
INCREASING THE LEGITIMACY OF THE INSTITUTIONAL PROCESSES FAVOURABLE TO CITIZENS

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Abstract

In this paper, I analyze the problem of institutional reconstruction in Romania after 1989, which remained until today under the influence of the constitution and social revolution report. The 1991 and 2003 constitutional moments led to institutional conflicts. Regarding this, there are two implications: unsatisfactory institutional processes and the fact that political institutions often appeal the Constitutional Court to interpret or clarify the constitutional texts framing the institutional processes. This shows an underlying problem with the Constitution. I will analyze in detail the consequences of a weak normative integration of the two constitutional moments: decreasing the legitimacy of the institutional processes and the dilution of the Parliament's role. I thus emphasize the extent in which these implications are risky in relation to the integrity of the democratic institutional processes. In the constitutional economics approach, this brings instability and insecurity in the institutional processes. For the citizens, it can generate uncertainty regarding their rights and liberties. In politics, this generates conflicts and duplication of institutional roles in the decision-making processes. Finally, I present and discuss three models for the adoption of the constitutional convention and on this basis I select the most suitable one for the current situation in Romania. This model must be able to meet two main requirements of the normative framework that I use. The first requirement concerns the economic function of the constitution. The Constitution cannot ignore the interests of its citizens and therefore it should allow them to achieve their personal goals. A constitution that is contrary to the legitimate interests of its citizens is not suitable and cannot be normatively integrated in the society. The second fundamental requirement is that the Constitution should protect the legitimate interests of citizens to other interests that contradict them. The question is whether the constitutional rules will structurally favour other interests than those of its citizens.

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1. Argument

In democratic structures, a fair relation between the interests of citizens and the institutional processes is guaranteed by the Constitutional Court. In Romania, the power of the Court has grown significantly over the past 14 years, compared to the other fundamental institutions of the state. This is because of the instances when the Court was called on to clarify the spirit and even the application procedures for various pieces of legislation at a lower institutional level. Within the Romanian institutional framework, the Constitutional Court of Romania has a number of prerogatives through which it exerts constitutional control over the actions of political institutions. Under the fundamental law, the most prominent role of the Court, in view of preserving the democratic order, is to pass rulings on the constitutionality of laws, including related organizational provisions. In practice, however, the Court completes the institutional and legislative processes. Instead of meta-governing them, it clarifies them and provides them with proper procedures. Under these circumstances, there are two major implications: the legitimacy of the other institutions, and the political influence in relation to the Court.

2. Discussion

The checks and balances standards cannot completely keep the Constitutional Court free from political influence. To meet the criterion of independence from the political realm, the validity of Court judges can be endorsed by Parliament by qualified majority. Romania's parliamentary history indicates at least that judges are not supported by a qualified majority in Parliament. In most cases when Constitutional Court members were appointed, the vote indicated an either/or type of support. In the case of the Presidency, appointments cannot be counterbalanced. This indicates that the very genesis of the Constitutional Court appointment process is flawed, and if the start is illegitimate in terms of political independence, then the Court decisions can hardly be unchallengeable. In the Romanian system, the Court is independent, and its attributions [The Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished. The attributions of the Constitutional Court, online at: www.ccr.ro/Regulamentul-de-organizare-i-functionare, accessed on March 8, 2013] include ruling on the constitutionality of laws prior to promulgation, checking for constitutionality the constitutional review initiatives, ruling on the constitutionality of the treaties and conventions that Romania signs, ruling on the constitutionality of Parliament regulations, settling constitutionality objections, settling constitutional conflicts between public authorities, ensuring compliance with election procedures, and so on. This is why, in its nature, it is meta-political and meta-normative. As such, its association with political elements is undesirable.

Consistently with the neo-institutional conceptual framework, we cannot guarantee that institutions represent the long-term collective interests as long as the Court itself, which is entrusted with clarifying other types of relations than the fundamental ones, cannot have its political independence guaranteed. Therefore, checks must be defined, which should reduce to a minimum the risk of arbitrary decisions, and of temptations of opportunism and free riding (which are at work in the political realm). Such risks generate distrust among citizens, who expect the Court, more than any other institution, to make decisions in the best public, constitutional interest. Impartiality conditions can be improved either by changing the way in which judges come to represent the constitutional interests, or by introducing the rule of unanimity or consensus in decision making. The rulings of the Court need to be legitimate. Precisely because it is the closest institution to the constitutional moment, the Court must reflect on a legislative act “until its unconstitutionality is proven beyond any reasonable doubt, if it dismisses the act as unconstitutional, or until all the suspicions regarding the constitutionality of a law are settled in favour of that law, if it endorses the act as constitutional” [2]. Under these circumstances, a simple majority vote does not ensure the legitimacy of the decisions.

In this respect, in the Romanian case, it is difficult to give unlimited credit to a Court ruling passed by a majority of 5 to 4 judges. How certain can we be that an act comes against the constitutional contract, if the other 4 judges view it as legal? Any doubt must be clarified in the spirit of the constitution and subsequent legislation. This is why, if an act at a level below the constitutional one is declared constitutional or unconstitutional, this must be clear for the decision-makers, particularly when it entails dramatic consequences for individuals. This derives from the importance of ensuring that institutions carry out their activity in full compliance with the constitution. As such, the evaluation of a legislative process cannot rely on a structure that admits a continuum between favourable and unfavourable positions. Worth emphasizing is that the decisions made by the constitutional court are too important to have the decision structure divided into subgroups of judicial opinions. Introducing the unanimity criterion in decision making (which may meet the conditions of a qualified majority or extraordinary majority) will make a comprehensive deliberation necessary, and will thus guarantee the legitimacy of this fundamental institution.

3. The consequences of a non-integrated Constitution

This is the consequence of the fact that the 1991 and 2003 Constitutions, and especially the first Constitution of post-communist Romania, were adopted in a superficial manner, lacking an in-depth, clarifying public debate. This situation is also an indication of a too recent history of relevant constitutional practice. Romania is a young democracy, with a recent democratic Constitution. Under these circumstances, the Court is forced to act as a source of law or as a clarifying agent for disputes that do not normally belong in the collective-legislative field. Democracy requires that legislation should be endorsed and

clarified in Parliament, not in Court. But with the Government frequently undertaking a legislative role, by issuing simple or emergency ordinances (according to the home page of the Chamber of Deputies in the Parliament of Romania, in 2011, the Government issued 99 emergency ordinances and in 2010, 131) [http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=21628, accessed on March 8, 2013] or by asking for votes of confidence from the legislative body (the government may request a vote of confidence from the joint Chamber of Deputies and Senate, on a program, a declaration of general policy or a draft law) the Court found itself in a position of assessing the constitutionality of these very proceedings. If we look at the legislation issued by the government, either by means of ordinances, or through votes of confidence, we notice that the legislative initiative, particularly in terms of organic laws, belonged to a greater extent to the government than to Parliament between 2008 and 2012. Around 23% of the bills tabled in both Chambers of the Parliament were endorsed. In other words, of the total 5000 bills, only 1138 became laws [http://www.cdep.ro/pls/proiecte/upl_pck.home, accessed on March 8, 2013]. As compared to the 2004-2008 legislative term, we notice a 30% decrease in the number of laws [2] passed by the Parliament of Romania.

This situation points to a dilution of the role of the Parliament and to a decreased legitimacy of the legislation, because it is no longer adopted by the institution empowered by the Constitution to do that. Given that in 2012, the Court was asked to clarify ambiguous texts of law — which could have been given superficial political interpretations — or the meaning of constitutional articles, the role of the Court was artificially enhanced. The Court was practically forced to intervene in the parliamentary decision making.

Let's take, for instance, the vote of confidence for the government. In judicial terms, this translates as political liability before Parliament and criminal liability, under Law No. 115 of 28 June 1999 on ministerial liability [http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=21628]. If we look, for example, at the law on merging the elections, for which the government asked Parliament for a vote of confidence in 2011, this is an instance of political liability, leading to the government's resignation or dismissal by Parliament through censure motions. The Court was asked to rule on this bill, which was not subject to parliamentary debate. The Court established that there had been a number of violations of the principles underlying the functioning of the democratic institutions (some of the most important aspects established by the Court include: infringement of the principle of holding periodic elections, inherent both to the election of central representative authorities and to local ones, and the serious distortion of the only means of operation of the system of representative democracy; the representative nature of democracy is ensured by means of elections organized in due time and in keeping with the spirit of the constitution; making legislative changes within a year before the elections; violation of Article 61 in the Constitution, paragraph 1, under which the only lawmaking authority is Parliament.) This procedure, which is at the limit of democratic decision-making, also requires, under Law 115/1999, undertaking

responsibility for the consequences that derive from requesting Parliament's confidence and from the Government's guarantee for that bill. The ruling of the Constitutional Court should have entailed, *per se*, the Cabinet's resignation (The Boc Cabinet did resign subsequently, but the reasons put forth did not include the dismissal of the draft law by the Court). When the practice and role of democratic institutions can be eluded, the consequences for the quality of democracy are serious.

In Romania's post-1989 history, *ex post* the endorsement of the 1991 Constitution of Romania, there have been major conflicts between the government and presidency, both mediated by Parliament. In 1996-2000, the president dismissed the prime minister, while in 2007 the parliamentary majority impeached the president, who was reinstated further to the May 2007 referendum. The conflict of 2012 proved the insufficient capacity of the Romanian institutional system to establish clear and balanced relations between powers, irrespective of the sub-type of semi-presidentialism. In fact, the Constitution does not clarify the extent to which the Romanian institutional system is sensitive to political power. There is no clear model to be adopted by the institutional system, which is why the Constitutional Court is requested, in an increasing number of cases, to resolve major conflicts between the institutional powers. Romania has a semi-presidential political regime, but the constitutional contract does not clarify the sub-type of semi-presidentialism. This has undergone various stages, from a qualified majority supporting the both the president, and the prime minister to a divided majority, in which the president is not supported by a parliamentary majority, but the prime minister does benefit from this majority. This relationship is known in political practice under the name of cohabitation. Naturally, the first stage, experienced between 1990 and 2004, ensures the greatest stability, and in the second stage political instability is higher. The 2003 revision of the constitution rather indicates a shift from a semi-presidentialism where the president's power is reduced to a weaker semi-presidentialism, or one with parliamentary accents. In 2003, the problem of the president's power to dismiss the prime minister was solved, after in 1999 (through the Decree 426/December 13, 1999), Emil Constantinescu had removed Radu Vasile as premier, inherently triggering the dismissal of the entire cabinet. Although the dismissal of the prime minister caused an extended political crisis, one may argue that Decree 426 was unconstitutional. However, the Constitution of Romania neither forbade, nor allowed the president to remove the prime minister. Since this prerogative was forbidden, Constantinescu interpreted in his own favour a constitutional loophole, which was in fact explicitly clarified as part of the 2003 constitutional revision: the president cannot dismiss the prime minister, under article 107, paragraph 2 [*The new Constitution of Romania adopted under Revision Law no. 429/2003, Chapter III - Government*]. The case where a government is supported by parliamentary minority, and the parliamentary majority backs the president, also lacks clear specifications. Especially since the concept of cohabitation involves a delicate balance preserved by a mature political class, which is willing to compromise and does

not seek excessive personal authority over decision making processes. Therefore, there is a long line of Court rulings that tackle institutional conflicts and clarify (both the president and the prime minister or Parliament requested the clarification of institutional relations in the various cases mentioned above) the constitutional foundations of particular actions or processes [Ruling no. 53/20.01.2005, Ruling no. 435/26.05.2006, Ruling no. 356/5.04.2007, Ruling no. 97/7.02.2008, 270/10.03.2008, Ruling no.1.222/12.11.2008, Ruling no. 838/27.05.2009].

Since the institutionalist theories do not allow us to rely on the good faith of the actors or on the prospective collective action of rational actors (willing to maintain and enhance power) the solution is for the Constitution to define a number of instruments for control and coordination at the level of institutions, an institutional system which is invulnerable and impermeable to political preferences. This type of system alone can allow the input of citizen preferences, instead of the preferences of political actors. This would protect citizens from the misrepresentation of their sovereign will. The year 2012 made it clear that the parliamentary majority was ever more tempted to make excessive use of its exceptional power, especially when the president and prime minister are in conflict with each other. The problem is that these exceptional powers are frequently read in a political, rather than institutional light. Could we count on the fact that political actors will have an impartial position as to institutional provisions? Are there chances for them to admit that the only preferences accepted by the institutional system are those of the citizens? The answer is 'no'. Not within the neo-institutionalist paradigm. The Romanian political practice proves that political actors excessively personalize the institutional processes.

In light of these elements, we note that the normative integration function of the Constitution has not been fulfilled to the extent required by its fundamental importance in society. The constitutional contract is closed concurrently with the normative integration of the new political-judicial regulations. Constitutional changes and the adoption of new institutions, as well as redefining the relations between powers, are best achieved in the dawn stage of states (here we have the perfect example of the Constitution of the USA). A second option is a structural change of political-judicial relations. However, the 1989/1990 moment falls into a third type of constitutional pact, one generated by sudden and violent change, e.g. revolutions. This particular case implies a weak normative integration of the newly established institutional system. Also, the debate preceding the 2003 constitutional revision was insufficient, in that it failed to clarify the sub-type of semi-presidentialism as regards a number of procedures. The post-socialist Romanian constitutions partly integrated a series of fundamental institutional processes. In 2012, the consequences became more evident than ever: the frequent requests for the Constitutional Court to clarify institutional processes that should have been long clarified at the collective level of practices, procedures and consequences.

The ambiguity of constitutional texts in terms of the institutional processes defined by the relations between the main powers (Parliament, President, and Government) does not allow, in fact, for a complete constitutional regulation, and instead of facilitating the preferences of citizens, it favours the manipulation of institutional flaws in order to fulfil political preferences. The institutional shortcomings caused by the insufficient normative integration of the Constitution allow personal interpretations by political actors, aimed at obtaining more power. The constitutional ambiguity enables political actions that are at the periphery of the constitution or even beyond it. Hence, the conclusion that the insufficient regulation of these institutional relations entails a weak integration of the preferences of the society. Thus, institutional processes are to a great extent cut off from citizens, who are ultimately affected and who should be the target of these processes. The risk of institutional conflict and even deadlock is serious, if we think of the extent to which both the president and parliament may give preferential interpretations to the constitutional ambiguities concerning the institutional relations.

4. Solutions. Three normative models of legitimate constitutional processes

We have discussed here the issue of the legitimacy of the institutional processes favourable to citizens, and we have linked it to the clarification of the constitutional project that governs the institutional system. Because my framework of analysis takes the individual as the key to the performance of any cooperation structure, I have defined this framework in terms of *constitutional economics*. If we view individuals as those who decide on cooperation, then, in a political cooperation structure, we will use Vanberg's phrase, 'citizen sovereignty' [3]. This principle requires that any constitutional pact meet two core conditions.

The first one has to do with the economic function of the constitution. The latter cannot ignore the interests of its citizens, and therefore it must enable them to reach their personal goals, defined within the same framework of reality. A constitution that comes against the interests of its citizens is unsuitable and cannot be normatively integrated in society. The second fundamental requirement is to protect citizens' interests from political interests that are against the general and personal interest, if constitutional regulations structurally favour other interests than those of the citizens.

Keeping in mind these two requirements, we can outline three constitutional models. The first one defines the institutional system as a structure that solves problems and provides services, while citizens benefit from these services. The distinctive feature of this model is that citizenship is primarily an economic attribute. The state structure is an instrument in solving the citizens' problems. The Constitution is an instrument that remains in force as long as it serves the individuals. Unless they criticize its functioning, a revision should be out of question. The constitution must pass the utility tests. This is why, when they adopt it, the individuals are not behind a 'veil of ignorance', but are well

aware of their needs. Under no circumstances will they choose a set of instruments and rules whose effects they will not know and desire. The decision makers are rational utility maximisers. Through the constitutional pact, the parties negotiate crystallized solutions that come with costs and benefits for the actors involved, which vary from one case to another. As such, the constitutional principles and values are the outcome of the negotiations in various situations. If actors accept restrictions, they do it in order to enter cooperation structures where they will still try to obtain maximum benefits.

The second model is built on a set of shared values, acknowledged and desirable at a social and cultural level. This is based on the assumption that society shares a set of values prior to the constitutional pact. These common values may outline an identity that should be empirically determined. But the empirical determination of common values, of an identity from which to extract the principles and norms that underlie a society, is highly unlikely. It is not methodologically viable. This approach is primarily evolutionist. In a first stage, through repeated interactions, people establish conventional norms, and then they choose to formalize them. In other words, the constitutional pact is *a posteriori* in relation to the constituting object.

The constitutional pact is initiated in order to acknowledge the existence of a community, and the adoption of a constitution inaugurates the demos. In short, resorting to the constitutional power requires the implicit existence of a community. The tie between the community (identity) and constitution is indispensable. This theoretical model was structured in the early 20th Century nationalist theories concerning the birth of the state, intended to justify the nation states. This implies a desirable normative feature of individuals, which is not consistent with the principle of their rationality (given that we are within a neo-institutionalist paradigm with constitutional economics elements). In addition, this model favours a type of ‘constitutional patriotism’ [4] which includes the image of a community turned into a political community through a moral act, in which individuals engage in citizen relationships that connect them independently from their associative relationships such as the family, groups, religion and so on [5]. The shift of the analysis towards patriotism will yield negative overtones. Instead of this concept, the constitutional economics paradigm views the term ‘constitutional’ as enough to denote tolerance, consensus and plurality.

There are no logically viable arguments to give a society the status of a normative constituent per se, which implies homogeneity of the values of its individuals. Obviously, individuals predictably create norms, but the only norms they collectively apply are the economic ones (in the sense of their utility). In reality, a model of this kind is not compatible with the two main requirements of a legitimate constitutional construction: normative integration, impossible when values do not transcend the individuals, and the protection of each individual from having others’ interests imposed on them. Rationally, aggregating (individually perceived) values is not possible, and including transcendent

values cannot be accepted in this paradigm. In these terms, no constitutional pact could be adopted consensually.

The third model of constitutional convention is an integrating model, based on complex and in many respects participative citizenship. Regardless of the model they choose, citizens receive an answer to the normative question: what purpose does a Constitution serve? The specific feature of this model is the existence of constitutional standards that society must embrace. Actors must be persuaded that embracing these standards is beneficial. The post-communist history gives us examples of this kind: the South-Eastern European countries that adopted constitutional norms and institutions, and only afterwards the participating actors had to be persuaded to act accordingly. To a great extent, this is the case with Romania, which in 1991 adopted a Constitution without the debates that could have ensured a better normative integration of the fundamental law. This model is, to a certain extent, compatible with the first one, in the sense of a common concern with the justification of the Constitution and with defining its goals. Both models answer the question ‘what is the goal?’ but the third model does not answer the question ‘what is the utility?’. However the first model gives consistency to the principles of constitutional economics, in that it concurrently allows questions about utility and facilitates debate, which in turn facilitates the normative integration of the constitution. What is normatively accepted stands better chances to become legitimate. The normative integration function may be fulfilled by the deliberative dimension of the Constitution. The concept of deliberative democracy originates in the works of John Rawls, holding that, “for democratic regulations to be legitimate, they must be preceded by public deliberation” [6].

5. Conclusion

Constitutional processes need a normative fundament. Citizens are not bound to acknowledge a constitutional framework, but must discuss the benefits of this framework as compared to the other alternatives. Individuals cannot be ignored if we take into account the normative integration that will lead to institutional efficiency. They are the direct and constant beneficiaries of institutional changes. This is because it is them who have to respect and apply them. And there is no guarantee that their *ex post* engagement will convince them to support the new institutional processes. Deliberation is a means for individuals to adopt principles and norms pragmatically. The Constitution does not adopt values, but meta-normative principles. Values are abstract and are perceived differently by each individual. On the contrary, constitutional principles contain provisions on how these can be realized. Institutions are the means to maintain the constitutional principles. Debate is also recommended in order to minimize the risk of subsequent institutional deadlocks. A convention on values is, obviously, not excluded, but this does not need to be institutionally formalized. What is relevant for the constitutional debate framework is to clarify as much as possible the constitutive principles of the institutional framework.

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