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ELEMENTS OF ROMANIAN CONSTITUTIONAL HISTORY

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ELEMENTS OF ROMANIAN CONSTITUTIONAL HISTORY[1]

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Abstract:

Romania's constitutional history hardly gathers two centuries; along them, many of our fundamental papers were mostly imported ones, than national original creations.

At the beginning of the modern era, we received the frameworks of the constitutional life from the phanariots, Russians, and later from the European powers interested in setting the Principalities at the mouth of Danube. In 1866, we succeeded to strengthen a unification which was hardly accepted by the European powers and we adopted a constitution which translated into Romanian the text of the Kingdom of Belgium's fundamental law. Then, after The Great Unification from 1918, we made the first Romanian constitutional text, pursuant to the highest democratic standards of that time. Unfortunately, we abandoned it in 1938, by Carol the II[nd]'s coup d'état. Reinforced after the war, the 1923's Constitution was quickly replaced by the first Soviet-type constitution, in 1948. Two other communist constitutions followed: in 1952 and 1965; both of them set up orders of the single party and of the socialist property, with social extensions towards dictatorship and the cult of personality. After the anti-communist Revolution from 1989, Romania came again on the trajectory of the pluralist constitutional democracy. 1991's Constitution and its amendments from 2003 settled us within the European and Euro-Atlantic frameworks. Enough ambiguities still persist in our fundamental law, creating the environment of an inefficient operation of the state owned institutions, as well as a certain citizen's distrust in democracy.

Keywords:

Constitution, history, separation of powers, constitutional law

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Introduction

A story about the Romanian Constitution is as necessary as a family history, as a countryside monograph or a (decent) textbook of national history. We have to know how we disciplined from a bureaucratic, administrative and political points of view from the modern era, in order to understand where we still have to work at the roots of our nowadays behaviour marked either by the "Honour the work" emphatic declaration (set up compulsory at the end of the petitions written by the citizens of the Socialist Republic), or by the real saying about the curly hair puppy, which swears that it does not steal, in spite of all the evidence.

We, the Romanians, had a Constitution since the first half of the XIXth century, almost at the same time with other nations which are more prosperous and happier now. We created democratic institutions and we put them to work "for the people's sake", even if we had the conscious of "the forms without background". We geared either to the occidental democracy, or to the soviet totalitarianism, hoping that one day the unusual order will be overthrown, based on the well-known principle that kings' death means fools' joy. Nowadays, after more than two post-communism decades, we find ourselves in the fever of amending our fundamental law (assigned to our honourable members of Parliament of all professions – from turner to historian), asking ourselves whether it deserves changing something from our present Constitution, or maybe we are on the edge of repeating the same mistakes from the past, trying to fix (just like at the countryside) a broken fence which you would better demolish in order to make a new one, instead of patching it. Our story is one of a repeated obedience as regarding the Occident; it is at the same time, an outbreak of national identity, of political "originality" and useless protest.

Along almost three millenniums of pre-modern historical civilization which hallmarked us, the constitutional problem appears in a fugacious way during Hammurabi - the Babylonian king, in the classical Greek antiquity from Plato and Aristotle's time, as well as during the Republican Rome. As to the rest, the world was governed by the free agency of the powerful ones, without limitative texts (excepting the notable, but confusing Christian dictum which gave to Caesar those political things which were needless for God …). Only in the year 1215, the English barons imposed to the John without Country the document entitled *Magna Charta Libertatum*. In 1776, the Americans proclaimed

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Virginia Bill of Rights and the Frenchmen adopted their first constitution during the turbid times of the Revolution from 1789. The XIXth century will be more productive with a view to the constitutional texts (mostly in the context of the bourgeois revolutions from 1848), involving some ideological and juridical debates, where the liberal individualism, the separation of powers and the minimal state will be the main subjects, together with the older ideas of property and (economic, religious, of awareness and of expression) liberty guarantees. But this thing did not happen all over the world; the conservatory empires maintained the monarchical absolutism for a long time (the Ottomans adopted their first constitution in 1876 and the Russians in 1906).

The Beginnings

In the Romanian area, political associated with the neighbour powers, the evolution of the state organization started at about 1740, under the care of the phanariots (Constantin Mavrocordat, Alexandru Ipsilanti, Scarlat Callimachi and Ioan Caragea) who set up the first laws, including administrative elements, as well as private law elements. Texts with a content referring to the state order were also made by the native nobility (from Tudor Vladimirescu, to the Moldavian "Cărvunari"), asking for the independence of Walachia and Moldavia, as well as for a parliamentary monarchy, in order to guarantee the property law, the liberties from the *French Declaration of human beings and citizens' duties*, the worthwhile access to the public jobs, the penalization of the administrative abuses, order in the public finance and national army. Both the phanariots' legislation and the "terrestrial" nobility owned the piers of the feudal order, offering privileges to the laic and clerical aristocracy, where the ordinary people (either peasants or townsmen) had to pay. During the European modernity, we may say that the principalities from the Danube's mouth were sailing according the "feudalism – our national recipe" formula.

The state's modern organization principles were effectively applied only by the help of the introduction of the Organic Regulations (1831 in Walachia and 1832 in Moldavia) under the authority of - Russia, the protecting power, which dominated the Principalities, from a military point of view and by the help of Pavel Kiseleff (the governor), until the year 1834. The similar constitutional papers from those two states consecrated the powers' separation and the elective monarchy. In spite of

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this, the rulers had a great authority, exerting the executive power integrally, even in the legislative part (together with the Ordinary Public Convention) and in the juridical part, too. The regulations also imposed the setting up of ministries or central administrative departments (the internal affairs, finance, police, law, cults and state secretariat), as well as the administrative-territorial organization, based on counties and "plăşi" (small rural districts) in Wallachia, and the so-called "ţinuturi" (regions) and "ocoale" (a sort of wards). Justice is also organized on modern principles, being set up hierarchical instances for the civil and penal parts (from the countryside court, to the High Committee), as well as the administrative and commercial courts; there have been brought under regulation the jobs of judge, prosecutor and lawyer, in a new system of justice, which forbade the torture, the mutilation and the confiscation of fortune. The writing of the Principalities' Regulations, by some nobility commissions and approved by Russians, their "rectification" at the Petersburg's imperial court and the adoption by the public committees from Bucharest and Iasi demonstrate the fact that sometimes, the foreign interference can do good things, too. At that time, the Christian Empire did not have a constitution, as well as the Ottoman power; we had one! The terrestrial lords (reinforced by the Ottoman Empire in 1822) ruled the Principalities on the basis of the Organic Regulations up to 1848, when the liberal revolutionary groups searched for the Ottoman reliance in order to abolish what Bălcescu named "disorganized legislation", which brought pauperism in the Principalities and which was forcibly inforced by one hundred thousand Russian bayonets. In spite of the Romanian revolutionary people, the Ottomans did not accept the Regulations' abeyance, but reached an agreeemnt with the Russians, in 1849, by the help of the Balta-Liman Convention. The czarist army remained in our country till 1851. The lords were proclamed by the agreement of the two empires, for a seven years mandate; the representative meetings were replaced by some legislatures which were made up of rulers who were named by the Ottomans.

Constitutional Regulations for the United Principalities

In 1853, the deterioration of the relationship between the protector and the suzerain (as regarding the Russian rights of protecting the orthodox pilgrims at the Holy Places, in a competition with the rights of protection of France for the catholic pilgrims) reached the climax when

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the Russian occupied the Walachia and the rulers' exile to Wien; this is how the Crimeea War began. In March 1856, the Peace Treaty from Paris ended the conflict, the Tzarist Empire had to withstand the alliance between the Otomans, Britains, Frenchmen and the Sardinian Kingdom. The Danube Principalities were still under the Otoman suveranity and the Russian protectorate was replaced by the the "collective guarantee" statute, on behalf of the great European powers. Naturally, in such a situation, the constitutional paper which was released under the czarist control was suspended *de facto*. From the French interest games (they went nap on the nationalism in a conjectural way) as well as the Austrian ones (for whom a Moldavian-Wallachian union might have represented a point of interest for the Transylvanian people), they reached a compromise, setting up a sort of two-state confederation, each one with a ruler, parliament and a distinct govern, but also with a Central Commission and an unique Court of Cassation (with the headquarters in Focşani), in order to harmonize the common interset problems. In 1857, the ad-hoc committees were convoked in Moldavia and Muntenia, in order to agree upon the conditions of the common evolution of the two Principalities, as well as for the elcetion of the two rulers. They had to exert thier executive attributions, and the legislative ones had to fulfil on the basis of a common agreement with the Central Commission from Focşani. Thus, the Principalities made a first step toward the unification.

For a further step, the Romanians found an inventive solution: the double election of Alexandru Ioan Cuza as a ruler, in Iaşi and Bucureşti, in 1859, January. Hardly agreed by the Otomans and the rest of the European powers, the ellection was folloed by a number of reforms in the sense of the Moldavian-Wallachian unity, which deepened from an institutional point of view at the beginning of 1862; that was the moment when a single parliament and a single govern were set up, for a new country named Romania.

But things evolved in a difficult way, because the ruler of a moderate liberal orientation was not backed in the legislative meeting, neither from the conservative members (the majority), nor from the radical liberals.

Between 1859 and 1862, there were five elections for the legislative committees and twenty governs followed, hoping that the situation will be unlocked someday. In the end, at the beginning of May, 1864, the conflict between the ruler and the legislative ended with its

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dissolution and with two papers issued by Cuza and his prime-minister – Mihail Kogălniceanu: The Devoloping Statute of the Convention from Paris and a new election law. Both of them were submited to the plebiscite, at May10th, 1864. The great powers found out about this change, without enjoying it, but understanding once again, the political reasons of this fullfilled fact.

The constitutional regime imposed by Cuza, by the help of the *Developing Statute* text, empowered the ruler both from a legislative and an executive point of view. He could issue decrees with no parliamentary notice; he had legislative initiative, being technically backed by a new body – The State Council.

The Parliament became bicameral, being made up of the Elective Committee and the Moderating Body (The Senate), which had the role of "censoring" the decisions of the inferior chamber and of exerting the constitutionality control. The Elective Committee was directly elected by the citizens (in the conditions of the censitary vote), for a seven years mandate; due to the new election law, the Elective Committee was no more dominated by the conservatory nobility, because the right to vote was no longer conditioned only by the incomes from land exploitation. Thus, Cuza averted the opposition with a view to his liberal reforms. The control of the executive upon the Elective Committee was generated by the fact that its president was designated yearly by the ruler, and the operating regulation of the Chamber was issued by the Govern. As regarding the Senate, its body parts were set up partially by the ruler, too. Among the senators, there were required the Primate Metropolitan (also having the job of President) and the bishops of the eparchies, the first President of the Court of Cassation, the old general of the army and other 64 members (half of them representing the counties and the other half being chosen by the ruler according to their "merits". Half of the senators' mandates were renewed every three years, by ballot.

In comparison with the institutional arrangement issued by the Paris Convention, the *Developing Statute* allowed a personal power regime of the state's leader. The authoritarian accents of Cuza were not enjoyed by many of the politicians of that time; they surpassed their animosities and contributed at the coup d'etat from 1866, February. The prince was forced to abdicate and exiled. After they tried to crown Philip of Flanders (from the ruling dynasty of Belgium) – but they failed, the political crisis and the risk of abolishing Romania's unity ended with the proclamation of

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Carol de Hohenzollern-Sigmaringen as a ruler. Having a new ruler, Romania needed a new constitution, too.

The First Romanian Constitution, but Belgian …

The first Romanian Constitution was enacted at July 1st, 1866, its content being copiously inspired by the Belgian Constitution from 1831 (which had to come together with the ruler). The legislative committee - which proclaimed Carol Ist as a ruler – became Constituent Committee, issuing and voting the first text which was not imposed neither by the suzerain power, nor by those seven surety powers. According to the Constitution, Romania became an ereditarian monarchy, where the following political-juridical principles were kept: national suveranity, separation of powers within the state, the representative governing, the ministerial responsability, the Constitution's supremacy upon all laws. At the same time, Romania's Constitution proclaimed and guaranteed all the rights and civil liberties written in "The Declaration of the rights of man and of the Citizen" from 1789. The long-lasting primary act of Romania, the Constitution from 1866 was three times ammended: in 1879, in order not to condition the Romanian citizenship at a Christian rite membership; in 1884, in order to diminish the number of ellectoral colleges and to expand the voting rights, as well as for the introduction of "Romania" and "king" denominations, instead of "The United Principalities" and "lord"; in 1917, for eliminating the "sacre and intangible" character of the property, in order to achieve the aggregation reform (they put the peasants - who fought on the front lines - into possession of land).

The Constitution of the Great Romania

In 1923, as a follow up of the process of creating an unitarian national state (in 1918, Basarabia, Bucovina and Transilvania unified with the Kingdom of Romania) and as a follow up of the introduction of the universal vote, the Constitution from 1866 was replaced by another one, being considered one of the most democratic constitutions from Europe. The new constitutional act did not ignored integrally the old one; practically, half of its articles (73 from 138) were taken from the 1866's text. The state life remained the same, but gained a much modern expresion with a view to the constitutional language.

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The way in which they attained the final text of the Constitution is very interesting. Initially, there were four projects, three of them belonged to some politicians (I. C. Brătianu, the liberal, Constantin Stere, and the representative of the Romanian National Party from Transylvania, Romulus Boilă), and the expert Constantin Berariu. The bicameral Parliament elected in 1922, March, dominated by liberals, assumed the revision of the Constitution, even if this thing was synonymous with convening a constituent council (according to article 129 form the 1866's Constitution). The liberals did not assume the risk of losing two thirds from the parliamentary majority (which was necessary then, as well as nowadays) and thus, they forced the amendment/adoption of the Constitution by an ordinary legislative council, by the vote of the Senate and of the Chamber of Deputies from March 26th and 27th, 1923.

The Constitutions from 1866 and 1923 are cosidered by the community of historians and by the most of the political analysts, as being some juridical pieces of works; by virtue of these works, there was set up a democratic regime of parliamentary monarchy, where the king ruled, but did not governed. In other words, the monarch was a sort of moderator of the political life and a guarantor of liberties, situating himself above the partisan interests, and due to his German origin, above the Balkanical spirit. The reality was a little bit different. Carol Ist and his descendant, Ferdinand Ist (to say nothing of the special case of Carol the IInd), had a great power of direct influence of the power, by their large prerogatives. Thus, in legislative terms, Romania's kings had legislative initiative, promulgated and rejected laws which were voted by the parliament, elaborated norms for applying the laws, convoked and closed the parliamentary sessions (ordinary or extraordinary ones) and could dissolve every chamber of the national agency, being summoned general elections afterwards. By this last mechanism, they reached an unwritten rule, by means of which, the govern that organized the elections was supposed to win, having thus, its parliamentary majority (as the conservator P. P. Carp said in a suggestive way: "Your Majesty, give me the Govern and I'll give you the Parliament!"). The executive power was assigned to the king, who carried it on by his ministers, they also being responsible for his executive deeds; he appointed the prime-minister and the ministers; he had the power of dismissing the govern. It is true that the judicial power was exonerated by the possible interference of the monarch, but he could commute, diminish or abolish a punishment (excepting the ones for the

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ministers). A king with such prerogatives (adding here the leadership of the army, the transaction of the international contracts and "coinage") did not look as one who … governed. He was more the follower of the ruling tradition from the Romanian feudal states.

Constitution and Dictatorship in Romania before comunism

The kingship consolidated its power positions in 1938, together with the institution of the carlist dictatorship, inspired by the ideas of the corporatist doctrine. That was the time when another fundamental law (plebiscite at February, 24th) was imposed; it consecrated "the monarchical missionarism", the elimination of the political pluralism (replaced by the Front of National Rebirth – a unique party ruled by Carol IInd himself) and the destruction of the parliamentary life, the pre-eminence of the citizens' indebtedness as regarding their rights and the increase at 30 years for the age when one could vote, which was only for scholars (but - a good thing – for women, too). The separation of powers was in brackets, the king concentrating in his hands the legislation and governmental authority. The bicameral parliament remained only a decoration object. Among the anti-democratic "performances", the carlist Constitution remembered the fact that it had as a promoter a monarch with a bad political and moral reputation, that it did not admit any parliamentary debate before being enforced and that it went through no more than an "arranged" plebiscite, in spite of all the inter-war suffrage. In 1940 September, when the General Ion Antonescu (appointed head of state) forced the king to abdicate, the Constitution from 1938 was suspended and the political had to carry on under the special conditions of the military dictatorship (military-legionary, initially) and state of war.

After the falling of Marshal Antonescu's political system, at August 23rd, 1944, the democratic Constitution from 1923 was reinforced, but it lasted only three years. The setup of the communism in Romania, by the help of the Russians, imposed not only a change of political system (from monarchy to republic), but also a constitutional one (from the demo-liberal pluralism to the communist totalitarianism).

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The Communist Romania's Constitutions

The communism (as well the fascism) did not compulsory need a constitution; the state order which imagined and put into practice referred at a positive legislation only in a formal way, because the "justice" cause was not a human and conventional one, but superhuman and absolute – the historical law of the ineluctable succession of the eras which were based on the principle of the class conflict. In spite of all these, during the communist period, the Romanian state functioned on the basis of three successive constitutions.

The first one was voted by the Parliament (a mono-chamber council, having a constituent statute and elected in 1948, March) on April 13th, 1948, with the unanimity of the 401 deputies, with no debates, but only one day before "Scânteia" - the communist newspaper published the text which was forged in the Moscow's ideological laboratories. It was all about a new "organic regulation", which admitted the birth of the Popular Republic of Romania (after the abolishment of the monarchy, in December 30th, 1947) and announced that nefarious times had to follow for the capitalist economy (by the definitional "relaxation" of the article about dispossession for a cause of public utility). The new fundamental law gave up the *national state* rating, keeping only its characteristics of "unitary, independent and sovereign", prefaced by the "popular" label. The blue collar workers were declared leaders against the fascism, reaction and imperialism, resulting thus, a new state order. The means of production were considered a state property, as goods of the entire people; all the other properties which were not state owned yet, had to be nationalized by law. The private property and the inheritance right were still guaranteed – in a formal way – by article 8, but in article 9 they stipulated the stimulation of the cooperative association; in the next two articles, they insisted upon the idea of dispossession for public utility. In the 3rd Title of the Constitution, the citizens' rights were tightly related with the liabilities. The voting age was diminished to 18 years old, and the right to be elected (increased for all the people categories, no matter the gender or job) was set at 23 years old. The parliamentary mandate still remained an imperative one. The legislative power belonged to the Great National Assembly, which had a management based on friendship; it was made up of five people and it was named "Presidium" (its prerogatives were similar with the ones of a president of republic). The executive power belonged to the Council of Ministers (the govern), which had a

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president (prime-minister). As regarding the local communities (villages, "plăşi", counties and regions), they were administered by elected popular councils (with an executive segment named "executive committee"), also viewed as "local authorities of the state power".

The second Communist Constitution, of September 24, 1952, makes Romania a potential Soviet republic, where the fundamental rights and duties (starting with work!) are sent to Chapter 7 (they were followed only by the provisions regarding the election system, the state insignia and the amendment procedure). The text of the new fundamental law has an introductory Chapter which defines the Romanian Popular Republic as a "state of the town and village workers", born as a result of the liberation effort of the glorious Soviet Army, which is why the entire politics of Romania must be aligned to the interests of the USSR. Chapter I, dedicated to "social structure", proclaims half a victory of the Soviet-type order, showing that, beside the dominant socialist economy, there is a small individual production sector, but also a capitalist one (the kulaks' farms, private commercial establishments and industrial enterprises that had escaped the nationalization of June 11, 1948) based on man's exploitation of man. Against this last remnant of the bourgeois society, the state undertakes to lead a continuous confining policy. In order for the private property that generates exploitation to be definitively exposed to ridicule, article 15 of the Constitution specifies that "In the Romanian Popular Republic, work is a duty and a question of honour for each citizen able to work, according to the principle 'he who doesn't work doesn't eat' In the Romanian Popular Republic the socialist principle 'From each according to one's abilities, to to each according to one's work' is more and more widely implemented." The state structure is defined for the first time as a "popular democracy", that is workers'power. The legislative power remains the responsibility of the High National Assembly ("the supreme body of state power") led by the Presidium, and government is defined as an "executive supreme body and body controlling state power". The local bodies of state power are called "Popular Councils" and they function within the administrative divisions called communes, towns, departments (after the Soviet model) and regions. The local executives are called Committees and they are led by a president and operate under a pyramid system of double subordination: to the Popular Council that elected them, but also to the Executive Committee of the immediately superior administrative division; such a

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structure strengthened the control mechanisms of the so-called "democratic centralism". In the 1952 Constitution, the regions are expressly specified (without resorting, like today, to the cardinal points): Arad, Bacău, Baia Mare, Bârlad, Bucureşti, Cluj, Constanţa, Craiova, Galaţi, Hunedoara, Iaşi, Oradea, Piteşti, Ploieşti, Stalin (the new name of Braşov), Suceava and Timişoara, to which the Autonomous Hungarian Region (having its administrative centre in Târgu Mureş and the following constituent departments: Ciuc, Gheorgheni, Odorhei, Reghin, Sângeorgiu de Pădure, Sfântu Gheorghe, Târgu Mureş, Târgu Secuiesc and Topliţa) is added with a special status.

We've spent a little more time talking about the constitutional episode of 1952 as it marks the apex of the ideologization of Romanian society, the peak of state violence against individual rights, against private property and democracy. The Sovietization constitution left us, in the collective mind and in the arsenal of sensitive issues of Romanian politics, with the legacy of a visceral hatred of private property, a false glorification of work and an endless agitation of territorial autonomy based on ethnical criteria.

In the following thirteen years of communism, things evolved a lot in Romania. The dissent from the "popular democracy" regime died out, so much so that in 1964 the authorities afforded the "luxury" of freeing political prisoners. The power of the pro-Soviet leading group suddenly weakened, which also led to a gradual separation from the great ally in the East. Socialist property was reinforced (including by completing the cooperativization of agriculture in 1962) and the change of generations took place at the top of the party. The new realities made necessary the Constitution of August 21, 1965, which proclaimed the Socialist Republic. The period during which it was in force coincides with the "Ceauşescu Era".

For any reader interested in constitutional texts, the document of 1965 is a real anti-Soviet revolution. The embarrassing introductory chapter praising the USSR is replaced simply by a first article that haughtily states that: "Romania is a socialist republic. The Socialist Republic of Romania is a state of the workers in towns and villages, sovereign, independent and unitary. Its territory is inalienable and indivisible". There is no more mention of the great liberator that had seemingly made it possible for us to exist as a state. There is no more emphasis on the conflictual spirit that opposed the working class to the

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other social categories, it is shown that they all build socialism together, creating the conditions for the transition to communism. The third article completes the definition of the Romanian state: "… the leading political power of the entire society is the Romanian Communist Party". After the first three articles settle the essentials of the life of the Romanian state, it then comes back to the issue of the people's sovereignty, exercised through the High National Assembly and the popular councils, elected by universal vote. The last fundamental thing is, of course, the (state and cooperative) socialist property, which makes it possible for work – the duty of honour of every citizen – to no longer be marked by the exploitation inherent in capitalism. The first Title of the Constitution also develops the principles of socialist statism (the state is the one that makes all things possible and impossible) and reverts to the traditional administrative and territorial organization of Romania, based on communes, towns (including municipalities) and counties.

Foreshadowing the opening to the Western world, the Consitution of 1965 reverts to the theoretical model of placing the citizens' fundamental rights (and duties) immediately after the definition of the state. In a seemingly liberal language, it proclaims the citizens' equality of rights, whatever their sex, race, ethnicity or religion. The principle of the guaranteed right to work (compulsorily exercised 8 hours a day, with an unquantified weekly break) is kept and the right to rest, to regular and maternity leaves, is added. The right to education of all levels, at the state's expense, is established. Beside the generous idea of protecting the family, the mother and the child, the Constitution of 1965 speaks, very correctly, about many other rights and freedoms, including political, religious and of association, with the amendment that they can all be exercized under the supervision of the Communist Party and of a larger organization called the Socialist Unity and Democracy Front. The individual's inviolability, the secrecy of mail, the access to justice and the right to petition are supplemented with the right to inheritance and ownership, the last ones being not just guaranteed but "protected by law".

Justice in Romania during the Ceauşescu era included two institutional elements: the judicial bodies (which were entrusted with "making justice") and the prosecution bodies (charged with the activity of criminal prosecution and with the application of punishments). They both had the role of defending "socialist legality" and structure, in this regard also taking care of prevention and the reeducation of criminals. Such an

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organization left us, in the post-commusit era, with the essential question if judges and prosecutors are all magistrates and if, as a result, they should be equally protected against political interference.

In what concerns the state's powers, the Constitution of 1965 equips the High National Assembly with a body with continuous activity, called State Council ("the legislator on duty" during the long periods of parliamenttary holiday, similar to the present right of the government to issue ordinances) and with a constitutional commission (to check the constitutional validity of laws). After the amendment of the Constitution in 1974, the newly-created office of President of the Republic (which will be occupied by Nicolae Ceauşescu, repeatedly elected "head of state" by the High National Assembly) also includes the function of president of the State Council, supreme commander of the Army and of presiding over the government (like in semi-presidential regimes) when necessary. The central executive remains the Council of Ministers, accountable to the High National Assembly and the State Council. As regards local organization, the Constitution makes the distinction between "the local bodies of state power" (the popular councils) and "the local bodies of state administration" (the executive committees, in the case of the counties, municipalities and districts of the Capital; the executive offices, at the level of towns and communes). The constitutional powers of the President of the Socialist Republic of Romania (at the legislative, executive and military level) and especially his political positioning as General Secretary of the Romanian Communist Party create the conditions for the inception of a dictatorship, based on personality cult and the independence fantasies of national communism (a strange form of neo-Stalinism). After the fall of that regime, Romanians will live with the constant worry not to let a president take over state power, even if many of them regret the seemingly protective authoritarianism of the "golden era".

The Constitution in the Post-Communist Era

Two hundred years after the famous historic event called the French Revolution of 1789, a profound political change process started across the entire Eastern Europe, after which the Soviet-inspired communist dictatorships fell one by one and were replaced by democratic regimes modelled after the Western ones. The fall of the dictatorships and the rebirth of democracy, together with the changes in economy (the

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transition from the planned and centralized socialist economy, based on state property, to the competition-type capitalist economy based on private property) and culture shape the so-called "transition" phenomenon.

The problems of the institutional transition were fundamentally related, in Romania – as in any other young democracy –, to the processes and mechanisms of the new constitutional synthesis, after the elimination of the totalitarian structure and after going through a time of constitutional void. The political changes occurred after December 22, 1989 are related to the phenomenon of implicit and explicit dissolution of the fundamental law of the socialist state, and of construction and legitimation of the state of law. Within this phenomenon, the constitutional model of 1965 was perpetuated in many ways in its form and in its spirit, even if the Revolution of 1989 seemed to reorient the country towards the Western-type democracy.

The institutional transition, started with the installation of the new legislative and executive power, had three distinctive phases: a) *the provisional institutions phase*, with the National Salvation Front Council at the legislative level (then turned into the Provisional National Union Council), and the Government led by Petre Roman, at the executive level; it lasted from the end of 1989 until the elections of May 20, 1990; b) *the Constituent Assembly phase*, when the institutions resulted, on the one hand, from the elections of May 20, 1990 (when the bi-cameral Parliament, with the status of constituent assembly, and the President of the Republic were elected) and, on the other hand, from the specific regulatory documents drawn up by the legislative body; c) *the phase of the pluralist constitutional state*, after the adoption of the Constitution in Parliament and its validation by referendum, on December 8, 1991. After the new Constitution came into force, Romania started a laborious process of supplementing and reinforcing the institutional structures, evolving towards a political system reproducing to a high degree the formal framework of Western democracy, but annoyingly keeping too many of the customs, prejudices and informal networks originating in communism or that analysts associate with the Balkan spirit.

The first phase of the institutional transition (that of the provisional institutions legitimized by the Revolution) ended after the parliamentary and presidential elections of May 20, 1990. Once the bi-cameral Parliament was validated and the President of the Republic took

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the oath, the transition entered the "constituent assembly phase". The regulatory document that established the political reference frames of this stage was the Electoral Law (the Law-Decree no. 92, regarding the election of Romania's Parliament and President, drawn up by the Provisional National Union Council and published in the 'Official Journal of Romania' no. 35 of March 14, 1990). Usually, an electoral law does not make changes in the institutional structure of a country; through the type of election that was adopted, the law can only change the political party spectrum. In the specific situation of the *de facto* repeal of the communist constitution, the Electoral Law had to set the form of government (the semi-presidential republic) and the type of legislative assembly (the bi-cameral parliament, with the status of Constituent Assembly), to proclaim the separation of state powers and the election by universal vote of parliament members and the president. The type of election set by law was that of party lists (the parties themselves being created based on the Law-Decree no. 8 of December 31, 1989), without electoral threshold. The elections confirmed Ion Iliescu as President of the Republic, with a crushing majority (85.07%); in Parliament, they gave the National Salvation Front absolute majority (approximately 67%), which allowed this party to impose its political agenda and especially to make decisions regarding the Constitution.

The Commission in charge of drawing up the Constitution (made up of ten members of parliament belonging to the National Salvation Front, two members of parliament belonging to the National Liberal Party, two from the Hungarian Democratic Union of Romania, an independent member – the President of the commission, the jurist Antonie Iorgovan – and one member of parliament from four other political parties and national minorities) had to settle a few issues of principle, before reaching a text version: the form of government, the *expresis verbis* inclusion of the principle of separation of powers, guaranteeing private property and the unitary, national character of the Romanian state.

During 1990 and 1991, there were repeated mentions, in Romanian society, and especially in some intellectual circles, of the idea that maintaining the republic would mean keeping the communist paradigm and that reverting to monarchy would be a sign of coming back to the "interwar democratic tradition". The monarchists invoked the absolute invalidity of the abdication document of December 30, 1947.

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Their adversaries said that Mihai I's rise to the throne took place without compliance with the constitutional provisions, on September 6, 1940, that's why his reign was always marked by a procedural flaw; they also stated that Mihai was not the first born of Carol and, finally, that a potential return of the Hohenzollern-Sigmaringen dynasty to the head of the state, through Mihai I, would mean the extinction of the dynasty line, since the sovereign had no male heir. Even though it would have been able to do it, the post-revolutionary power did not see it necessary (and did not risk it) to have a referendum to set the form of government, the topic being many times ridiculed, infested with populist discourses regarding the "royal and bourgeois clique" reclaiming the country's riches.

The second essential issue related to the change of the constitutional system in Romania was the principle of separation of powers. After the totalitarian experience of several decades, Romania had to avoid the risk of a new dictatorial regime, by separation of powers and mutual control. This principle of the state of law had been proclaimed on December 22, 1989, but it had been set aside for more than a month and a half, until the creation of the Provisional National Union Council. Once applied through the net separation of the legislative and the executive bodies, the principle also had to be specified in the constitution so it could be thus guranteed. However, this issue wasn't settled, as the opposition wanted, by being expressly mentioned in the Constitution.

The experts in constitutional law that contributed to the drawing up of the text of the fundamental law expressed criticism of the principle of separation of powers, considering it an obsession damaging both the constitutional theory and the practice of exercising power. At the theoretical level, our experts relied on the reflections of some philosophers that emphasized the inconsistency of Montesquieu's doctrine. Thus, Rousseau had shown that Montesquieu, not being able to divide sovereignty in its principle, divided it in its object; but, if we cannot divide sovereignty, logically we cannot divide power either. According to Rousseau, the legislative power consists of two inseparable things: making the law and enforcing it; this means that the executive would only be an "extension" of the legislative body. According to other theorists, Montesquieu may not have used the concept of "power" to refer to any "political body". He may only have meant to emphasize the specialization of the power's functions, which, however, stays unitary. If we interpreted Montesquieu's classical concept *ad litteram*, in practice we would reach a

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political mechanism made up of isolated pieces, without any links between them. But, in the exercise of power, there are "mixed areas" between the state bodies (e.g. the Government has legislative initiative and can issue ordinances during parliamentary holidays or regulate situations in cases of emergecy; the President grants commutations of sentences and pardons; judicial bodies also have some administrative activities, etc.).

After the theoretical disputes were finished, the commission that drew up Romania's Constitution opted for the idea of a soft separation of the power's functions (the power remaining unitary, just as the sovereignty which generates it) and for the principle of supremacy of the legislative body, mentioned in many titles and articles: article 2, regarding the indivisibility of national sovereignty and the uniqueness of its holder (the people); title III, regarding the demarcation and inter-conditioning of the power's functions among the various public authorities (the Parliament, the President and the Government being called "public authorities", just as the central and local public administration or the judicial authority); articles 84 and 95 regarding the Parliament's ability to suspend the President of the Republic from office and to put him on trial for high treason; article 58, which stipulates that the Parliament is the only legislating authority; article 112, regarding the accountability of Government to Parliament; article 104, which says that the office of member of parliament is compatible with that of minister. According to the way in which they were appointed, public authorities in Romania were included in two large categories: a) the directly representative authorities, that is those elected by universal, direct, secret and freely expressed vote (the Parliament, the President of the Republic, the mayors, the local and county councils, as well as the President of the County Council, starting from 2008); b) the derived or indirectly representative authorities (the Government, the central public administration and its territorial services, the judicial authority, the Constitutional Court and the People's Ombudsman).

Although the principle of separation of powers, in its "modernized" form, stood at the basis of Romania's Constitution, the lack of its explicit mention in the text caused political tension between the parliamentary majority and its opposition. The latter accused those in power, for a long time, that they wanted to maintain the confusion regarding the separation of powers to leave open the possibility of establishing an authoritarian regime. The representatives of the majority

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answered that the opposition had not tuned into the current worldwide debates related to the inconsistency of the principle of separation of power. In the end, most of the representatives of the opposition voted against the text of the Constitution (which gained them even more dislike within the public opinion).

The third complicated issue of the post-communist Constitution was guaranteeing private property – a principle insistently requested by the representatives of the liberal and peasants' parties, but rejected by the National Salvation Front majority, politically socialized in accordance with the precepts of the Soviet socialism and with Proudhon's slogan from the 19th century which stated that "property is theft!". Again, the constitutional model of 1965 prevailed: private property was to be… protected.

The last big issue of principle that marked the stage of drawing up the new Constitution was caused by the representatives of the Hungarian Democratic Union of Romania. Starting from the structure by nationalities of the country's population, as well as the constitutional tradition of the 20th century, the text of our fundamental law stated that "Romania is a national, sovereign and independent, unitary and indivisible state" (Article 1), and that "the official language is Romanian" (Article 13). The fact that almost 90% of the country's population was made up of Romanians made the legislators think that the provisions of the two articles were justified. The Hungarian Democratic Union of Romania, stating that it was the political representative of the Hungarian population (7.1% of the total population of Romania in 1990, and 6.5% according to the census of 2011), contested the definition of the state as national (due to the fact that there are several nationalities in Romania), contested the unity of the state (wanting it to be federalized to create administtrative divisions based on ethnic criteria), as well as the existence of just one official language (wanting Hungarian to be the second official language of the Romanian state). The challenges did not change the decision of the Constituent Assembly. But the insistence of the Hungarian Democratic Union of Romania regarding this matter and the complaints brought before international bodies against Romania created tension within the political setting and inter-ethnic relationships, as well as the relationships between Romania and Hungaria. At present, those issues have been transferred to the domain of local administration, with laws providing the

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use of the languages of minorities in administration in the places where a national minority accounts for at least 20% of the population.

Combining in an "original" manner the traditions of the interwar Romanian politics and the experience of the constitutional life of Western states (mainly France and Sweden), Romania's Constitution of 1991 changed the organization of the state in a few essential points: a) unlike during the communist era, the state acquired new attributes, such as: "state of law, democratic and social"; b) the state powers were given a new name, that of "public authorities"; c) two totally new institutions were created: the Constitutional Court and the People's Ombudsman; d) beside the traditional rights and freedoms (which existed even in the old socialist Constitution), new ones were introduced: the right to information, to free circulation, the protection of the right to privacy, etc.; e) the Constitution created the legal framework necessary for political pluralism.

On November 21, 1991, the final form of the Constitution (resulted from the debates by article and the inclusion of the amendments) was submitted for approval to the plenum of the Constituent Assembly. From July 11, 1990 (the official date the process of drawing up the Constitution started), more than 16 months had passed; Romania's Constituent Assembly had completed its mandate in time. The vote for the adoption of the Constitution was open, nominal and broadcast live by the Romanian Television. Of the total of 510 members of parliament (senators and deputies), 509 were present: 414 were for and 95 against the adoption of the Constitution. All the members of parliament belonging to the Front, the Romanian National Unity Party and those representing national minorities (except the Hungarian minority) voted in favour; 5 deputies and senators from the opposition also approved the Constitution. The members of parliament belonging to the National Peasants'Party, the Liberal Party and the Hungarian Democratic Union of Romania voted against. The Constitution came into force after the referendum of December 8, 1991, the results of which (77.3% of votes in favour; 20.4% against; 2.3% void votes) were published in the "Official Journal" no. 250 of December 14, 1991.

The new Constitution of Romania took a decisive step towards completing the institutional transition. Of course, some of the institutions established through the fundamental law were yet to be created (the Constitutional Court and the People's Ombudsman); the Parliament and

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the President were to be elected for their first constitutional mandate; the authorities of the local public administration were provisional, without any law regarding their organization; the independence and immovability of magistrates were not yet established. However, from that point on, there would be legal frameworks necessary to develop the state of law and the pluralist democracy.

As any legal construction, the fundamental law of Romania adopted in 1991 was not infallible. From the tensions generated by the main ideological trends that marked its adoption (national-communist conservatism, minority ethnicism and liberalism amended with social-democratic and Christian-democratic precepts) emerged the functional deficiencies of the post-communist political system. Some were related to our relationships with the West which, in the context of our Euro-Atlantic integration process, was not pleased with the constitutional solutions regarding guaranteeing private property (and the right of ownership for foreign citizens), the separation of powers, local autonomy, etc. Others were related to the ambiguities of semi-presidentialism in a society marked by the fear of dictatorship, but at the same time accustomed to expecting redeeming solutions from the head of state, in all important matters of public life.

In 2003, before the completion of the negotiations of Romania's accession to the European Union, the Constitution was changed, the Revision Law no. 429/23.10.2003 having no less than 79 articles. Some of the significant changes include: specification of the principle of separation and balance of powers; international treaties that are contrary to constitutional provisions are to be ratified only after the amendment of the Constitution; the priority of Community law over the contrary provisions in domestic law; electoral rights, in local communities, for the EU citizens residing in Romania; the right to elect and be elected in the European Parliament; private property is equally guaranteed and protected by law, whoever the owner may be, and foreigners can acquire ownership of land, in the conditions of the accession to the EU; the mandate of the President of the Republic is extended from 4 to 5 years; the chambers of the legislative body have separate duties; the national currency can be replaced with that of the EU; the duties of the Constitutional Court are extended; the Superior Council of the Bench is reorganized.

The amendments of 2003 Europeanized our fundamental law, making it more flexible in the Euro-Atlantic integration process.

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Nonetheless, those amendments did not succeed in removing the inconsistencies of an institutional system created especially by reference to the people who occupied high public offices after 1990, with their strengths and weaknesses. At present, we do not have a badly shaped Constitution, but at the same it isn't sufficiently clear and secure to prevent authoritarian lapses, together with those of a parliamentary majoritarianism able to play at President's suspension.

It would be good for us to have the time and peace so as not to change a constitution only for the sake of a circumstantial majority. The story of the two hundred years of constitutional normativity in Romania can give us some understanding of what we need to be less demanding when it comes to our political structures, less irritable when we are shown, from outside our country, the things that are going wrong, but at the same time, more inclined to learn the rules of civility.

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