

THE ROMANIAN CONSTITUTIONAL DISCOURSE BETWEEN MODERNIZATION AND EUROPENIZATION

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Abstract

This paper is a critical view on the constitutional dynamics in the Romanian public space, reviewing the constitutions from 1866 until now, with a particular outlook on the present constitution, the one from 1991, revised in 2003. Every text has had a short life and a lot of amendments, a fact worthy of our reflection.

Starting from the hypothesis that every constitutional text is an answer to a determinate fear, or at least to certain concerns and desires specific to the historical moment, I have explored the weaknesses and gaps or deficiencies capable of explaining public behaviour, public constitutional discourse and Romanian constitutional alternatives as answers to these issues. In this context, some features will be analysed such as the ambivalence of tendencies, the continuous oscillation to the opposite poles, the recurrence of representations, etc.

Amid all these antinomies and paradoxes, Romanians should find a proper way to behave in the constitutional space, even by rethinking democratic values in the light of national needs and in a context where modernization and Europeanization are important aims for us to achieve.

Keywords

Antinomy; Constitutional behaviour; Constitutional thinking; Europeanization; institutional illness; modernization

1. INTRODUCTION

Upon abandoning its political organization and leaving the socialist bloc of Eastern Europe, Romania had to make a quick adaptation of its political system, including legal and constitutional measures and means used to achieve a new status and to enable it to build a democracy using the model of Western democracies.

While in Central-Eastern Europe, ex-communist countries like Poland, Czechoslovakia and even Hungary benefited from a so-called “velvet transition”. In Bulgaria, Romania or Moldavia the transition was more “violent” (Radu 2010).

All the changes, from 1990 until now, have targeted a modernization of Romania, but we should emphasize that the concept of modernization has a specific connotation, in Romanian’s case; in a similar manner, the achievement of democracy and the rule of law have had a very specific journey. A particularly proper concept used to describe the process of modernization in Romania is the one of “tendentious modernity”, as defined by Constantin Schifirnet¹. This reverses the normal trend from the economic, capitalist layer, to the political and institutional one, just like in Western Europe, in an approach where political institutions of democracy forced the economy to find its way so as to form capitalism of burning stages and impose shapes and rules without the necessary time for growth and preparation of the relevant actors for all of these changes. There is of course a dramatic dimension of Romania’s modernization profile. “Tendentious modernity” is an inflicted one, a result of a modernization “in the rear-guard, not at the forefront” (Schifirnet 2012, p. 12). At the same time, tendentious modernity is marked in Eastern Europe by an “economic weakness, a self-image of countries lying at the periphery of the Western European centre, under authoritarian rule for some decades” (Schifirnet 2009, p. 52). With regard to the Romanian case, its “hybrid nature” characterized by pronounced segmentation and delayed development as the entire ideological history reveals is still influencing Romanian philosophy

¹ “This means development in the opposite direction: from the affirmation of the national spirit and political construction towards economic development” - Schifirnet 2009, p. 52.

(Schifirnet 2012) as well as political thinking, and some aspects of Constitutional conceptual dilution (Vrabie 2004; Vrabie 2012).

The last three decades have forced Romania to adapt its political institutions (Parliament, Presidency, parties), but also its legal and constitutional framework and establishment in order to accomplish an important objective: to become a member state of the European Union and NATO.

With respect to the idea of “tendentious modernity”, we have to understand the evolution of the Romanian constitutional formula, observing the fragile *status quo* accomplished at some historical moments, and also the ambivalence of choosing a philosophy or the opposite way of thinking when historical circumstances imposed it.

2. HISTORICAL EVOLUTION IN ROMANIA'S CONSTITUTIONAL DEVELOPMENT

2.1. Constitutions of the Romanian monarchy

In Romania, constitutional texts have had a very short life span. That is why from 1866 until now there have been 7 fundamental laws with 25 revisions. What does this mean? Is it that there is something wrong with Romanian constitutional thinking? That we cannot agree on the political institutional profile in a manner of reaching for stability and continuity? In an interpretation of history from a perspective of “fear and need for security” (Delumeau 1986), we can say that the revision of every constitution, much like every new constitution, is a response to a determinate fear about something specific to that historical moment. In these terms, we can assert that the text of the present constitution has as its main purpose “the exorcism of some demons haunting Romanian society after the Revolution: the dismemberment of the national, unitary, indivisible state and the restoration of the monarchy” (Carp and Stanomir 2008, p. 234).

Hence, there are enough reasons in Romanian history why there has been such frequent change in the life of constitutional texts. This fragility of the institutional *status quo* has given a specific profile to political evolution in

Romania and has created a festering place for a lot of diseases and weaknesses of constitutional thinking.

The first Constitution of the United Principalities (later Kingdom) of Romania was adopted on July 1st 1866. Inspired by the Belgian Constitution from February 7th 1831, one of the most liberal constitutions in Europe at the time, the Romanian Constitution of 1866 proclaimed elected monarchy as the form of government, the separation of powers principle as a basic constitutional norm, the bicameral system, the immunity of parliamentarians, ministerial responsibility and numerous civil rights and liberties given in the spirit of that time. Nevertheless, the Constitution of 1866 was revised no fewer than three times.

In 1923, after the expansion of the national territory following the Great Union of 1918 amid the territorial and population-related changes, the new minorities (Hungarian, German, Ruthenian, Serbian), as well as the new religions (Greek-Catholic, Protestant, Catholic), a new constitution seemed to be necessary and was approved. The newly-adopted constitution maintained the general principles of the one from 1866. In fact, it was “the former Constitution, revised to some extent” (Focseneanu 1992, p. 60) and fully accepted, in order to express the will of all Romanian citizens to uphold its provisions. However, new elements occurred: a simpler electoral system, several guarantees for the rights of national minorities, some small administrative and institutional reforms. Thus, the new constitution kept the spirit of the previous one, but took a more modern form, a superior one from the point of view of juridical techniques, using modern language to adapt the old constitutional provisions to the new political, economic and social situation of the post-war age. It should also be mentioned the tendency to instil a checking system of citizens’ rights and liberties, and with regard to the regime of the powers in the state (Focseneanu 1992, pp. 70-72).

In 1938, the fragile democratic tradition which had been started in 1866 was broken by King Carol II, who abrogated the 1923 Constitution and imposed an undemocratic constitution, only one month after he had abolished all parties, embracing supreme power. By those acts, the King defied the constitutional revision procedure, as the constitution itself did not emerge from the nation, but from the executive power. That was a massive and ill-timed step backwards. The exercise of constitutional power became a royal monopoly, with the King turning into a powerful “head of the state”, imposing

very strict discipline and demanding obedience from the people. That type of monarchy fostered a strange and unhealthy pattern, where “King reigns and King governs at the same time” (Focseneanu 1992, p. 78).

2.2. Communist Constitutions

In the communist period, three constitutions were implemented: in 1948, 1952 and 1955. After a fraudulent election in 1946, the communists imposed a new political establishment, compelling King Michael I at the end of 1947 to abdicate, abolishing monarchy and proclaiming the Romanian People’s Republic. All democratic forces were summarily liquidated and Romania entered, also as a constitutional formula, the Soviet political system, using the widely known economic practices: nationalization of industries and banks, collectivization of agriculture, etc. In 1948, The Assembly of Deputies was replaced by The Great National Assembly and legislative power was passed to the executive. The economic provisions overwhelmed the political. Private property was abolished, judges’ irrevocability was removed, and the Constitution could be amended through an ordinary procedure.

The next step of the process of identifying with other states from communist Eastern Europe and with the Soviet constitutional model was made by the Constitution of 1952. It was a constitution which reflected the relationship and nearness to the Soviet Union, the affirmation of socialist property, and an undemocratic growth in the number of citizens’ duties compared to their rights.

Likely to be considered monocratic constitutions, given the single political formation, the Communist Party, which generated them through a “manifested power monopolization and a proliferation of abuse” (Focseneanu 1992, p. 137), the communist constitutions legitimated the abrogation of the separation of powers principle and resorted to a serious personalization of power established with the presidential function of the Republic in 1974.

3. TRANSITION TO DEMOCRACY

After the Revolution of 1989, a new constitution was adopted in 1991. The Romanian Constitution as a fundamental law establishes the structure of

the institutional establishment, the functions of each political institution, the principles of legitimacy of government, Romanian citizens' rights and obligations, the parliamentary system of law-making and its procedures etc. The 1991 Romanian Constitution, a result of the Constituent Assembly, was adopted by a National Referendum on 8th of December and it had a single amendment process, being revised in 2003, amid the objective of joining the EU and NATO.

The current Constitution it is not a profoundly original project, but an eclectic assembly of articles and provisions from several constitutions, declarations, charters, with a major influence of the French Constitution of 1958.

As a technical law structure, the Constitution of 1991, as revised in 2003, contains 156 articles, divided into 8 major sections or "Titles": General principles; Fundamental Rights, Freedoms, and Duties; Public authorities; The economy and public finance; Constitutional Court; Euro-Atlantic integration; Revision of the Constitution; Final and transitional provisions.

3.1. Strengths and weaknesses of the '91 Constitution

The post-revolution Constitution marked a prominent step towards democracy, breaking the long age of communist constitutional provisions. The new Constitution imposes the rule of law as the framework of political and public life, and also as the standard and imperative of a genuine democracy. The separation of powers principle and the check and balance idea began to take root in political philosophy, as well as in public discourse. There, we find the settlement of the organization of Parliament, Presidency, Government, and bodies of public administration at the central and local level, the judicial power structures, with relations of control and support among these political institutions. The political construction is far from being perfect, but the affirmation of relative independence and the interconnections of the parts of this institutional system amid its hierarchy do matter.

In fact, the major ends of such provisions are the assertion and preservation of human dignity, of the fundamental rights of citizens, the free

development of the human being, the institution of social equity and political pluralism¹.

But there are several limitations of the 1991 Constitution and these weaknesses have prompted much criticism in constitutional and political literature. It has been said that the 1991 Constitution is a split from the Romanian democratic constitutional tradition and that the option for foreign patterns and formulas was not wise. It is to be mentioned though that the democratic constitutional tradition was a short one, so is it a better choice to use a short experience instead of importing a foreign model, i.e. borrowing ideas from much more experienced states in terms of democracy and rule of law practices? Is this habit of continually subjecting our institutions to foreign patterns not a doubtful one or at least too harsh?

Eclecticism was a practice in use when creating the post-communist Constitution and it became visible by employing several constitutional sections from many European constitutions (the French, the Belgian, the Swedish, etc.), and even from *The European Convention on Human Rights*. The emerged Constitution did not keep anything from the ones of 1866 or 1923, but instead it replicated ample parts of the French Constitution from 1958 and, with regard to presidential powers, we can even find traces of the socialist Romanian Constitution of 1965. The People's Advocate (article 58) is inspired by the Swedish Ombudsman institution and, unfortunately in the Romanian case, it is insufficiently covered by law and not at all known and properly called upon in the public sphere. Citizens' rights were meticulously enumerated, but insufficiently secured by constitutional guarantees (Focseneanu 1992, p. 158).

It is to be noticed the ambiguous *Trias politica* (separation of powers). The expression "power in the state" is replaced by "public authorities" and comprises: Parliament, the Romanian President, Government, Public Administration and Judicial Authority. Another ambiguity or inadvertence is the provision according to which "The President of Romania exercises the mediation function between the state powers", but the state powers are three, while the public authorities are five, and the executive power is too extended.

¹ According to a constitutional provision from the 1991 Romanian Constitution, published in *Monitorul Oficial* no. 233 from 21 Nov. 1991, art. 1, par. (3). This provision is challenging the previous demagogic provisions with respect to human rights, from the communist constitutions mentioned.

The Executive comprises three public authorities: President, Government and Public Administration.

There are also legislative problems: the main issue being the Government's plausible abuse of legislative delegation when using parliamentary privileges in adopting laws. The spirit of any democratic constitution is to entrust with this a single legislative institution, Parliament, regardless of its name (Assembly, Parliament, National Representation¹, House of Lords and House of Commons², National Assembly³, Bundestag and Bundesrat⁴, Congress, Sejm⁵, etc.). And albeit the Romanian Constitution proclaims Parliament as the only legislative power in the state, the Government may circumvent this provision in many ways: the legislative way, of project liability, through which a bill can become law without Parliament's vote and regular bill procedure, or by the practice of emergency ordinances, or through the legislative delegation procedure, in the case of ordinary laws. The abuse of emergency ordinances has also been criticized by the Venice Commission⁶ and will be the subject of a future amendment to the Romanian Constitution.

Another form of criticism pertains to the semi-presidential republic option, also an issue of questionable importation (Dima 2014). In fact, are there any reasons to wonder whether the Romanian political regime is semi-presidential or semi-parliamentary⁷? Considering that the French political formula was targeted, was this a good choice? "In similar situations, countries

¹ New Zealand.

² Great Britain.

³ France, Australia.

⁴ Germany.

⁵ Poland.

⁶ In its 2012 Opinion, the Venice Commission clearly recommended that "the issue of government emergency ordinances should be addressed. One of the reasons for the excessive use of such ordinances (140 emergency ordinances in 2011) appears to lie in the cumbersome legislative procedures in Parliament. Reform of Parliament should therefore be on the agenda. Even if quicker action through Government intervention were indeed required, urgent legislation, for example on implementing EU legislation, should be adopted by way of legislative delegation (Paragraphs 1 to 3 of article 115 of the Constitution)."

⁷ The Venice commission also believes that the Romanian Government "is still halfway between parliamentary system and presidential system, in such a way that it can be easily qualified both as semi-parliamentary and/or semi-presidential".

like Germany, Italy and Spain, after right-wing dictatorships, or Hungary and Czechoslovakia, after left-wing dictatorships, chose parliamentary democracies. The French pattern was a bad choice" (Deleanu 2008, p. 162), especially because of political and social instability, leading to about 15 constitutions in 200 years.

The omission of imposing the rule of ministerial countersigning of every presidential decree is another limit to be discussed. The 1923 Constitution provided that rule. The President's decrees are almost never countersigned by ministers and by the Prime-Minister, besides in cases of international liability, in exceptional conditions or when granting social rights.

Romanian citizens are not allowed to complain directly to the Constitutional Court when harmed by a public authority, which is a very critical limitation, again of French inspiration. Meanwhile, the Constitutional Court is allowed to reject any objections of unconstitutionality without subpoenaing any parties, which paves the way for plausible abuse without any control.

3.2. 2003 - Constitutional Revision

Constitutions can be considered witnesses of history, whose moments are reflected and engraved within them. That is the reason why constitutions are to be reformed and amended. A constitution needs some time to tackle new social and/or international relations. A very important problem is a classic¹ one, which could be asserted in this way: "Who has the authority to make legal rules and by what process of enactment? Once established, how is the law made known? Who has the authority to amend or revoke a law once it has been enacted and proclaimed? How do changes in laws affect the regime and vice versa? How much legal change can a given regime tolerate? At what point do changed laws entail a *changed regime*?" (Josiah 2005, p. 398). With these issues in mind, we start questioning in fact the legitimacy of legislation and any acceptable answer is an attempt to solve the problem of legitimacy when instrumenting law, including the process of amending the law. From

¹ The issue was exposed in the Ancient Greek legal system, related to the legislation problem and amendment procedure.

this point of view, the provision of a clear, constitutionally-framed amendment procedure is a necessary instrument under the condition of responsible flexibility.

Amending the Constitution of 1991, after such a short period of time, was justified by the several deficiencies and dysfunctions manifesting themselves in the application of constitutional provisions under the exigency of solving all these problems that occurred. Could we consider the enforcement of the 1991 Constitution and the revision from 2003 as trial and error processes in the way of modernization of the state?

But beyond the criticism about the limits of the 1991 Constitution and not least a re-evaluation of the guarantees on liberty and human rights, perhaps the most important reason for revision was the request for a serious institutional preparation for integrating into the Euro-Atlantic structures.

The revision of the 1991 Constitution was approved by the Romanian Parliament, being adopted by a constitutional referendum held in October 2003. The new Constitution entered into force on 29th of October 2003. More than half of the articles of the Constitution underwent large or small changes. The revised Constitution comprises 156 articles, divided into 8 titles (one on "*Euro-Atlantic Integration*" has been added). In this form, the democratic character of the state has been legally reinforced and the citizens' access to decisional process has been clearly established. A more efficient manner of guaranteeing citizens' rights and freedoms has also been set in place.

There are new settlements, restatements and definitions; a distinct settlement of the democratic principle of the separation of powers has been included. Parliamentary immunity is now limited; the powers of the two parliamentary chambers are differentiated. A law comes into force three days after its publication in the Official Journal. The presidential mandate has been extended from four to five years in order to differentiate the parliamentary mandate from the Presidential one and to prevent the mutual influence and parties' interference.

Some procedures are more coherently provided: the specification of the cabinet reshuffle, the Government's assumption of responsibility etc. The legal regulation of adopting emergency ordinances has been implemented. The Prefect's status has been clarified.

In the Constitutional text, we can notice a promising increase in justice independence, together with the growth of the Constitutional Court's

institutional role. Procedures for joining the European Union and NATO do not require any further referendum. A parliamentary vote (by a 2/3 majority) is sufficient. Once Romania became a member of the European Union (EU), its citizens, just like any EU citizen, were given the right to vote and run for local elections.

The equality of citizens without any privilege or discrimination has been provided, as well as the access to public and civil dignities for double citizenship beneficiaries.

With regard to citizens' rights, private property is guaranteed and protected by law. The use of national minorities' languages in relation with local public administration authorities and decentralized public services has also been provided.

Not least, it was intended to give better citizen representation and shape active and participatory democracy by involving citizens in the decision-making process and giving them direct means of active participation in the state's activity (see the citizens' legislative initiative). The revised Constitution provides new means and instruments for political decision influence, in keeping with the idea of civic society improvement (civic NGO's, foundations etc). NGOs, under the new provisions, may become real partners of the Government in the decision-making process. These organizations also appear as means of guaranteeing citizens' rights (Ionescu 2003, p. 147).

4. CONSTITUTIONAL ANTINOMIES IN THE EFFORT OF MODERNIZATION AND EUROPEANIZATION

Constitutional thinking has its own life and a relative independence of spiritual movement. A constitution is a witness of a historical moment and speaks about the political circumstances and social needs of that moment. An inflexible constitution challenges tendencies of modernization.

In constitutional dynamics, there are several aspects which might be characterized as antinomies. For instance, a sort of ambivalence of the vectors, the continuous oscillation to the opposite poles: modernization versus consolidation, cosmopolitanism versus autochthonism, ambiguity versus obsession for clarity, appetite for power versus temperance, the ambivalence of power discoloration versus ostentation, elitism versus civism and the side

effects of legislative delegation versus recurrence. We shall try to illustrate some of these Constitutional ailments in the following paragraphs.

4.1. Cosmopolite disease

Cosmopolite disease includes the antinomy between cosmopolitanism and traditionalism. One could notice a contemporary tendency of breaking the democratic constitutional tradition in Romania. For instance, nothing was kept from the 1866 or 1923 Constitutions in the current Constitution. On the contrary, we can find significant French influences and imports. The French Constitution of 4th October 1958 was a real model for the 1991 Romanian Constitution. There is also the Swedish influence - the chapter on the People's Advocate was inspired from the Swedish Constitution, with its Ombudsman idea. The influence of European ideals could be identified in some paragraphs taken from *The European Convention on Human Rights*, from September 3rd, 1953.

Nevertheless, an important lack is to be underlined. Traditionally, and also in many other Constitutional systems, presidential decrees require a counter-signature of the Prime-Minister and a minister responsible for the enforcement of such a decree. In the current Romanian Constitution, only a few Presidential decrees must be countersigned. This failure is one which has provided a source of irresponsibility and a cleavage between President and Prime-Minister/ministers. They have to apply a law over which they have no responsibility and for which the President himself could not and would not be held responsible.

On the other hand, and on the other pole of antinomy is the tendency of reversion to tradition: the Romanian Parliament is bicameral, confirming¹ the traditional principle that had been applied from 1864 until communist times. The reinvention of the second Chamber of Parliament is just a disguise of continuity, because in 1866 and perhaps even in 1923 the Senate had a

¹ We can notice nowadays several projects aimed at a new constitutional revision, where an important objective might be a minimalist Parliament (reducing the number of members), or even removing one of the two chambers, thus establishing a unicameral parliamentary model. Then, the principle of tradition will be denied once again.

balancing role, which might be an aspiration and an inspiration for the present and future Romanian Senate (Carp and Stanomir 2008, p. 206).

The extradition issue is also a traditional practice. In 1938, the Criminal Procedure Code - Carol II (art. 630-638), inspired by Belgian and also French laws, provided a mixed system of extradition: the first research was to be conducted by the prosecutor and by the magistrate, then the court had to decide on the admission or rejection of the extradition petition, and that decision had only an advisory character because the final decision was the Government's. The Government had the right to decide in a sovereign and indefeasible way whether extradition was to be granted or not. But if the court rejected the petition, the decision in discussion was not an advisory but a binding one. So, in case of rejection, the extradition system was completely judicial, and not political.

The 1991 Constitution provides that Romanian citizens should not be extradited or expelled. This was, at that moment, a very secure way of dealing with the matter. However, an amendment occurred in 2003¹: a Romanian citizen could be extradited in special conditions, but only upon ruling by the court. It is a way to keep some traditional points of view by not including political issues, but only judicial criteria.

Another issue is the one about system of government and monarchy dissolution in Romania. There were some discussions about monarchy in the public space, but not a proper public debate on this issue. The Constitutional Thesis from 1990 and the project of constitution, subject to public referendum, offered only one option in a package where the republican regime was included, with no alternative, just "take it or leave it!" Thus, the Interwar monarchical tradition was denied and all the heads of state after 1991 have claimed that the national government is closer to the French Fifth Republic

¹ Expulsion ARTICLE 19:

"(1) No Romanian citizen shall be extradited or expelled from Romania.

(2) By exemption from the provisions of paragraph (1), Romanian citizens can be extradited based on the international agreements Romania is a party to, according to the law and on a mutual basis.

(3) Aliens and stateless persons may be extradited only in compliance with an international convention or in terms of reciprocity.

(4) Expulsion or extradition shall be ruled by the court."

than to the Constitutional Interwar Monarchic system (Carp and Stanomir 2008, p. 259).

But the question is whether the Presidential Institution and the semi-presidential republic system are really a modern, European, efficient constitutional solution, while the monarchy is obsolete and undesirable. It is a fact that there are many examples of monarchy criticism in more traditional European monarchies, such as Great Britain or Belgium, so maybe there is one legitimate question: should we return to monarchy at the very moment when some European states are eager to abandon the monarchic regime?

The semi-presidential option, even as an attenuated semi-presidential alternative (Sartori 2006), assumes the cohabitation of a President elected through a popular vote (universal suffrage) with a Government, in the form of a dual executive authority. The Romanian option for a semi-presidential republic is even stranger in a context where many former communist countries from Eastern Europe preferred a parliamentary republic and no presidential approach. So, the Romanian case is a particular one in the light of this option, unlinked to the idea of modernity.

4.2. The ambiguity towards modernity

Any Constitutional text lives at the border between political and juridical discourse and has a founding role of the nation itself (Carp and Stanomir 2008, p. 85). This is the reason why it is very easy for some ambiguities to creep¹ into that text and, at the same time, there is a propensity for flexibility. Flexibility in Constitutional thinking indicates a fear of rigidity, but assumes the risk of producing blockages and political crises. A flexible constitution, a tendency of a “let it be” attitude in the constitutional text interpretation may lead to an excess of liberty, which in legal terms might be perceived as threatening the original spirit of the Constitution. Indeed, it allows too much speculation around the rules and leaves an impression of insecurity, explained by the very frequent appeal to the Constitutional Court for clarification.

¹ “In an issue of ‘constitutionalisation’ of EU treaties, giving EU law a far greater role than expected in everyday life and generating the theory of ‘competence creep’” (Corrias 2011, p. 153).

Some examples of excessive interpretation and speculation on a Constitutional text may be given by referring to the interpretation of Articles 85¹ and 103² - the Government investment procedure - making the President an active player in designating the Prime-Minister, after consulting with the representative parties from Parliament. An entire discussion started from these articles. Is the opinion of the Parliamentary majority compulsory or just a formality to be fulfilled? Is the president bound by the opinion of the Parliamentary majority? In what cases? This debate finally involved the Constitutional Court, an institution that has acquired the role of arbiter in the political and Constitutional public life for any disagreement, no matter how important they may be.

The other side of the antinomy is the plea for a constitution that is as accurate as a cookbook for beginners, covering every particular case with prescriptions. The tendency to promote a precise, almost rigid constitution in order to avoid any misunderstanding in constitutional practice is not at all a sign of modernity.

4.3. From elitism to civism for Europeanization

The post-communist stage of constitutional reframing induced an excess of scientism in the constitutional process. First, the constitutional process was an elitist one, involving academics, specialising in constitutional law, able to offer a theoretical endowment to the constitutional project. The procedure of constitution enacting included three stages: debate, amendment and endorsing of the "Thesis" of the future constitution; the debate, amendment and endorsing of the project of constitution and the endorsement by Referendum of the constitution meant that, from that moment on, the constitution entered into force. This difficult process gave a conventional feature to the constitution (Deleanu 2008, p. 417), but it also represented the expression of the sovereign

¹ Article 85 (1): "The President of Romania shall designate a candidate to the office of Prime-Minister and appoint the Government on the basis of the vote of confidence of Parliament."

² Article 103 (1): "The President of Romania shall designate a candidate to the office of Prime-Minister, as a result of his consultation with the party which has obtained absolute majority in Parliament, or - unless such a majority exists - with the parties represented in Parliament."

will of the Romanian people and reflected the juridical and political values of the parties and parliamentary groups at the time.

Moreover, we can notice the absence of a genuine public debate on constitutional issues. The debate included only a few influential circles and broadly lacked a public and civic voice. Certainly, we can assert that one may hardly talk about a civic voice, meaning a civic society at that time. This deficiency was tackled later by supporting, including through a legal framework, the development of the civil society in an effort of modernization, democratization and Europeanization. But at that time, constitutional theses were created by a few experts, leaving public desires aside, and at referendum time the Romanian people had only two options: to validate the project, accepting the entire “package” without any selection or amending possibilities, or to reject it in its entirety. There was no public debate or consultation, no attempt to determine the people’s will and intentions, not even on delicate issues like the republican option or the semi-presidential one.

Nonetheless, the constitutional discourse is conducted in the name of the people. The legislative performance has a given legitimacy, including people as recipients and assuming their support and participation, even in a passive way. The legislator has a sort of monopoly over the “business”, but the channel of communication is unilateral. She makes, however, the symbolic reference to the subjects to be addressed, society, citizens, etc. There is an abstract order present in all the Constitutional texts. The preamble of most Charters, Proclamations, Declarations or Constitutions contain the impersonal, but quite real “we”, “we the people, we the nation/nations have decided”, etc., but in fact we have not decided anything, but one has decided on our behalf (Goudenhooff 2014, pp. 203-204).

On the other hand, we can notice the resort to an excessive practice of the referendum, in order to ensure an apparent public constitutional acceptance. Maybe behind this practice is a legitimation intention and also one of covering the lack of a civic voice in the Constitutional process. In order to gain legitimacy or to increase it, even if legitimacy is already acquired through the election process, the public discourse invokes the people’s voice and will. This practice engages its negative dimension: a reduplicated propaganda attitude of an uncertain nature. The frequent and unnecessary appeal to the public voice reveals some uncertainty or hypocrisy. The positive part is the intervention of the civil society in overseeing political activities and the

increasing attention from the authorities paid to defending European values and aims, with respect to civic participation and citizenship.

In any modern society, citizenship should be thought as an act of political participation, and the second article of the Romanian Constitution lays down this purpose even at a theoretical level¹. This provision is a first-time institutionalization of the Referendum in Constitutional Law. But the Referendum, when excessively practiced, could endanger Parliament's authority and legitimacy. That is the reason why the use of the Referendum should not be perceived as an alternative to the semi-direct democracy expressed by Parliamentary voice, but as a complementary practice (Carp and Stanomir 2008, p. 249). This idea is underlined by the Council of Europe in Recommendation no. 1704².

4.4. The appetite for power

There is a reality belonging to human nature, a peculiarity that neither time nor the progress of human kind could deny: the appetite for power. Sometimes, it is to be found even under the pretext of the public good or public interest, or it may be openly presented and exposed as a quality of determined and strong political manhood, making one eligible for political exercise. But it is generally admitted that the extrapolation of this appetite for power is wrong in itself and especially given its consequences: it could bring the danger of authoritarianism or at least of an abnormal extension of power,

¹ Romanian Constitution, ARTICLE 2:

“(1) The national sovereignty shall reside within the Romanian people, who shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum.

(2) No group or person may exercise sovereignty in one's own name.”

² Recommendation 1704/2005. “Referendums: towards good practices in Europe: 5. Being convinced of the complementarity between direct and representative democracy, the Parliamentary Assembly recommends the use of referendums as a means to reinforce the democratic legitimacy of political decisions, enhance the accountability of representative institutions, increase the openness and transparency of decision making and stimulate the direct involvement of the electorate in the political process. Complementarity between direct and representative democracy implies that referendums should not be considered as an alternative to parliamentary democracy and should not be misused to undermine the legitimacy and primacy of parliaments as legislative bodies.”

endangering the fragile democracy edifice in a country experiencing transition towards democracy. That is why a question about the correlation between the tendency to increase the appetite for power and constitutional provisions is legitimate. Should the Constitution institute several guarantees in order to limit the expansion of the appetite for power? Does it?

In the first Constitutional Configuration (1991), *Trias politica* was not stated in the constitutional text. In 2003, the revision of the Constitution included *expresis verbis* the separation of powers. Accidentally or not, the ambiguity of power separation is an unswerving habit in Romanian constitutional life, and has allowed the escalation of a very dangerous disease, the unstoppable appetite for power.

A first example is the controversy around Ion Iliescu's presidential mandates. He earned the nickname "three-mandate-Iliescu" after he decided, in 1996, to once again run for the Presidential chair, even if the Constitution limits the possibility of being President to only two terms for the same person. The Constitutional Court gave him the possibility to run for the supreme political position using the unfounded reason that the first presidential term (1990-1992) was not a whole four-year mandate. The appetite for a new presidential term was completed by a controversial Constitutional Court decision.

In order to end this constitutional weakness, the Constitution text limited the number of presidential mandates in the provision of art. 81¹ from the amended Constitution of 2003. But the same Constitution extended the presidential term from four to five years.

4.5. The ambivalence of power discoloration

In order to ensure that the aims of democracy are met, as well as to modernize and Europeanize the Constitution as much as possible, there were some constitutional provisions on the de-politicization of several institutions, a process named "discoloration", which primarily concerns the President and the Prefect.

¹ Art. 81 (4): "No one may hold the office of President of Romania but for two terms of office at most, which can also be consecutive."

The Romanian President is not allowed to be a member of any political party¹, or to be involved in political activities during his term of office. He is supposed to be a President of all Romanian citizens without any difference pertaining to political colour. But in fact, the candidate to the Presidency is usually a salient member of a political party and/or has strong support from a political party. According to the constitutional provision after the election process, we witness the President's "discoloration" and a process of becoming neutral and unbiased.

On the issue of the Prefect institution, Article 123 of the Romanian Constitution, revised and republished, stipulates that the Government will appoint a prefect in each county and in the Municipality of Bucharest. The Prefect is the representative of the Government at the local level and the prefect's attributions are framed by organic law².

On the Prefect's "discoloration", Law 340/2004, on the Prefect and the Prefect's institution, at Article 17, specifies that neither the prefect, nor the under-prefect, as high public officials, shall be allowed to be members of any political party or any organization related to political parties by juridical regime, according to the law. The penalty for breaking this provision is public dismissal.

But is discoloration really possible or is it a fake expression of impartiality? This subject is to be approached from many points of view. Often, the political discoloration of high-ranking officials has been discussed in the light of deontology, hypocrisy and demagogy.

On the other hand, assuming political colour and genuine political orientation together with the respect for citizens and for the public interest would be better than embracing impossible ideals as it is the legal imperative of anyone who has left their political party. This imperative is, in reality, a formal rule, which everyone obeys without believing in it.

¹ Art. 84 (1): "During his term of office, the President of Romania may not be a member of any political party, nor may he perform any other public or private office."

² The law concerning this matter is 340/2004, on the Prefect and the Prefect's institution, published in The Official Journal no. 658/21 July 2004.

4.6. The side-effects of legislative delegation

Legislative delegation or the substitution procedure is the act of transferring the attribute of legislation, as an exception, in quite restrictive terms, from the legislative power (Parliament) to the executive power (Government), as mentioned in the problematic Article 115. This procedure was thought as a substitute for the normal parliamentary law-making activity, particularly in times of crisis, critical situations, and even war. By this procedure, the Government is able to produce ordinances and emergency ordinances, which might be useful in order to ensure a continuous legislative activity¹, but it is also able to usurp the legislative parliamentary function. The delegation procedure raises a genuinely controversial problem about the constitutional principle of separation of powers and of the “*delagata potestas non delegatur*”. According to the latter’s provisions, law-making is not an original power, created by itself, but a right assigned by the Constitution and the Constituent Assembly in the name of the Nation, so it cannot be delegated (Deleanu 2008, p. 699). In another opinion, it is not one of the *Trias politica* to be delegated, but only a mandate or commission in the field of regulation (Vid 1999, p. 116).

But the procedure itself is not controversial. It is to be noted that a lot of other countries use it. The problem is the tendency to cross the line: an exceptional practice becomes a habitual one, devaluating Parliamentary attributions and the relevance of the institution itself. Governance by regular use of emergency ordinances is abnormal and irregular, tending to cover areas which require a very technical regulation, and even removing Parliamentary opposition. Still, this regulation category should be maintained, as a “necessary evil” (Deleanu 2008), within some legal limits, without any generalization and particularly without substituting the parliamentary function. The idea of obstructing any governmental legislative initiative is not better than empowering it, so long as there are a lot of useful, efficient, reliable initiatives provided by the Government office.

¹ It permits the regulatory recovery process and solves problems with the interruption of Parliamentary activities, such as during the holidays between Parliamentary sessions.

4.7. Recurrence of representation

Representations about government and politics are elastic and recurrent (Goudenhoofd 2009, p. 79). As a tendency, in time, we go back to the first representation or to a similar one, as long as the new images of the ulterior representations are not continuously sustained. A lot of studies have documented a negative image of administration and Government and even if in time, there have been a lot of efforts and achievements on the issues of fighting corruption and administration decentralization and reform (Dogot 2006; Dogot 2010), a new and better image cannot replace the previous one, unless the new image is fixed through permanent relevant facts. Otherwise, the Romanian people will continue to blame the administration, Government, Parliament, President and politicians and to perpetuate the distrust chain if the public discourse does not succeed in abandoning manipulation means and becoming a reliable, trustful, result-based one.

5. CONCLUSION

All of these specific diseases or weaknesses of political constitutional behaviour reflect our society at some moment in its constitutional evolution, emphasizing several inheritances but also numerous loaned models on its way towards finding the proper Constitutional framework. Does the pursuit of or even obsession about a proper way make any sense? Is it not better to just take a stable pattern of constitutional democracy and follow it? Is the constitutional journey finished or shall we witness a new revision paradigm according to the political will of the Government, using all the findings resulting from public debates and constitutional forums, including the ones organized by the civil society, which have fortunately been more common lately than in the 90s?

The strengthening of constitutional culture, its absence often being noticed (Blokker 2012), should be an objective for the Romanians' aspirations for achieving the principle of rule of law and for a genuine civic life or a beneficial evolution of constitutionalism in Romania (Balan 2013).

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