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EUROPEAN COMMISSION FOR DEMOCRACY THROUGHT LAW
(VENICE COMMISSION)

OPINION ON THE DRAFT REVISION OF THE CONSTITUTION OF ROMANIA (Unfinished texts by the Committee for the revision of the Constitution)

adopted by the Venice Commission
at its 54th plenary session
(Venice, 14-15 March 2003)

on the basis of comments by

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Introduction

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

2. *Following a visit to Romania, during which they met the authorities, Mr Gerard Batliner and Mr Jacques Robert, Members of the Commission, Mr Vlad Constantinesco and Mr Joan Vintró, Experts of the Commission, drew up observations (CDL (2002) 50, 52, 6 and 86 ; see also CDL (2002) 85). On that basis, the Venice Commission adopted, at its 51st plenary session (Venice, 5-6 July 2002), an Opinion on the proposed revision of the Constitution of Romania (CDL-AD (2002) 12).*

3. *In June 2002, a Parliamentary Committee on the revision of the Constitution of Romania was formed.*

4. *On 1 and 2 October 2002, a delegation from the Venice Commission, consisting of Mr Gerard Batliner, Mr Jacques Robert and Mr Jean-Pierre Massias, an Expert of the Commission, visited Bucharest to discuss the work on the revision of the Constitution with the Romanian authorities (see, in particular, document CDL (2002) 128). At its 52nd plenary session (Venice, 18-19 October 2002), the Commission adopted a supplementary opinion on the revision of the Constitution of Romania (CDL-AD (2002) 21).*

5. *On 24 December 2002, Mr Valer Dorneanu, President of the Romanian Parliament, sent the Venice Commission the texts already adopted by the abovementioned Parliamentary Committee. He also sought the Commission's opinion on a "note concerning the unfinished texts by the Committee for the preparation of the legislative proposal on the constitutional revision" (see document CDL (2003) 3). Mr. Gerard Batliner, Mr Jacques Robert, Mr Vlad Constantinesco and Mr Joan Vintró then drafted observations (CDL (2003) 2, 4, 5 and 6), on which the present consolidated Opinion is based.*

General observation

It would have been interesting to know the origin of the proposals examined below (and the grounds provided for them), in order to understand the precise purpose of submitting these proposals.

Some proposals are formulated in very laconic, or even elliptical, terms: it is difficult to comment in the absence of a drafted proposal.

1. Article 1: The Romanian State

The adjective "national" used to qualify the Romanian State should be deleted from Article 1 paragraph 1. The new version of Article 1 paragraph 1 would read as follows:

> "Romania is a sovereign, and independent, unitary and indivisible, national State."

The deletion of that word raises the question of the meaning of that adjective in the present Constitution. To declare that Romania is a "national State" evokes the concept of "nation-State", which implies that the State can only be the political expression of a single nation and amounts to emphasising that the Romanian State must correspond only to a single nation, the Romanian nation. However, that is not really defined by the Constitution:

- is the reference to the nation of will, a subjective political concept which brings together all those who share the same values, the same history and the same future?
- or is it to an "objective", "cultural" and "ethnic" concept of the nation, which brings together only the speakers of the same origin, sharing the same language?

The Constitution itself (Articles 4.2, 6, 32.3 and 119.2) speaks of "national minorities" or of nationalities and seems to reserve the word "national" for the elements of identity of an ethnic, cultural, linguistic or religious type. There would then not be a single nation in Romania and, consequently, the word "national" in Article 1 may lead to a certain confusion and it seems desirable to delete it. Such a formulation is more consonant with the constitutional provisions on minorities. The definition of the State is already clearly stated by Article 1 when it states that Romania is a sovereign, independent, unitary and indivisible State. One might likewise point to Article 2 "national sovereignty belongs to the Romanian people", Article 4.1 ("the State is based on the unity of the Romanian people") and Article 4.2 ("Romania is the common and indivisible fatherland of all its citizens").

Accordingly, the deletion of the "national" character of the State does not affect issues of sovereignty.

2. Article 13 : Languages

The reference in Article 13 (Title I, General principles of the Constitution) to the use of the language of the national minority in relations between citizens of the minorities and the public authorities serves to confer a general dimension of this constitutional guarantee. That is perfectly reasonable, because, if it is a question of recognising the right of the national minorities to preserve their linguistic identity, the exercise of that right cannot be confined to relations with the local authorities but must also extend to relations with all the public authorities of the territory in which these minorities live. Thus, should it be desired to extend that guarantee to the courts and to the deconcentrated public authorities, there is no doubt that for reasons of systematics it would be better to incorporate that guarantee in Article 13. As regards the constitutionalisation of the 20% of the inhabitants belonging to national minorities, it is necessary to determine the appropriateness of that formality according to the sociological data on national minorities in Romania, because, on the one hand, it may be an element of guarantee or of exclusion and, on the other, it may introduce excessive legal rigidity.

By comparison with Article 6 of the Constitution, this amendment gives a welcome specific form to respect for the protection of the languages of the national minorities. It corresponds to Articles 9 (justice) and 10 (administrative authorities and public services) of the Charter on Regional and Minority Languages, but remains outside its requirements: although Romania signed the Charter in 1995, it has not yet ratified it.

3. Article 89: The dissolution of Parliament

A new Article 89 is proposed, one which differs from the old version in that other substantive conditions are laid down for the dissolution of Parliament and, unless there is a mistake, certain provisions (paragraphs 2 and 3) are repealed.

Former Article 89	Proposed Article 89
1. After consulting the Presidents of the two Chambers and the leaders of the parliamentary groups, the President of Romania may dissolve Parliament if it has not agreed on vote of confidence for the formation of a government within 60 days of first being asked to do so and only after rejecting a minimum of two requests for investiture. 2. Parliament may only be dissolved once during a year. 3. Parliament cannot be dissolved during the last six months of the term of office of the President of Romania or during a state of siege or emergency.	The President of Romania may dissolve Parliament after consulting the **Prime Minister**, and the Presidents of the two Chambers, **should the ratio between the majority and the opposition be altered following changes in the composition of the parliamentary groups**. The opinion of the Prime Minister and of the Presidents of the two Chambers shall be advisory. A general election shall be held within no more than 60 days following dissolution.

This version appeals to refer to changes in the political groups' support for the government, brought about directly because that support is withdrawn, or indirectly by changes in the composition of the political groups (loss of representatives). In both cases the discretion conferred on the President leaves him the choice of accepting a Government with a minority in Parliament.

Under the former system, Parliament could be dissolved when a Government was formed if the Government did not obtain the support of Parliament (Article 102): the crisis could not exceed 60 days, and in order for dissolution to be possible, Parliament had to have refused at least twice during that period to express its confidence in a Government. That requirement is not found in the new proposal.

Under the proposed new system, the opinion of the Prime Minister is now required (his participation, even in a purely advisory capacity, in the dissolution procedure emphasises the parliamentary nature of the regime) and the new substantive condition is a change in the ratio between majority and minority following a change in the composition of the parliamentary groups, probably when certain Deputies of the majority cross over to the minority. Dissolution appears to be a sanction of the change or recomposition of the balance in Parliament resulting from the elections, in the course of a legislature, without the Government having been held responsible.

The right to dissolve Parliament is a classic institution of the parliamentary regime which essentially allows the electorate to have the say in resolving a situation in which there is a hung Parliament and the Government is unable to command a majority. From a practical aspect, the person with the right to dissolve Parliament is the Head of State (Articles 12 and 19 of the French Constitution of 1958), or the Prime Minister or the Government in the majority of parliamentary regimes. In Romania, where the Head of State, as in France, is elected by direct universal suffrage, the fact that the power is conferred on the President of the Republic alone may seem to be consistent if the intention is to reinforce his institutional position, but it is possible to think of other solutions which also exist in semi-Presidential regimes (Article 13.2 of the Constitution of Ireland) and which allow the Government to play a part in the exercise of the right to dissolve Parliament.

Attempts to link the right of dissolution to conditions which are in the hands of the members of Parliament has often proved illusory. If dissolution must resolve a crisis, why not wait until the crisis becomes manifest, as in the previous version? The circumstances which may provoke a parliamentary situation of this type are not reduced, as one may read in the proposal for the new Article 89, to "changes in the political composition of the parliamentary groups", but may arise merely as a result of new political trends adopted by the parliamentary groups during the life of the legislature.

It is dangerous to allow the President of Romania to dissolve Parliament "should the ratio between majority and opposition be altered following changes in the political composition of the parliamentary groups". This opens the door to all the manoeuvres of luring away or scission within the parties.

If the intention is that dissolution should become a wholly discretionary weapon in the hands of the President of the Republic, it would be better to say so clearly. The expression used in the new Article 89 would appear to be of formidable ambiguity.

Last, it should be noted that the new formula ("after consulting") represents a considerable improvement on the old text ("on a proposal") and avoids blockages, especially in the event of "cohabitation".

In conclusion, one might refer back to the more open text of the first proposal for a revision of the Constitution. One may refer to the text contained in point 46 of the Opinion adopted by the Venice Commission in July 2002, CDL-AD (2002) 12:

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

4. Article 59: Election of the Chambers

The institution of *ex officio* Senators is also found in the Italian Constitution (Article 59). All the same, in the case of Romania, where the Senate, according to the new article introduced after Article 73, has the final word on important legislative measures, respect for the democratic principle would demand, rather, that the composition of the Senate is based entirely on the popular will.

5. The motion of censure

A technique of rationalised parliamentary government, the motion of constructive censure forms part of the constitutional heritage of Europe (Article 67 of the German Basic Law, Article 113 of the Constitution of Spain and Article 96 of the Constitution of Belgium). Even though the technique relates to a political choice, the following point must be emphasised: the requirement, in the motion of censure, for the presentation of a candidate – mentioned by name – for the post of Prime Minister is the only means of avoiding the constitution of heterogeneous oppositions which would agree only to bring the Government down without being capable of implementing a coherent government programme under a leader. It is certainly a means of ensuring that the ministerial crisis consequent upon the dismissal of a government is short-lived and of forcing the political groups not merely to dismiss a Prime Minister but also to agree on the name of his successor. In this way a certain stability of government is ensured.

However, such a proposal remains susceptible to many adjustments, among which a choice should be made: since no information has been provided, it is difficult to do more than approve this suggestion in principle.

6. Involvement of the responsibility of the Government

In the absence of details, it is not clear what is being proposed. In so far as the formulation is reminiscent of Article 49 paragraph 3 of the French Constitution, and of the involvement of the responsibility of the Government on a text, one may refer to point 42 of opinion CDL-AD (2002) 12 on the limits on free discussion and on the right of amendment in the legislative process:

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

More generally, a choice is made either to implicate the Government solely by means of the confidence expressed, or not expressed, when Parliament votes on a Bill, which gives rise to more opportunities for ministerial crisis; or to leave the matter to the motion of censure at the initiative of Parliament, with the presentation of the future Prime Minister, if one wishes to ensure a minimum of government stability ... The co-existence of these two procedures (which may operate at the same time or one after the other) does not appear to be very coherent.

7. Article 119: The principle of subsidiarity

A new version of Article 119 is proposed:

Article 119 (current version)	Article 119 (new version)
Public administration in territorial administrative units is based on the principle of local autonomy and on that of decentralisation of public services.	Public administration in territorial administrative units is based on the principle of local autonomy, on that of subsidiarity and of that of deconcentration of public services.

The introduction into the Constitution of the principle of subsidiarity as one of the bases of the functioning of the public administration may lend itself to reinforcing local autonomy and to protecting it; it strengthens the constitutional framework for Romania's accession to the European Union, because the European Union has long supported the application of that principle in all countries.

According to the principle of subsidiarity, each level of organisation must receive as many powers as it is capable of exercising satisfactorily. If the principle of subsidiarity is taken in its full sense, it requires not only the "deconcentration" of the central State but also a certain autonomy for the decentralised structures, or at least certain guarantees for decentralisation. "Deconcentration" is quite different from decentralisation. "Deconcentration" depends on the existence of territorial districts in

which the State is present in the form of its services, whereas decentralisation relies on the presence of territorial communities whose organs are elected and exercise certain powers on their own behalf. The proposal replaces one by the other: is that desirable? The question also arises as to the means, in particular the financial means, which subsidiarity presumes. What exactly does subsidiarity mean, in this context? Is it anything other than a rhetorical formula?

In the absence of a definition of such a principle that is acceptable to everyone, moreover, it is more than desirable that the respective powers of the various authorities should be determined by an institutional statute; otherwise there is a danger of increasing the number of conflicts of powers rather than ensuring greater clarity.

8. National minorities

The expressions "national minorities" or "minority national communities" as constituent elements of the State could be defined in Article 4 of the Constitution. It might also be appropriate to state Article 6 of the Constitution:

> "1. The State recognises and guarantees the right of persons belonging to **national minorities** to preserve, develop and express their ethnic, cultural, linguistic and religious identity."

The promotion of national minorities to the rank of "minority national communities, constituent elements of the State" may reinforce their position. This is a political decision to be adopted by the Romanian Parliament on the basis of the historical and political weight of these minorities, a decision which cannot be judged by comparison with general criteria of political theory or of comparative constitutional law. However, to say that a "national community" is a constituent element of the State is meaningless in the absence of any definition of a "national community". Beyond the value of a definition like that being discussed, it is important to state that in this sphere the Romanian Constitution already satisfies one of the legal requirements deriving from comparative law and from the texts of the international institutions: that national minorities are guaranteed the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity (Articles 6, 32.2 and 119.2).

The replacement of the expression **"national minorities"** by **"minority national communities"**, while being consistent with the rules of the European constitutional heritage, differs from the traditional and generally accepted vocabulary. It gives the impression that these national minorities form part of a wider national community which does not coincide with the population of the State. To define "minority national communities" as constituent elements of the State would make it necessary, in the interest of symmetry, to mention, as the first constituent element of the State, the "national majority" or the "majority national community", which would extend also to minority nationals who live in the diaspora: is that what is intended?

9. Military authorities

As regards the military authorities, it is necessary to delete from the Constitution any ambiguity concerning the direction of policy in that area. For that reason, it is proposed that the expression "the Armed Forces shall be exclusively subordinated to the will of the people" should be deleted from Article 117, which should merely describe the functions of the armed forces; and the articles on the President, Parliament and the Government should ensure the separation of powers in that regard, which in any event expresses the complete subordination of the armed forces to the civil institutions.

10. Police custody

It is necessary to distinguish "police custody", which is a security measure, necessarily of short duration, following immediately after arrest, even before the judicial investigation, from "preventive detention", which is associated with the "accusation" or the "charge" at the trial hearing (and which may last much longer).

It is probably necessary to amend Article 23 paragraph 4 of the Constitution: the duration of detention ordered by decision of a judge would increase from a maximum of 30 days to "more than 60 days". The duration of detention at the trial stage would be "more than two years". Owing to its lack of clarity, it is impossible to comment precisely on this proposal.

11. Extradition of Romanian citizens: see Article 19 paragraph 1 in conjunction with Article 144 paragraph 2

On the extradition of Romanian citizens, one may reiterate paragraphs 103-105 of Opinion CDL-AD (2002) 12:

> "a. It is perfectly justifiable that a State should not wish – in principle – to extradite its nationals because surrendering a national impinges on the ruling prerogatives of a sovereign State and that State may itself wish to try before its own courts the national whose surrender is demanded. In this respect, there are many States which refuse to give up their nationals.
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> b. However, within a "European judicial area" which must of necessity be constituted in the long run to fight crime and terrorism in Europe effectively, the Member States of the Union must co-operate closely in prosecuting criminals and voluntarily hand over any of their nationals who have committed criminal or unlawful acts.
>
> This text leaves sovereignty intact without hampering the necessary European legal co-operation."

and point 25 of the Supplementary Opinion CDL-AD (2002) 21 :

> "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, paras 103 et seq.). The Commission will not comment here on the conformity of such a revision with Article 148 of the Constitution."

The current Article 19 prohibits the extradition of Romanian citizens, which might cause problems in future should the European arrest warrant come into force.

The "surrender" of a person to the International Criminal Court (Article 89 et seq. of the Statute of Rome of 17 July 1998), which is a Court common to the countries which have ratified its Statute, is not "extradition" in the technical sense (which is carried out to another country).

12. The role of the Judicial Service Commission

It is necessary to provide a remedy against decisions delivered by the Judicial Service Commission in disciplinary matters, which according to the current Article 133 paragraph 2 of the Constitution sits at first and last resort. It is absolutely essential, in order to comply with the fundamental principle of "two-tier proceedings", that a judge found to have committed a disciplinary offence can appeal to a higher judicial authority against the decision taken against him. The proposal to provide the possibility of an appeal constitutes an effective improvement in the protection of the persons concerned and of the State subject to the rule of law. The Court of Cassation appears to be a good choice for this role. In spite of the presence of a number of specialised courts in European democratic States, one of the essential principles of a State subject to the rule of law is that of judicial unity. In order to satisfy that principle, it is necessary that decisions of the specialised courts or disciplinary authorities are amendable to challenge before the higher judicial courts. For that reason, it is proposed that Article 132.8 of the Constitution of Romania be deleted, so that the law can provide that decisions of the Judicial Service Commission in disciplinary proceedings against judges and prosecutors can be referred to the High Court of Cassation and of Justice. As an example from comparative law, reference may be made to Article 143.2 of Spanish Institutional Act 6/1985 on the judiciary.

If provision is to be made for an appeal against decisions taken by the Judicial Service Commission in disciplinary matters, is it not necessary to choose between an appeal on questions of law and an appeal on questions of fact and of law, and to set it out in the Constitution or refer to an institutional statute?

13. Article 139(1): The Court of Auditors

Should the judicial powers of the Court of Auditors be abolished, and disputes relating to the auditing of accounts be determined by the ordinary courts? The present Court of Auditors is in favour of retaining its judicial powers, which may be justified, in States where such powers exist, by the technical and specialised perspective of the auditing of accounts and of the audit officers. It is to be feared that the solution mentioned will render the proceedings more cumbersome and more complicated. Do the ordinary courts have the special professional capacities to deal with such cases?

Generally, and in many countries, the Courts of Auditors are regarded as "courts of law". There is absolutely no reason why they should be deprived of that qualification. The concept of "disputes arising from the activities of the Court" merits explanation: does it mean disciplinary penalties, or declarations concerning the accounts?

For the reasons stated in the preceding paragraph, i.e. observance of the principle of judicial unity, a statute may make provision for disputes in this area to be determined at last instance by the High Court of Cassation and of Justice. Spain provides an example: Article 49 of Institutional Law 2/1982 on the Court of Auditors.

14. Article 144(c): Jurisdiction of the Constitutional Court to settle conflicts of a constitutional nature

The jurisdiction of the Constitutional Court to settle "conflicts of a constitutional nature between the public authorities, at the request of the President ..." is not always very clear. Admittedly, the former wording "resolve conflicts of a constitutional nature" is replaced by the words "settle conflicts". However, some questions remain. It should be made clear that the reference is to conflicts of a legal nature and not to those of a political nature. A constitutional court must remain what it is: i.e. a court with jurisdiction only to "declare what the law is". To that extent, such a dispute between institutions is a progress of the State governed by law. On the other hand, a Constitutional Court is not a body for mediation between the powers of the State, responsible for appeasing disputes between them and for finding a "political" solution for their differences.

What does "conflict of a (legal) constitutional nature between the public authorities" mean? It may, of course, mean, first of all, positive or negative conflicts relating to powers in a specific case. However, the proposed text goes further. It appears to embrace all conflicts between the public authorities concerning the interpretation and application of the Constitution in a specific situation. The concept of "conflict" remains to be defined.

If the conflict to be resolved by the Constitutional Court is between "public authorities", the right to refer the matter to the Constitutional Court must be confined to the authorities, the institutions and the organs authorised to express the will of those institutions. It would therefore be appropriate to add that the application to bring the matter before the Constitutional Court may be decided upon by the Chamber of Deputies or by the Senate by means of a decision adopted in a plenary sitting.

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According to the draft, the right to refer the matter to the Constitutional Court is taken away from the parties to the constitutional conflicts. That makes it even more necessary that the conditions on which the matter can be referred to the Constitutional Court (the existence of a conflict) be properly defined.