# *CONSIDERATIONS REGARDING THE OPPORTUNITY OF REVISING THE CONSTITUTION*

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*Abstract: The basic law of the state must comply to the evolution and dynamics of society and state clearly the manner of exercising the power within the state, the limits on exercising of the main prerogatives of government and the rights and duties of citizens.*

*The Romanian Constitution, adopted in 1991 and revised in 2003 has proved to be ineffective in many cases. Of course, compared to the 45 years of totalitarian leadership and the manner of thinking during 1990, the fundamental law was a milestone for Romanian democracy. However, constitutional practice as well as the research that followed after a quarter century demonstrates some shortcomings both in terms of form as well as in terms of content, which should be eradicated by the legislature in the next review.*

*This paper proposes an analysis of some constitutional issues that were found either unclear or inefficient that have generated multiple possibilities of interpretation or serious constitutional conflicts is part of a more complex personal research which led to my PhD "Democracy in the Romanian constitutional theory and practice during 1866 – 2003".*

Keywords: Constitution, review, constitutional crisis, fundamental rights and freedoms

The theory according to which the Constitution, the fundamental law of the state, was based, on one side on the principle of limiting the governing authorities and on the other side on the knowledge of its stipulations by means of an act recognized by people through referendum is indisputable.

Our constitutional history proves the constant concern for a fundamental act where one can find both the rights and the obligations of the governing authorities and the governed ones. Thus, a close look to the origins of the democratic state in Romania, that is the period prior to adopting the 1866 Constitution as the first fundamental act, entirely elaborated and adopted by a

local assembly, indicates a series of documents of real constitutional value, which, even in an embryonic state signals the evident tendency to a fundamental law *regarded as a sacred charter embodying the foundation of the common good*[1].

Modern ideas concerning the way of organizing the state are found in the Approved Constitutions of Transylvania, elaborated during 1540-1653, collection of decisions of the Transylvanian Dieta, which include important principles forming the base of the organization of social and judicial life of the province during Middle Ages. Acknowledging the legislation right of the Dietas, the principle of the prince's sovereignty , his free election, the free pronouncing of the vote are all stipulations foreseeing the actual, modern constitutional principles[2].

Reforming ideas are found in the Project drawn in 1802 by Dimitrie Sturdza, "*Plan or a form of republican-aristocratic-democratic rule"* as well as in the memorial of the cărvunari, initiated by representatives of the small landowners in Moldova and presented to Ioan Sandu Sturdza, a very relevant document due to its reforming and progressive ideas and its actual judicial consequences marking a memorable constitutional moment where one can find both clear principles of state organization and citizens' rights. In this regard, in doctrine, the Constitution of Moldova dated September 13th 1822 was considered "the first attempt to bring firmness to the liberal tendencies of Romanians structure and to the democratic principles in the entire world[3]". All these documents, as many others, prove the will to adapt some stipulations to the Romanian framework, even in an incipient form, stipulations that make up and foresee the judicial and constitutional future modernity.

This paper can't identify all projects, internal or international memorials, the above enumeration having the role of pointing out the constant concern for a fundamental judicial act to correspond to the economical, judicial, political and social life in a certain stage of development of each state.

The 1866 Constitution represents in the Romanian constitutional history, the fundamental judicial act that brings along in the Romanian scenery, a political regime that has as an exponent the monarch, as the symbol of the balance and moderation. The privileged position on one side,

[1] Stanomir I., Naşterea Constituţiei, Limbaj şi drept în Principate până la 1866, Ed. Nemira, Bucharest, 2004, p. 217
[2] Herlea A. ș. a., Constituţiile Aprobate ale Transilvaniei (1653)., Ed. Dacia, Cluj-Napoca, 1997, p.30-31
[3] Barnoschi V.D., Originile democraţiei române. „Cărvunarii". Constituţia Moldovei de la 1822. Ed. Viaţa Românească, Iaşi: 1922, p. 7

and as a moderator on the other, offered by Constitution, gives him legal rights within the legislative branch as well as in the executive one. The bicameral structure, as a constitutional option, as it is asserted by doctrine[4], was meant to "save the balance between powers, within which the nation was differently represented". Thus, the principle of the separation of powers was ensured by the existence and the cooperation with the other powers, legislative and executive, not only on the constitutional level, but also in its effective practice. The Constitution voiced the sovereignty principle, which meant that all State's powers emerge from the nation and are exercised by mandate according to the constitutional rules[5]. Although violently criticized as being a copy of the Belgian model not appropriate for Romanians structure and moreover, too liberal, the 1866 Constitution represented the fundamental establishment for almost six decades, revised twice, in 1878 and in 1917.

Adoption of the fundamental Act in 1923 was determined by the very important events of 1918, the unification of the Romanian provinces and created a new frame for Romania's constitutional development and a significant leap towards modernity which aimed to unify legislation, people and traditions. A simple revision of the Constitution from 1866 was not enough, the administration, the mentalities, the justice being very different from a province to the other[6]. Under these circumstances it was clear that legislative, administrative, economical, financial, national harmonization was necessary. All these aspects are reflected in both opposition parties' projects but especially within the conferences organized prior to adopting the constitution. I mention the lectures organized by the Social Romanian Institute under Professor Dimitrie Gusti, lectures that brought in the debates of those times, relevant topics as: universal vote as well as woman's position as a potential voter, the mechanism of cooperation and interference of the state powers, the role of the judicial branch, "but also on the necessity of turning towards the nation, by referendum[7]"

With a judiciously drawn and profound democratic content, the 1923 Constitution brought in the Romanian constitutional space new elements, maintaining the fundamental

[4] Stanomir I., Șibertate, lege și drept. O istorie a constituționalismului românesc, Ed. Polirom, 2006, București, p. 71-72
[5] Art. 31 din Constituția Romîniei publicată în M.O. 1/13 iulie 1866
[6] Damean S.L., Dănișor C., Ghițulescu M., Oșca A., Evoluția istituțiilor politice ale statului român de la 1859 până astăzi, Ed. Cetatea de Scaun, Târgoviște, 2014, p. 87
[7] Stanomir I., op.cit., p.86

institutions that proved during almost six decades efficiency. Founding the Army Superior Council[8] and the Legislative Council proves the concern of creating a unitary legislation, "according to the Constitution, foreseeing apart from the accuracy given by the judicial technique, the cutting back of the possible judicial litigations concerning unconstitutionality and creating generally a unitary, consistent legislation, aiming to an ideal state, resulted from a moral authority and a judicial capacity required from its members"[9].

Regarding fundamental rights and freedoms, the constitutional Act from 1923 kept a significant part of the previous stipulations, modifying, as asserted in doctrine, the state's position in relation with the owners and the economical factors of development[10].

The rights and freedoms such as: freedom of conscience (art. 22), freedom of cults, freedom of the media (art. 25), the privacy of the correspondence and the phone conversations (art. 27), freedom of labor (art. 21), social security measures, the right to association (art. 29), primary school compulsoriness (art. 24), as well as guarantee rights, petitioning rights (art. 30), represent a stage of significant development from a constitutional and a democratic point of view.

The 1938 fundamental act marks an involution stage, constitutionally and democratically, the legislative changes being the effect of the political mutations, more or less explicit on the Crown level. The constitutional values plenary asserted and sanctioned by the two previous fundamental judicial acts were replaced by values and principles that neglected the first ones. The imbalance of the state powers by the pre-eminence of executive power over the legislative one, usurpation, by means of transferring competencies of certain attributions to the assemblies by the executive, the law- decrees, the siege, the drastic freedom of speech, are, as precisely shown in doctrine[11] the symptoms indicating the sabotage of the constitutional regime of the limited monarchy sanctioned by the 1923 pact. Abolishing political parties, the interdiction to found others, limiting the universal vote by including a new category of voters, namely the educated ones, as well as king's position, named the Head of the State who exercised his legislative authority through the National Representation, the executive power through the

[8] Art.106 din Constituţia din 1923 publicata în M.O. nr. 282 /1923
[9] Berceanu B.B., Istoria constituţională a României în context internaţional. Ed.Rosetti, Bucureşti, 2003, p. 307
[10] Stanomir I., op. cit. p. 101
[11] Stanomir I., op. cit. p. 116

Government, judicial decisions enforced in his name, were legislative measures to consolidate the authoritative instituted regime.

The period of constitutional regress, of fundamental degradation of the constitutional institutions and of the public freedoms doesn't end with the 1938 fundamental Law, the erosion of the constitutional system will continue in the fundamental acts enforced thereafter in order to consolidate power. Similarly, 1948, 1952 and 1965 Constitutions consecrated a new way of organizing the society and implicitly the Romanian constitutional life where the role and the monopoly of the single party was judicially transcribed. Dividing up the society was possible not only by transforming the fundamental, democratic institutions of the state, which, as asserted in doctrine, "mattered a little or not at all"[12], by abolishing private property and destroying the human factor and the connections between the state and the citizen. Stipulation of the fundamental rights in these three Constitutions was only declarative: freedom of conscience, and private life, as well as freedom of expression were flagrantly contradicted through all those judicial stipulations of inferior judicial force which were sanctioning any manifestation against the regime.

The events in 1989 determined, as expected, adoption of a new fundamental law to correspond to the requirements of a new society whose totalitarian leadership lasted almost 45 years. Compared to the 45 years of totalitarian leadership and the manner of thinking during 1990, the 1991 Constitution represented a remarkable moment. It regulated the relation between state and citizen by stipulating their rights and obligations. However, researches that followed in the next quarter century demonstrate some shortcomings both in terms of form as well as in terms of content, which should be eradicated by the legislature in the next review that we consider necessary. There are opinions in doctrine[13] according to which the 1991 fundamental law didn't resume the Romanian constitutional traditions synthesized by the 1923 Constitution, but it was influenced by the communist dictatorial constitutions that formed the judicial foundation of the Romanian people oppression, so that 1991 Constitution kept in some approaches the communist conceptions regarding the content and the terminology. Moreover, as

[12]Damean S.L., Dănişor C., Ghiţulescu M., Oşca A, op.cit.p. 157
[13] Oroveanu M.T. Istoria dreptului românesc şi evoluţia instituţiilor constituţionale. Ed. Cerma,, Bucureşti, 1992., p. 305

far its adoption, there are opinions in doctrine[14] according to which "people chose between a constitutional project and the absence of the constitutional order".

Revisions are a consequence of the necessity of clearing and deepening the definition of all constitutional aspects that proved either unclear or inefficient. The essential condition is to quantify all notions in order to restrain the multiple possibilities of interpretation that generally represent a major deficiency for any primary legislation, so much more in the case of a judicial fundamental act.

The 1991 legislator obviously benefited from the lessons offered by the democratic societies but it limited – in many cases – to the alignment to the concepts of the moment, without daring to customize and deepen the concepts of the Romanian society and to consider its expectations.

The actual practice of the 1991 fundamental Law revised in 2003 proves the necessity of a real revision to restate its superior position in the hierarchy of the judicial acts and its role in the society's state organization, in determining the fundamental principles and values on which base all social-political systems - organized for this purpose- function[15]. The next revision of the Constitution should be founded on the concept stating that there must be precisely defined important notions found in constitution, not left to intuition either of the reader or of the practitioner. We mention in this respect: introduction of a preamble, rethinking of the legislative delegation institution, changing the semi-presidential regime in a parliamentary one.

The 1991 Constitution doesn't have a preamble to define the basic principles of the state policy. The importance of this preamble is obvious, politically, ideologically and last but not least normatively. As far as the judicial nature of the preamble is concerned, doctrine[16] correctly pointed out that its stipulations have no judicial value but a normative significance for exact and scientific interpretation, including enforcing the other constitutional stipulations.

Legislative delegation, stipulated by article 15 in Romanian Constitution is an attribution of the legislator that empowers by means of a law - for a certain period of time and in certain

[14] Carp R. , Stanomir I., Limitele Constituţiei. Despre guvernare politică şi cetăţenie în România., Ed. C.H.Beck, Bucureşti, 2008, p. 113
[15] Gabureac A., Constituţia- principala garanţie a protecţiei drepturilor omului într-un stat de drept, în Mecanisme naţionale de protecţie a drepturilor omului, Ed. Academiei de Administrare Publică, Chişinău, 2014, p. 363
[16] Guceac I., Constituţia la răscruce de milenii, Ed. Academia de Ştiinţe a Republicii Moldova, Chişinău, 2013, p. 176-177

conditions – the Government to issue normative acts with the force of a law (decrees) in the domains that are not bound to organic laws. Thus, the judicial institution of the legislative delegation is an important means in the mechanism of exercising state power. Constitution stipulates also the situation when legislative delegation can require emergency decrees, which enables Government to issue in certain extraordinary situations, whose rule can't be postponed, decrees for organizing laws' and decrees' enforcement, based on a special law, within the limits and the conditions imposed by law.

In the absence of law, the legislator didn't stipulate the cases when exceptional situations are required, omission leading to an excessive number of emergency decrees, but stipulating only the situations when they can't be adopted. According to the constitutional stipulations emergency decrees can't be enforced in the domain of the constitutional laws, can't affect the functioning of the state's fundamental institutions, rights and freedoms, electoral rights and they can't endorse measures of forced passing of certain goods to the public property (art. 115 item 6 Romanian Constitution). The constitutional practice of the last years proves the alteration of the separation of powers principle as well as the one of representation and imposes their rethinking in the future revision.

The solution of transforming Romania's Parliament into a unicameral one, as validated by referendum is efficient because Parliament will become more operative, more mobile, more efficient in solving problems related to the state's internal and international affairs, because the Parliament's role must be in accordance with the new political-judicial realities determined by European Union's founding as a superior and inter governmental organization.

The aspect concerning the rights of the minorities to an education in their native language[17] should be revised, considering that art. 13 stipulate that in Romania, the official language is Romanian.

These considerations are not limited; the opinions concerning the future revision are diverse and aim at either the fundamental restructure of the Constitution, or at restating and amending some articles. In this respect, Hegel's opinion is relevant: "People must have, related to the Constitution, the feeling of his own right and his own state of affairs, otherwise it can exist but lacking any significance or value".

[17] Art. 32 alin. 3 din Constituţia României publicată în M.O. Partea I, Nr. 767 din 31 octombrie 2003

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