CONSTITUTIONAL PRAGMATISM

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The constitutional pragmatism expresses the reality existing in some countries of the world, where Constitutions drawn up many years ago and which are still in force, exist. These situations can be an example for the Romanian constitutionalism.

The paper also includes positive, but also critical appraisals concerning the Romanian Constitution and the texts that could be improved, namely those concerning the bicameralism, the immunity, the compatibilities, judges' immovability etc.

I. I would like to stress the actuality and importance of this scientific event. Its actuality comes from the reality that one of the major issues that dominate the Romanian political and juridical life is just the viability and the efficiency of the fundamental law. The importance of the scientific event will be assessed through discussions, expressing well grounded ideas and proposals that will help to identify the areas in which the Romanian constitutional system can be improved. And the improvements, natural in the context of the historical time being, are required even by the situation of the Romanian society, on the one hand and, by the demands of the integration into EU structures, on the other hand.

The legal basis of the constitutional order in our country is the Constitution. The current Constitution of Romania was passed in 1991 with a comfortable vote and approved by a popular referendum, also by a comfortable vote. In order to make judicious assessments on the Constitution we first must go back in history.

Thus, we will hold an initial finding according to which the constitutionalism, as a doctrine and philosophy, and the Constitution, as a practical expression, have a long history in Romania, an aspect that is sometimes neglected.

II. Often, when we examine the history of the Constitutions of the world, we express the admiration regarding the longevity of some and undoubtedly, we plea convincingly on the Constitution's stability. Because a Constitution is a profound reform, it must have a durable existence which will enable its achievement. Looking on the constitutional geography of the world, we will first identify the United States Constitution[1], first written Constitution in the world, which exceeded the venerable age of two centuries, then the Constitution of the United Kingdom of Great Britain and Northern Ireland[2] a customary constitutional (precisely mixed), whose content has been

[1] Adopted in 1787. See the text in E.S. Tanasescu, N. Paul, U.S. Constitution, All Beck Publishing House, Bucharest, 2002

[2] The English Constitution consists of *Magna Charta Libertatum* (1215); *Petition of Right* (June 7 June 1628) *Habeas Corpus* (1679); *Bill of Rights* (13 February 1689); *Act establishing the succession to the throne* (1701); *The Act of Parliament* (1911), setting out the powers of the House of Lords in relation to those of the House of Commons and the

crystallized in time starting with the famous Magna Charta Libertatum's John of England (1215) and, without doubt, the Constitution of New Zealand[3], also a customary Constitution.

The explanations of this longevity are multiple. We consider several, namely:

- the stability of the essential directions of socio-economic and political systems. In time, the natural developments took place, but with identifying and satisfying certain constants - the ideological and political foundations, the respect for human rights, the consistent application of the classic principle of separation and balance of powers, the democratic exercise of power, the supreme authorities in the state being legitimated by the popular vote, freely expressed. The doctrine states that the absence of a written Constitution in Great Britain and New Zealand is usually explained by their strong political consensus on the basic political rules, which would make superfluous a formal constitution[4];
- the flexibility of the Constitutions, which enabled improvements and corrections of the constitutional order, with a few amendments to the Constitutions[5]. The flexibility allowed the creation of institutions of higher power in the constitutional system, such as: the constitutionality control of laws in the USA[6], in Romania[7].

We name the situation briefly exposed as **constitutional pragmatism**. Understanding that the developing a Constitution requires great efforts, particularly scientific, but also the capitalization of domestic and foreign legal realities, the pragmatism could be adopted also in the Romanian constitutional strategy.

It is not exaggerated to recall other rules, namely:

1. The Constitution should be a national achievement. The transfers of Constitutions are not possible or advisable. There is not a template constitution, there are national Constitutions. In this respect, Hegel's findings remain valid in the sense that people must have the feeling of their right and the state of facts, towards their Constitution, otherwise it may exist, it is true, with an external face, but it has no meaning or value, knowing that "every nation has the constitution that fits and deserves"[8].

It is also pertinent to recall the beautiful Alexis de Tocqueville's notes in the sense that "the Constitution of the United States resembles those beautiful creations of human intelligence, which

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reducing of the term of office and Parliament Act (1949), which amended that in 1911; *the Act relating to representation* (1949), which strengthens the electoral system; *The Act on Human Rights* (1998), which encodes the the European Convention on Human Rights in the British law; *The Acts of decentralization of state power* (1998), authorizing the creation of the local parliaments in Scotland, Northern Ireland and Wales; *the Act on the House of Lords* (2002), where its powers of regulation have been reduced to annihilation; *conventions, practices and common law principles*. See I. Muraru, E.S. Tanasescu, *Constitutional Law and Political Institutions*, ed. 13, vol I. Publisher C.H. Beck, Bucharest, 2008, p. 47; A. Lijphart, *Patterns of democracy*, Polirom, 2006, p. 38-39, E.S. Tanasescu, N. Pavel, Constitutional acts of the United Kingdom of Great Britain and Northern Ireland, Publisher All Beck, Bucharest, 2003

[3] The Constitution contains a number of fundamental laws - *Constitution Acts* of 1852 and 1986, *electoral laws* of 1956 and 1993 and *Bill of Rights Act* of 1990 - conventions and customs. See: A. Lijphart, *Patterns of democracy*, Polirom Publishing House, 2006, p. 43, I. Muraru, E.S. Tanasescu, already cited ., p. 48

[4] A. Lijphart, cited work., p. 202

[5] U.S. Constitution known 26 amendments, the Constitution of Great Britain and Northern Ireland has been completed with a series of fundamental laws. View Bibliographic no. 2. Same for the New Zeelend Constitution.

[6] The Court of United States Supreme abusively assume the right to decide on the constitutionality of laws, by one of the most daring decision, Marbury v. Madison, in 1803. This decision used among the justifications the idea, existing in the political mentality, of an effective subordination of the law towards the constitution and the possibility of imposing a form of control even upon the legislature. View Muraru I., E. S. Tanasescu, cited work, p. 73

[7] The control of the constitutionality of laws performed by judges was hardly accepted in Europe. However, the doctrine of comparative law noted as a "Romanian precedence" (G. Conac, R.D.P. no. 1 / 2000), the fact that in 1911-1912, first Court of Ilfov and then the High Court of Cassation and Justice took the right to check the constitutionality of laws in the famous "affair of the trams in Bucharest".

[8] G.W.F. Hegel, *Principles of law philosophy*, Academiei Publisher, 1969, p. 316

covers with glory and wealth those who have invented them, but which remain sterile in other hands".[9]

No doubt, it is possible and even advisable the capitalisation of the aspects of content and procedures from other countries, with rich constitutional practice and experience. Let us remember the capitalisation of doctrinal and legal sources by the developers of the Romanian Constitution, approved by the referendum in 1991.

2. A Constitution is viable and effective if the citizens and the authorities believe in it and they correctly interpret and apply it. The civilizing role of the Constitution is always asserted. If it is received in the consciousness of the people and it is respected, the civilizing goals are achieved. We recall what the unique Hans Kelsen[10] said, that "the church and the state exist if the people believe in them".

Undoubtedly, this judgement is applicable for the Constitution.

3. Even constitutionalists who have promoted the rigid Constitution stressed that the constitutional revisions were possible, and without any doubt, also necessary. But such an event should take place for solid reasons. The damaging idea, that evil of society is due to the Constitution and that its removal produces progress should be removed. The fetishism upon Constitution either in a positive or negative way is not a solution. Constitutions should be revised or replaced in motivated cases. The Swiss Constitution case is interesting. On January 1, 2000, entered into force the new Constitution of Switzerland, which is actually an overhaul of the Constitution of 1874. Some regulations considered outdated, obsolete or simply unnecessary[11] had been removed from its text. We consider here also the additions to the Constitutions of the United Kingdom and New Zealand, as explained before.

III. There are some findings that allow us to discuss current situation and prospects of the Romanian Constitution.

It is important for us, Romanians, to have first the clear picture of our constitutional history.

The evolution of the Romanian Constitution was achieved in a context of economic, political and legal instability. Romania has seen a succession of political regimes, from democratic regimes (tainted by demagoguery, dilettantism, it is true), to dictatorial regimes, characterized by the concentration of public powers in the hands of an oligarchy, the lack of rights and freedoms, the lack of a representative system, legitimized by free and fair elections. Several Constitutions have been developed and applied, namely: the Statute of Cuza, the Constitutions of the years 1866, 1923, 1938, the socialist Constitutions of 1948, 1952 and 1965.

In the climate of freedom opened by the Romanian Revolution of December 1989, the Romanians' hopes in a modern and democratic constitutional system revived. In this climate, the Constituent Assembly voted the Romanian Constitution, the fundamental law which is still in force today.

This Constitution was the result of a comfortable popular and parliamentary majority. Thus, within the Constituent Assembly, of the total of 510 deputies and senators, 476 MPs responded to roll call (20 deputies and 13 senators expressed voting by mail), 414 members voted for the adoption of the Constitution, while 95 voted against[12], and during the popular referendum held on December 8, 1991, from a total of 10,948,468 participants, 8,464,624 participants responded YES

[9] A. de Tocqueville, *Democracy in America*, volume I, Humanitas Publisher, Bucharest, 1992, p. 91

[10] Hans Kelsen, *General Theory of State*, Bucharest, pattern Oltenia Publisher, 1928, p. 69-70.

[11] See I. Muraru, E.S. Tănăsescu, *New Swiss Constitution, a Constitution for the third millennium*. Review of Public Law no. 1 / 1999.

[12] *Genesis of the Constitution of Romania*, 1991. *Constituent Assembly working session*. Régie Autonome "Official Gazette", Bucharest, 1998, p. 1063

(77.3%), while 2,235,085 participants responded NO (20.4%) and a number of 248,759 votes were declared invalid (2.3%)[13].

The Constitution emerged as a successful social and political contract. In writing the Constitution and in the procedures of debate, voting and approval, it was clearly expressed the support of the political parties, parties which, although always in a strong competition, were able to contribute in solving the major problems of the country.

The successful implementation of this national pact was possible thanks to the enthusiasm generated by the victory against the totalitarian system, to the prospects of a democratic, social state of law and to the openness to freedom.

Achieved by exploiting the Romanian constitutional traditions, the experience and direct support of states in the Western Europe, by rethinking the perspectives of the Romanian society, the Constitution has built a modern, viable and efficient legal state system.[14]

IV. By applying the Constitution, its normative qualities could have been checked and naturally, its revision has been made in the year 2003.

No doubt, as in any field, there were sceptics, critics, dissatisfied persons. And these are natural reactions for a society opened to dialogue. Especially since, as they say, the progress is the work of those dissatisfied. The constitutionalists around the world characterized the Constitution as a perfectible legal and political pact. There is no perfect law. Let us remember the famous Jean Jacques Rousseau, who said that "it would be Gods to give men laws," adding that "if there were a people of Gods, they would govern democratically, but such a perfect government is not fit for the people".

If we consider the prospect of constitutional refinements, I think that the proposals have to be relevant and solid grounded. They must be a part of the requirements of a democratic constitutional order. Allow me to add that it is unworthy to impute our failures to the Constitution. To seek the true reasons and, therefore, to consider what the Constitution contains good, so we apply it in our daily practice.

Such natural behaviours are and should be alien from the disrespectful attitude towards the Constitution and, especially, they can not justify in any way the violation of the Constitution. The Constitution, its supremacy must be respected by all: public authorities, public officials, citizens. By respecting the Constitution, respecting the institutions operating under its provisions, we respect ourselves. Thus, we prove that we understood the regulator and civilizing role of the Basic Law.

V. A constitutional perspective first requires a correction made to the entire political regime. Today it may be noted that the transition from dictatorship to democracy and the rule of law is more difficult in practice than in theory. Some Romanian officials and politicians do not understand democracy as the rule of law. Others fetish the law and without doubt, even the Constitution.

We must deliver a better functioning of the majority – opposition system existing in Parliament. The opposition should be allowed to express itself for real, and the majority to decide.

By explaining the consensual model of democracy, it is shown that the government performed by the majority and the feature government - versus - opposition, can be seen as undemocratic, because they are principles of exclusion; the primary meaning of the democracy is that everyone affected by a decision should have the opportunity to participate in the decision-

[13] *Genesis of the Constitution of Romania*, 1991. *Constituent Assembly working session*. Régie Autonome "Official Gazette", Bucharest, 1998, p. 1809

[14] "In preparing this document, the democratic constitutional traditions of our country, including those reflected in the 1923 Constitution, the principles of modern constitutions, as fundaments, in particular, of the the European democracy regimes, international covenants and conventions devoted and guaranteeing human rights and freedoms and the aspirations and ideals of the Revolution of December 1989 were considered "- Antonie Iorgovan in the *Genesis of the Constitution of Romania*, 1991. *Constituent Assembly working session*. Régie Autonome "Official Gazette", Bucharest, 1998, p. 56

making process, either directly or through elected representatives; the second meaning is that the majority will would have prevailed; if this means that winning parties can take all the governmental decisions while the losers can criticize, but not govern, the two meanings are incompatible; to exclude the defeated groups outside of the decision making process clearly violates the primary meaning of democracy[15]. It is therefore essential that, in all its dimensions, the classical formula of Lincoln, that democracy is the government of the people by the people.

1. The **Bicameralism** created by the Constitution was and remained an undifferentiated bicameralism. On the occasion of the constitutional revision in 2003 it has been tried to rethink this issue in the way of giving the parliamentary Chambers their own identity in the performed activity. Primarily, through art. 75, it has been established as one of the Chamber to be the **first seized Chamber** and the other one to be the **decision Chamber**. In this respect, clear rules on filing constitutional initiatives and legislative proposals and on the discussions and voting procedures have been set. Now we can appreciate that the revision failed. In a constitutional perspective, we consider that the maintaining of the bicameral structure of the Parliament should be improved by at least **three reforms**: differentiated electoral legitimacy, differentiated composition, differentiated powers[16].

2. The **Immunity**, in all its nuances should be a subject to a strict examination. The practices and rules from the EU Member States should be capitalised.

It requires a reconsideration of the immunity regarding the item of inviolability[17]. It will thus give full satisfaction to art. 16 para. (2) of the Constitution, that states "Nobody is above the law".

3. The **Ministerial responsibility** is an institution that should meet some improvements, especially since the practice has shown that the constitutional protection of ministers is stronger than the one of Senators and Deputies, and even of the President of Romania. In this regard, a simple and effective solution would be achieved if the constitutional text would establish that “The legal and political responsibility of ministers is regulated by a special law”.

4. The compatibility of public dignities and positions with other positions. Undoubtedly, the reasons for which the Constituent legislator in 1991 upheld the cumulating of positions for some dignitaries and public officials, including magistrates, have been solid. We believe that the goal was reached, so that the cumulating reasons disappeared. Furthermore, there were no exaggerations. Therefore, in a constitutional perspective, the prohibition of any cumulating, in public or private sector, to any person holding a public office or dignity in one of the authorities mentioned in the Constitution can be analysed. We consider in particular the prohibition of cumulating a ministerial position with any elective, executive mandate, public or private.

5. The **irremovability of judges** was granted too easily, which has had repercussions, often serious, on the judicial process. The editors of the Constitution yielded in front of the enthusiasm characterising the historical moment and did not appreciate correctly the weight of irremovability in the judges’ behaviour, neglecting in fact, the Romanian constitutional tradition and the demands of

[15] A. Lijphart, cited work., p. 49

[16] See I. Muraru, A. Muraru, *A brief plea to a differentiated bicameralism*, RDP no. 1/2005, p. 1 - 11. A. Lijphart considers that the main justification for the establishment of a bicameral legislative instead of one composed of a single Chamber is to give a special representation of minorities, including the smaller states of the federal systems, in a secondary or upper chamber… Superior Chamber shall be elected on different bases from those of the lower Chamber and should have real powers ... The European Parliament is the lower house of the legislature and the Council of the European Union can be considered the upper house ... in the cited work p. 55, 57. For the advantages of bicameralism in an unitary state, see also I. Muraru, E.S. Tanasescu, *Constitutional Law and Political Institutions*, ed. 13, vol.ll, Publisher C.H. Beck, 2009, p. 165 to 168.

[17] The Parliamentary immunity is considered to include the lack of legal liability for speeches and votes, and inviolability. See I. Muraru, M. Constantinescu, *The Romanian parliamentary law*, All Beck Publisher, Bucharest, 2005, p. 6, 22, 329 ff. See also, Coord. Elena Simina Tanasescu, *Liability in the constitutional law*, CH Beck Publisher, Bucharest, 2007, especially p. 1 to 11.

the civilized states of the world. The only beneficiaries of the irremovability should be **only** the judges of the Courts of Appeal and of the High Court of Cassation and Justice, after fulfilling stringent conditions of professional and conduct nature.

6. Some technical improvements of the legal technique

Simple and clear rules on the entry into force of legal acts mentioned in the Constitution should be established, which can be achieved by an article included in the final provisions. This article could be worded as: "The normative or individual acts named by this Constitution shall be published in the Romanian Official Gazette and shall take effect 5 days after the publication date or on a subsequent date provided in their text."

7. Simplifications for some rules

Of course, some simplifications in the regulation of certain state authorities are required, thus avoiding confusion, speculative interpretations.

In particular we consider:

a) The institution of the **People's Advocate**, where the use of the classical name of "**ombudsman"** has become common and understood;

b) Public Ministry. We believe that the extensive regulation can be removed and replaced by a synthetic regulation, as for instance "The prosecutor ensures the prosecution in the criminal cases."

c) **The Court of Audit**. We believe that is possible to return to the simple regulation enshrined in the Romanian Constitution of 1923, according to which "The preventive control and the management of all state revenue and expenditure will be exercised by the Court of Audit, that every year submits to the Assembly of Deputies a general report summarizing the management accounts of the last budget, while signalling the irregularities committed by ministers in the budget application. The final regulation of expenses should be submitted to the Assembly of Deputies at the latest within two years after the end of each year "(Art. 115);" There is a single Court of Audit for the entire Romania (Art. 116).