

2. El Gobierno, mediante decreto acordado en Consejo de Ministros, podrá poner fin al estado de excepción antes de que finalice el período para el que fue declarado, dando cuenta de ello inmediatamente al Congreso de los Diputados.

3. Si persistieran las circunstancias que dieron lugar a la declaración del estado de excepción, el Gobierno podrá solicitar del Congreso de los Diputados la prórroga de aquél, que no podrá exceder de treinta días.

Art. 16. 1. La Autoridad gubernativa podrá detener a cualquier persona si lo considera necesario para la conservación del orden, siempre que, cuando menos, existan fundadas sospechas de que dicha persona vaya a provocar alteraciones del orden público. La detención no podrá exceder de diez días y los detenidos disfrutarán de los derechos que les reconoce el artículo 17.3 de la Constitución.

2. La detención habrá de ser comunicada al Juez competente en el plazo de veinticuatro horas. Durante la detención, el Juez podrá, en todo momento, requerir información y conocer personalmente, o mediante delegación en el Juez de Instrucción del partido o demarcación donde se encuentre detenido, la situación de éste.

Art. 17. 1. Cuando la autorización del Congreso comprenda la suspensión del artículo 18.2 de la Constitución, la Autoridad gubernativa podrá disponer inspecciones y registros domiciliarios si lo considera necesario para el esclarecimiento de los hechos presuntamente delictivos o para el mantenimiento del orden público.

2. La inspección o el registro se llevarán a cabo por la propia Autoridad o por sus agentes, a los que proveerá de orden formal y escrita.

3. El reconocimiento de la casa, papeles y efectos, podrá ser presenciado por el titular o encargado de la misma o por uno o más individuos de su familia mayores de edad y, en todo caso, por dos vecinos de la casa o de las inmediaciones, si en ellas los hubiere, o, en su defecto, por dos vecinos del mismo pueblo o del pueblo o pueblos limítrofes.

4. No hallándose en ella al titular o encargado de la casa ni a ningún individuo la familia, se hará el reconocimiento en presencia únicamente de los dos vecinos indicados.

5. La asistencia de los vecinos requeridos para presenciar el registro será obligatoria y coercitivamente exigible.

6. Se levantará acta de la inspección o registro, en la que se harán constar los nombres de las personas que asistieren y las circunstancias que concurriesen, así como las incidencias a que diere lugar. El acta será firmada por la autoridad o el agente que efectuare el reconocimiento y por el dueño o familiares y vecinos. Si no supieran o no quisiesen firmar se anotará también esta incidencia.

7. La autoridad gubernativa comunicará inmediatamente al Juez competente las inspecciones y registros efectuados, las causas que los motivaron y los resultados de los mismos, remitiéndole copia del acta levantada.

Art. 18. 1. Cuando la autorización del Congreso comprenda la suspensión del artículo 18.1 de la Constitución, la autoridad gubernativa podrá intervenir toda clase de comunicaciones, incluidas las postales, telegráficas y telefónicas. Dicha intervención sólo podrá ser realizada si ello resulta necesario para el esclarecimiento de los hechos presuntamente delictivos o el mantenimiento del orden público.

2. La intervención decretada será comunicada inmediatamente por escrito motivado al Juez competente.

Art. 19. La autoridad gubernativa podrá intervenir y controlar toda clase de transportes, y la carga de los mismos.

Art. 20. 1. Cuando la autorización del Congreso comprenda la suspensión del artículo 19 de la Constitución, la autoridad gubernativa podrá prohibir la circulación de personas y vehículos en las horas y lugares que se determine, y exigir a quienes se desplacen de un lugar a otro que acrediten su identidad, señalándoles el itinerario a seguir.

2. Igualmente podrá delimitar zonas de protección o seguridad y dictar las condiciones de permanencia en las mismas y prohibir en lugares determinados la presencia de personas que puedan dificultar la acción de la fuerza pública.

3. Cuando ello resulte necesario, la Autoridad gubernativa podrá exigir a personas determinadas que comuniquen, con una antelación de dos días, todo desplazamiento fuera de la localidad en que tengan su residencia habitual.

4. Igualmente podrá disponer su desplazamiento fuera de dicha localidad cuando lo estime necesario.

5. Podrá también fijar transitoriamente la residencia de personas determinadas en localidad o territorio adecuado a sus condiciones personales.

6. Corresponde a la Autoridad gubernativa proveer de los recursos necesarios para el cumplimiento de las medidas previstas en este artículo y, particularmente, de las referidas a viajes, alojamiento y manutención de la persona afectada.

7. Para acordar las medidas a que se refieren los apartados 3, 4 y 5 de este artículo, la Autoridad gubernativa habrá de tener fundados motivos en razón a la peligrosidad que para el mantenimiento del orden público suponga la persona afectada por tales medidas.

Art. 21. 1. La Autoridad gubernativa podrá suspender todo tipo de publicaciones, emisiones de radio y televisión, proyecciones cinematográficas y representaciones teatrales, siempre y cuando la autorización del Congreso comprenda la suspensión del artículo 20, apartados 1, a) y d), y 5 de la Constitución. Igualmente podrá ordenar el secuestro de publicaciones.

2. El ejercicio de las potestades a que se refiere el apartado anterior no podrá llevar aparejado ningún tipo de censura previa.

Art. 22. 1. Cuando la autorización del Congreso comprenda la suspensión del artículo 21 de la Constitución, la autoridad gubernativa podrá someter a autorización previa o prohibir la celebración de reuniones y manifestaciones.

2. También podrá disolver las reuniones y manifestaciones a que se refiere el párrafo anterior.

3. Las reuniones orgánicas que los partidos políticos, los sindicatos y las asociaciones empresariales rea[illegible]

te les asignen los artículos 6.° y 7.° de la Constitución, y de acuerdo con sus Estatutos no podrán ser prohibidas, disueltas ni sometidas a autorización previa.

4. Para penetrar en los locales en que tuvieren lugar las reuniones, la Autoridad gubernativa deberá proveer a sus agentes de autorización formal y escrita. Esta autorización no será necesaria cuando desde dichos locales se estuviesen produciendo alteraciones graves del orden público constitutivas de delito o agresiones a las Fuerzas de Seguridad y en cualesquiera otros casos de flagrante delito.

Art. 23. La Autoridad gubernativa podrá prohibir las huelgas y la adopción de medidas de conflicto colectivo, cuando la autorización del Congreso comprenda la suspensión de los artículos 28.2 y 37.2 de la Constitución.

Art. 24. 1. Los extranjeros que se encuentren en España vendrán obligados a realizar las comparecencias que se acuerden, a cumplir las normas que se dicten sobre renovación o control de permisos de residencia y cédulas de inscripción consular y observar las demás formalidades que se establezcan.

2. Quienes contravinieren las normas o medidas que se adopten, o actuaren en connivencia con los perturbadores del orden público, podrán ser expulsados de España, salvo que sus actos presentaren indicios de ser constitutivos de delito, en cuyo caso se les someterá a los procedimientos judiciales correspondientes.

3. Los apátridas y refugiados respecto de los cuales no sea posible la expulsión se someterán al mismo régimen que los españoles.

4. Las medidas de expulsión deberán ir acompañadas de una previa justificación sumaria de las razones que la motivan.

Art. 25. La Autoridad gubernativa podrá proceder a la incautación de toda clase de armas, municiones o sustancias explosivas.

Art. 26. 1. La Autoridad gubernativa podrá ordenar la intervención de industrias o comercios que puedan motivar la alteración del orden público o coadyuvar a ella, y la suspensión temporal de las actividades de los mismos, dando cuenta a los Ministerios interesados.

2. Podrá, asimismo, ordenar el cierre provisional de salas de espectáculos, establecimientos de bebidas y locales de similares características.

Art. 27. La Autoridad gubernativa podrá ordenar las medidas necesarias de vigilancia y protección de edificaciones, instalaciones, obras, servicios públicos e industrias o explotaciones de cualquier género. A estos efectos podrá emplazar puestos armados en los lugares más apropiados para asegurar la vigilancia, sin perjuicio de lo establecido en el artículo 18.1 de la Constitución.

Art. 28. Cuando la alteración del orden público haya dado lugar a alguna de las circunstancias especificadas en el artículo 4.° o coincida con ellas, el Gobierno podrá adoptar además de las medidas propias del estado de excepción, las previstas para el estado de alarma en la presente Ley.

Art. 29. Si algún funcionario o personal al servicio de una Administración pública o entidad o instituto de carácter público u oficial favoreciese con su conducta la actuación de los elementos perturbadores del orden, la Autoridad gubernativa podrá suspenderlo en el ejercicio de su cargo, pasando el tanto de culpa al Juez competente y notificándolo al superior jerárquico a los efectos del oportuno expediente disciplinario.

Art. 30. 1. Si durante el estado de excepción el Juez estimase la existencia de hechos contrarios al orden público o a la seguridad ciudadana que puedan ser constitutivos de delito, oído el Ministerio Fiscal, decretará la prisión provisional del presunto responsable, la cual mantendrá, según su arbitrio, durante dicho estado.

2. Los condenados en estos procedimientos quedan exceptuados de los beneficios de la remisión condicional durante la vigencia del estado de excepción.

Art. 31. Cuando la declaración del estado de excepción afecte exclusivamente a todo o parte del ámbito territorial de una Comunidad Autónoma, la Autoridad gubernativa podrá coordinar el ejercicio de sus competencias con el Gobierno de dicha Comunidad.

CAPITULO IV

El estado de sitio

Art. 32. 1. Cuando se produzca o amenace producirse una insurrección o acto de fuerza contra la soberanía o independencia de España, su integridad territorial o el ordenamiento constitucional, que no pueda resolverse por otros medios, el Gobierno, de conformidad con lo dispuesto en el apartado 4 del artículo 116 de la Constitución, podrá proponer al Congreso de los Diputados la declaración del estado de sitio.

2. La correspondiente declaración determinará el ámbito territorial, duración y condiciones del estado de sitio.

3. La declaración podrá autorizar, además de lo previsto para los estados de alarma y excepción, la suspensión temporal de las garantías jurídicas del detenido que se reconocen en el apartado 3 del artículo 17 de la Constitución.

Art. 33. 1. En virtud de la declaración del estado de sitio, el Gobierno, que dirige la política militar y de la defensa, de acuerdo con el artículo 97 de la Constitución, asumirá todas las facultades extraordinarias previstas en la misma y en la presente ley.

2. A efectos de lo dispuesto en el párrafo anterior, el Gobierno designará la Autoridad militar que, bajo su dirección, haya de ejecutar las medidas que procedan en el territorio a que el estado de sitio se refiera.

Art. 34. La Autoridad militar procederá a publicar y difundir los oportunos bandos, que contendrán las medidas y prevenciones necesarias, de acuerdo con la Constitución, la presente ley y las condiciones de la declaración del estado de sitio.

Art. 35. En la declaración del estado de sitio el Congreso de los Diputados podrá determinar los delitos que durante su vigencia quedan sometidos a la Jurisdicción Militar.

Art. 36. Las Autoridades civiles continuarán en el ejercicio de las facultades que no hayan sido conferidas a la Autoridad militar de acuerdo con la presente ley. Aquellas Autoridades darán a la militar las informaciones que ésta le solicite y cuantas noticias referentes al orden público lleguen a su conocimiento.

DISPOSICION DEROGATORIA

Quedan derogados los artículos 25 a 51 y disposiciones finales y transitorias de la Ley 45/1959, de 31 de julio, de Orden Público, así como cuantas disposiciones se opongan a lo preceptuado en la presente Ley Orgánica.

DISPOSICION FINAL

La presente Ley entrará en vigor el día siguiente al de su publicación en el «Boletín Oficial del Estado».

Por tanto,

Mando a todos los españoles, particulares y autoridades, que guarden y hagan guardar esta Ley Orgánica.

Jan Helgesen
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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

I hereby submit some **preliminary** remarks, relating to "Titre(s) I et II". As indicated in Strasbourg, I do emphasise the preliminary nature of these reflections, the very short time limit is easy to understand; due to other commitments, it is difficult, however, to find the necessary time to present a elaborated view. The draft would certainly deserve more attention and a greater precision. I would be willing to elaborate more on these issues at a later stage, if the occasion should present itself.

These are my remarks:

Arts.2(2), 3(4) and 11(1).

These provisions refer to the relationship between norms at the internationla level and the national level. Experience has shown that this particular problem is not easy to solve in a succinct text in a constitution.

The three provisions cited contain concepts which might be open to different interpretations:

"principes universellement reconnus" (Art. 2(2))
"principes universellement admis" (Art. 3(4))
"normes du droit international" (all three provisions)
"traités internationaux" (Arts. 3(4) and 11(1))

The two first (somewhat inconsistent) references are not clear (at least in the French translation). Does this concept refer to universally recognised principles at the international or at the national level (compare the discussion on this problem according to the ICJ Statutes Art. 38)? The question whether one may claim

that there exist universally recognised principles at the internatoinal level is in itself controversial.

The third expression ("normes du droit international") is probably intended to cover customary law, since it in two of the articles appears as an alternative to treaties. Such an interpretation is not, however, the only logical one. The concept may be said to be broad enough to cover customary law as well as treaty law. This alternative inerpretation is supported by the fact that Art. 2(2) appears without an explicit reference to treaty law. Since most of the fundamental rights and freedoms are guaranteed in treaty law, it seems strange to exclude treaties from the scope of Art. 2(2).

These concepts certainly need more refinement.

Turning my attention to Art. 3(4) in particular, I recognise with satisfaction that the hierarchy between the two systems is made clear in the Draft Constitution.

Art. 2(3).

This statement is easy to understand, taking into account the past. I do doubt, however, whether such a general principle can be made operational in future legislation.

Art. 3(3).

The same remarks would apply. In particular: I do believe that such a general statement is hard to comply with in any democratic society during emergency situations.

Art. 5(2).

The concept "ideology" is certainly open for different interpretations. Again, the past provides most of the explanation. One might argue, however, that when the Draft declares that such values as i.a. market economy, private ownership, the social state, are the foundations of the new state, these values might constitute "ideologies" in one sense or the other.

Art. 13 (1).

Such an expression is often used in human rights documents from the past. In a contemporary human rights context, one important problem is whether the human being is protected from the moment of conception or from the moment of birth. The idea behind the expression in the Draft is obviously that human dignity and human rights are inherent in a human being, irrespective of social status. This idea should probably be expressed in a less ambigous way.

Art. 13 (2).

It is extremely important that the Draft explicitly states that the "human rights catalogue" in the Constitution is not exhaustive. By doing so, one might avoid conflicts between the international standards and the Constitution (this being all the more important since Art.3 (4) gives the international norms a lower status than the Constitution itself).

Art. 14 (3).

The list of non-discriminatory criteria is broader than in most of the texts of the international conventions. This reflects an up-to-date approach.

Art. 15 (3).

The linkeage between human rights and individual obligations/duties does certainly raise concern. No one would contest that a citizen has duties towards his society (see i. a. UN Universal Declaration Art. 29); what worries me is that such a formulation might imply that compliance with the obligations is a precondition for the granting by the state of human rights and fundamental freedoms. This philosophy was predominant during the days of the socialist regimes; a more sophisticated formula should now be found.

Art. 18

This article opens up for the principle of dual citizenship. Such a possibility is not favoured in public international law, since it normally creates conflicts. Art. 18 (2) is but an example, when it declares that, with one single exception, the double citizenship does not affect the duties towards the RF. Such a general statement runs the risk of violating international law; one example: an individual being a citizen of two states cannot be under an obligation to defend the one state against the other.

Art. 20 (2).

The problem of capital punishment is a controversial one. Seen from my perspective, it is promising to notice that the Draft strives to restrict the use of this penal sanction.

It is more controversial whether the death penalty can be executed without the right for the perpetrator to an appeal to a higher body (this right is probably covered elsewhere, in Art. 44 (4)), or the right to ask for mercy. To put it in a general statement (which needs more specification later): The draft may be claimed not to be in accordance with contemporary human rights law.

Arts. 22, 24, 26 and 25.

These articles contain basic human rights. As often is the case, the provisions are structured according to a model where the principle is stated in the first para., while the restrictions are described in a second para. In these articles, however, the restrictions basically contains in blanco delegations from the Constitution to the legislator. In most international human rights conventions, the criteria for restricing these rights are explicitly spelled out in a detailed enumeration. The problem with the Draft is that it leaves too much discretion to be carried out at the statutory level.

Art. 25, on the other hand, illustrates a formula which is typical at the international level.

Art. 24.

The first para applies to citizens only. One might argue that, according to international human rights law (see Covenant on Civil and Political Rights Art.12), the right to travel within a state cannot be restricted to citizens.

In the second para., it is logical and correct that the text relates to citizens.

Chapitre 4.

One notices with interest that the Draft has substantive provisions on socio-economic rights.

Arts. 38 and 43 (6).

It would probably be more correct to state that everyone has a right to seek compensation, since a Constitution cannot automatically gurantee compensation.

Article 43 (3).

This para. seems too general. Is it really the intention to establish some kind of actio popularis?

Art. 43 (7).

Why is this provision placed here?

Art. 44 (1).

What does the word "examen" mean? The text cannot guarantee that all aspects of a case are "examined" on the merits. Certain problems may be dismissed without a comprehensive "examination".

Art. 44 (4)

In the French translation, the concept "par **le** tribunal supérieur" is used. If the translation is correct, it might indicate that an individual would have the right to an appeal through different levels of the court system. It might be more correct to say "**un** tribunal", if the idea is that the right to appeal is protected as such.

Chapitre 6.

It is but natural that individual obligations/duties are regulated in a Constitution, at least in general statements. The problem is, however, that the character of these obligations differ considerably. There is a substantial difference between the duty to pay one's taxes (Art. 52) and the obligations towards the nature (Art. 50). The latter is less self-excecuting, less concrete than the former. This difference is not reflected in the text.

Oslo/Tromsø, April 1/2, 1992.

Jan Helgesen

UROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
ask Force on Constitutional Drafting
inland, Matti Niemivuo

MEMORANDUM
19.3.1992

OBSERVATIONS SUR LES DISPOSITIONS DU PROJET DE CONSTITUTION DE LA FEDERATION DE RUSSIE CONCERNANT L'ETAT D'EXCEPTION

1. Géneralités

Le projet de Constitution de Russie (à la date du 24 octobre 1991) contient, dans son chapitre XXV, six articles (133 - 138) sur l'état d'exception. Dans ce mémorandun, on examine ces dispositions notamment du point de vue des principes de la Convention européenne des droits de l'homme.

D'après l'article 133 (1) de la Constitution, l'état d'exception est un régime juridique particulier qui autorise des limitations aux droits et libertés des citoyens et aux droits des personnes morales ainsi que l'imposition à eux d'obligations supplémentaires. Cet article 133 de même que les articles 134 et 138 posent les conditions de fond au recours à l'état d'exception. Les restrictions aux mesures dérogatoires des droits et libertés sont mentionnées dans l'article 138. Les articles 135 - 137 stipulent la procédure à suivre en vue de la proclamation de l'état d'exception.

Généralement, les Constitutions nationales connaissent la possibilité aux autorités de prendre des mesures exceptionnelles dans des situations de grand danger public. Ces mesures permettent souvent des limitations aux droits fondamentaux garantis par la Constitution. La Convention européenne des droits de l'homme (comme aussi le Pacte des Nation Unies sur les droits civils et politiques de 1966) autorise à prendre des mesures dérogeant aux obligations prévues par la Convention, avec certaines exceptions. Les conditions d'application du droit de dérogation sont énumérées dans l'article 15 de la Convention.

Le projet de Constitution régle relativement minutieusement l'état d'exception. Certes, il est statué que l'état d'exception est réglementé aussi par une loi fédérale, mais la Constitution ne se contente pas d'une disposition générale avec une délégation à une loi ordinaire. Ceci est plutôt satisfaisant du point de vue de la sécurité juridique.

Ci-dessus, on se borne à examiner 1) *quelles sont les situations de crise qui autorisent le recours aux mesures exceptionnelles*, 2) *le contenu des mesures de dérogation*, et 3) *quelle est la procédure de décision, par laquelle on commence à appliquer ces mesures*.

2. Les situations de crise

L'état d'exception (état de crise, état de siège, état d'urgence, état de guerre ...) est, dans les législations nationales et traités internationaux, souvent lié à deux différentes formes de crise: (a) les crises graves politiques, telles que la querre ou le désordre intérieur, (b) et les situations de force majeure comme calamités. L'article 15 de la Convention européenne des droits de l'homme décrit l'état d'exception par le cas de guerre ou le cas d'autre danger public menacant la vie de la nation. Selon la Cour des

droits de l'homme ces notions "désignent une situation de crise ou de danger exceptionnel et imminent qui affecte l'ensemble de la population et constitue une menace pour la vie organisée de la Communauté composant l'Etat" (affaire Lawless, 1.7.1961).

Par définition, le danger public doit menacer la vie de la nation. Le danger doit donc avoir des répercussion sur tout le pays. Certes, il est admis, d'après la pratique de la Cour des droits de l'homme, qu'il peut exister une menace à la nation même si un danger immédiat ne se manifeste que dans une partie du pays.

L'article 134 du projet de Constitution dispose des conditions matérielles qui autorisent l'introduction de l'état d'exception. Aux termes du premier paragraphe de cet article, il doit exister "une menace réelle, exceptionnelle et inéluctable à la sécurité des citoyens ou du régime constitutionnel, dont l'élimination est impossible sans application de mesures exceptionnelles". L'article 133 (2) prévoit que l'état d'exception ne peut être introduit que "pour assurer la sécurité des citoyens et la défense du régime constitutionnel en vue de retour le plus rapide aux conditions normale d'existance de la société".

L'article 134 (2) contient une énumération des situations de l'état d'exception.

Les dispositions du projet de Constitution s'inspirent sur nombre de points des critères définis par la Convention. La définition de la situation de crise dans la Constitution n'est pourtant pas nécessairement identique à celle de la Convention, et on doit, en même temps, tenir compte que l'article 138 (3) contient de nombreuses restrictions à la limitation des droits et libertés pendant l'état d'exception. L'article 134 (2) ne doit pas être jugé seulement à la lumière de sa correspondance à la notion de crise dans l'article 15 de la Convention.

On peut remarquer, que l'article 134 (2) ne mentionne pas la guerre comme une situation exceptionnelle, et fait plutôt référence aux désordres intérieurs.

3. Le contenu des mesures exceptionnelles

Selon l'article 15 (1) de la Convention, l'Etat ne doit user de son droit de dérogation que dans la "stricte mesure où la situation l'exige". Cet élément de nécessité prévoit des limitations de durée des mesures exceptionnelles ainsi que l'application du principe de proportionnalité.

Selon le projet de Constitution, l'état d'exception est une mesure temporaire. L'article 135 (5) établit des périodes précises mais renouvelable. L'exigence de nécessité se manifeste surtout dans l'article 133 (2) "exclusivement pour assurer" et l'article 134 (1) "dont l'élimination est impossible sans application de mesures exceptionnelles" ainsi que dans l'article 138 (7 a). On peut donc noter que les dispositions du projet contiennent des éléments qui prévoient que les mesures exceptionnelles ne soient appliquées qu'en cas de stricte nécessité.

Aux termes de l'article 15 (1) de la Convention, les mesures dérogatoires ne doivent

pas être en contradiction avec les autres obligations découlant du droit international. Les articles 133 - 138 du projet de Constitution ne mentionnent pas expressément que les mesures exceptionnelles doivent être compatibles avec les obligations internationales (voir pourtant art. 9 (1) du projet de Constitution).

Un principe généralement admis est que les mesures exceptionnels ne doivent pas être discriminatoires. L'article 138 (7 c) contient une disposition à cet effet.

L'article 15 (2) de la Convention n'autorise aucune dérogation à l'article 2 (droit à la vie, sauf pour le cas de décès résultant d'actes licites de guerre), et aux articles 3 (interdiction de la torture et des peines ou traitements inhumains et dégradants), 4 (1) (interdiction de l'esclavage et de la servitude) et 7 (principe de la légalité des délits et des peines). On peut noter que le Pacte international sur les droits civils et politiques ajoute dans son article 4 aux droits non-dérogables mentionnés dans la Convention européenne le droit de ne pas être emprisonné pour non-exécution des obligations contractuelles, le droit à la liberté de pensée, de conscience et de religion et le droit à la reconnaissance juridique.

Les droits intangibles pendant l'état d'exception sont cités dans le paragraphe 3 de l'article 138 du projet de la Constitution de Russie. La liste des droits qui ne peuvent pas être limités est, en soi, plus longue que les droits non-dérogables dans les traités mentionnés, mais on peut faire certaines remarques. Le droit à la liberté de pensée (art. 26 (1)) n'est pas parmi les droits qui ne peuvent pas être limités. Il en est de même du droit garanti par l'article 44 du projet de la Constitution (interdiction de l'effet rétroactif d'une loi établissant la responsabilité juridique).

4. La procédure de décision

La Convention européenne des droits de l'homme prévoit une procédure d'information du Secrétaire général du Conseil de l'Europe des mesures prises et des motifs qui les ont inspirées. Une telle procédure est exigée par nombre de traités internationaux. L'article 138 (4) contient une obligation d'informer tous les Etats, avec lesquels sont conclus des traités internationaux, établissant des droits et libertés.

La procédure de décision de la proclamation de l'état d'exception est une question non-réglementé par les conventions. On peut pourtant avancer certains principes qui ont guidé l'élaboration de récents lois sur l'état d'exception: La proclamation de l'état d'exception est mesure qui devrait appartenir à la législature. Pourtant, en cas d'urgence, il peut être nécessaire que c'est le pouvoir exécutif qui peut prendre des mesures provisoires, avec un examen a posteriori par la législature. La durée de l'état d'exception devrait être limitée à un terme fixe, renouvelable suivant la même procédure que la durée initiale. La législature ne devrait pas être dissoute pendant la période de l'état d'exception.

Les articles 135 et 136 du projet de Constitution contiennent de nombreuses dispositions qui ont pour but de garantir les pouvoirs du Soviet suprême et aussi des Républiques. L'article 137 exige l'information préalable de la population.

L'article 135 semble contenir premièrement un système normal de déclenchement de

l'état d'exception. Il prévoit un décret de proclamation du Président *et* son adoption par le Soviet suprême. Ces deux conditions doivent, semble-t-il, être réunis avant l'application des mesures exceptionnelles. S'il en est ainsi, le paragraphe 3 stipulerait seulement de la validité du décret et non pas sur la cessation de son application.

L'autre système (paragraphe 4) est une procédure d'urgence permettant l'introduction immédiate de l'état d'exception (sans l'examen par le Soviet suprême et sans l'avertissement préalable de la population). Il est peut-être prévu que, même dans ce cas, le décret sur la proclamation est examiné (cette fois a posteriori) par le Soviet suprême, qui peut soit l'adopter ou le rejeter.

Les dispositions de l'article 135 paraissent être dans la ligne des principes susmentionnés.

EUROPEAN COMMISSION FOR DEMOCRACY
THROUGH LAW
Task Force on Constitutional Drafting
Finland, Matti Niemivuo

MEMORANDUM
31.3.1992

OBSERVATIONS SUR LES DISPOSITIONS DU PROJET DE CONSTITUTION DE LA FEDERATION DE RUSSIE CONCERNANT L'ETAT D'EXCEPTION - complément au mémorandum en date du 19 mars 1992

Le nouveau projet de Constitution de Russie en date du 2 mars 1992 donne lieu aux observations suivantes par rapport aux remarques présentées dans le mémorandum daté 31 mars 1992 qui s'est basé sur le projet de Constitution du 24 octobre 1991.

1. La procédure de décision est clarifiée et précisée dans l'article 133 du nouveau projet. Les dispositions prévoient expressément que c'est la législature (Conseil suprême de la FR) qui déclare l'état d'exception. En cas d'urgence, le Président de la FR peut décreter l'état d'urgence, suivi d'un examen par le Conseil suprême dans un délai court.

2. Selon l'article 135 (1) durant l'état d'exception des limitations temporaires des droits et libertés peuvent être introduites conformément à la loi fédérale. Cette référence à une loi fédérale n'existait pas dans le projet antérieur qui, par contre, disposait dans son article 138 (3), que les limitations aux droits et libertés doivent être désignées dans le texte du décret sur l'état d'exception.

3. La liste des droits et libertés qui ne peuvent pas être limités a été modifiée (l'article 135 (2)). De ces modifications on peut noter que à la liste a été ajouté l'article 45 (interdiction de l'effet rétroactif d'une loi établissant la responsabilité juridique).

COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

Quelques remarques succinctes
au sujet des articles 56-77
du projet de Constitution
de la Fédération de Russie

(projet du 2 mars 1992)

par
Gérard REUTER,
Président de la Chambre des comptes
du Grand-Duché de Luxembourg

Le titre III du projet traite de la société civile et se subdivise en

1. Chapitre VII - La propriété, le travail, l'entreprise
2. Chapitre VIII - Les associations
3. Chapitre IX - La religion et les associations religieuses
4. Chapitre X - L'éducation, l'enseignement, la science, la culture
5. Chapitre XI - La famille
6. Chapitre XII - Les moyens d'information de masse.

1) Le traité sur la délimitation des domaines de compétences et des attributions entre les organes fédéraux du pouvoir d'Etat de la Fédération de Russie et les organes du pouvoir des républiques, territoires, régions, régions autonomes et districts autonomes au sein de la RSFSR prévoit en son article VIII qu'il est destiné à devenir partie intégrante de la Constitution de la Fédération de Russie dans laquelle il formera une section à part.

Les dispositions relatives à la délimitation entre compétence exclusive de la Fédération et compétence conjointe de la Fédération et des républiques semblent pouvoir donner lieu à des difficultés quant à la détermination des organes compétents pour garantir et mettre en oeuvre les grands principes constitutionnels de la protection des droits de l'homme et des libertés (voir article I, 1, c. et article II, 1, b.). Le pouvoir fédéral central aurait ainsi la possibilité d'écarter les républiques, en partie, de la mise en pratique des grands principes démocratiques énoncés ci-avant.

.....

2) Après avoir affirmé le principe général du choix de l'économie de marché dans l'article 7, le titre III sur la société civile contient des dispositions détaillées au sujet des libertés fondamentales, conformes aux protocoles à la Convention européenne des droits de l'homme.

3) Il appert que l'Etat fédéral entend participer, de façon poussée, à la régulation de la vie économique; l'utilité sociale, l'intérêt de la société et le partenariat social entre l'homme et l'Etat sont souvent invoqués pour permettre à l'Etat de maintenir son influence dans les relations économiques, sociales et humaines.

4) Certains des droits et libertés énumérés au titre III paraissent absolus en ce sens qu'il est impossible de les soumettre à des restrictions sans amender au préalable la Constitution. La plupart des droits sont cependant relatifs en ce sens que l'on peut les limiter par le jeu d'une loi ordinaire. S'il est évident qu'il doit en être ainsi le plus souvent, il semble cependant que les possibilités de restreindre les droits et libertés sont trop larges, le projet de constitution omettant le plus souvent d'indiquer à quelles fins ils peuvent être limités par une loi ordinaire. Ainsi il sera possible soit à l'autorité fédérale seule, soit en cas de compétences conjointes, à l'autorité fédérale et aux autorités des républiques, de décider des limitations de ces droits et libertés.

Une société réellement démocratique ne saurait tolérer des restrictions à ses droits et libertés pour des raisons politiques, religieuses ou culturelles et des limitations pouvant constituer une menace pour la libre formation des opinions.

.....

5) ad art. 56 (1) et art. 59 (1)

L'article 59 (1) prévoyant des limites à la concentration de la terre dans les mains d'un propriétaire particulier semble constituer une entorse au principe général, prévu à l'article 56 (1), reconnaissant et garantissant la liberté en matière foncière.

6) ad art. 60 (2) et (4)

Quid de la procédure de solution des litiges individuels du travail? Ne faudrait-il pas, après avoir énoncé le principe de la liberté du contrat de travail, prévoir aussi la réglementation des relations de travail entre les employeurs et les salariés?

7) ad articles 63-68

Pas de commentaire spécifique; il y a lieu de relever seulement le caractère très élaboré des dispositions afférentes.

8) Les articles 69 à 73 semblent être conformes aux aspirations des rédacteurs de la constitution; ils ne sont pas contraires aux dispositions analogues figurant dans les constitutions de pays connaissant un régime démocratique de longue date.

9) ad art. 75 (5)

Est-ce que les obligations alimentaires reposant sur les enfants vis-à-vis de leurs parents ne sont pas limitées à l'hypothèse où les parents se trouvent dans le besoin?

10) ad art. 76 (3)

C'est par rapport aux limitations à l'utilisation de la liberté de l'information de masse que l'on peut craindre

.....

des ingérences intempestives des autorités fédérales pour des raisons inconciliables avec un régime démocratiqu (voir remarque sub 4).

11) Le soussigné continue l'étude des articles concernés et se réserve de faire parvenir au secrétariat un complément aux présentes observations.

Gerard REUTER

At this stage I can make immediately, in view of the urgency of the matter, the following general observations on Chapter 18 of the Constitution, which deals with the Judicial Power and I may expand on them later if necessary:

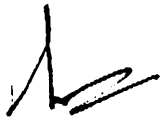
1. It is better to entrench in the Constitution the manner of appointment of the Judges of the Constitutional Court (Article 109), of the Supreme Court (Article 110) and of the Supreme Economic Court (Article 111).

2. As it seems that the powers of the Constitutional Court, under Article 109(3), will be, in any event, exercised by way of repressive norm control, it will be useful to specify on what occassions such powers, or any of them, can be exercised, also, by way of preventive norm control.

3. In addition to the powers of the Constitutional Court specified in Article 109 it appears desirable to make provision also for Constitutional Complaints for the protection of constitutional rights of private persons, for jurisdiction for Prosecutions for the Violation of the Constitution and for jurisdiction to Control the Formation of Supreme Organs of the Russian Federation by controlling elections.

4. It is desirable to set out in the Constitution, in Articles 110 and 111 respectively, the specific powers of the Supreme Court and of the Supreme Economic Court, as it has been done in respect of the Constitutional Court by means of Article 109, so as not to leave them open to variation by means only a Law.

Yours Sincerely,



Michael A. Triantafyllides,
Attorney-General of the Republic of Cyprus