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# ”Serenity in Overcoming Crises” A Parochial Gloss on the Transnational Shift in Constitutional Vocabularies<sup>1</sup>

BOGDAN IANCU

## INTRODUCTION: THE LANGUAGE OF CONSTITUTIONALISM

Constitutionalization and constitutionalism beyond the nation state (global, international, transnational, supranational, and the like) are prominent fads and fashions of the day. Variations on these themes resurface with predictable frequency in contemporary academic (political science and public law), judicial, and, to a more subdued but increasing degree, also in political discourse. Aside from the somewhat circular and repetitively tiring debates as to the possibility or opportunity of constitutionalizing the European Union, one hears also of the constitutionalization of international law under the UN Charter, of the WTO system in the aftermath of its quasi-judicialization through the dispute settlement bodies, of the Council of Europe system by way of the Strasbourg Court (ECtHR) decisions and even of the society itself as a result of global legal fragmentation and norm-collisions<sup>2</sup>. In the scientific literature, the common undertone of most contributions to the debate is dominated by two propensities: a general penchant for primarily abstract-theoretical discussions of constitutionalism beyond the state, often reaching the point of sterile pedantry, and the assumption, commonly unstated or implicit, that the “constitutionalization” of such processes and institutions represents an unmitigated civilizational benefit for the world at large and newer constitutional prodigies alike.

What follows from this text will be an inquiry into the possibilities of constitutionalism, when severed from its inherited contextual underpinnings, to serve as a satisfactory conceptual language for describing and assessing constitutional practices. Rather than tackling the problem in point of general theory, we will seek a qualified and contextualized answer to this question obversely, from the vantage point of a case study. The argument will analyze, namely, the way in which two bodies representing inter- and supranational legal systems purportedly in the process of constitutionalization, the European Commission for Democracy through Law (Venice Commission) and the EU Commission, have interacted with the Romanian constitutional system in the aftermath of a recent local political crisis, related to an attempt by the parliamentary majority in power to suspend the incumbent President. The interactions resulted in a number of indications rendered by these two bodies, as official positions on the matter. The Commission took its position as a part of its

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<sup>1</sup> Research for this article was supported by and undertaken within the framework of the research project PN-II-ID-PCE-2011-3-0115, “Governance/Government-The Constitutional Semantics of Autonomy”.

<sup>2</sup> Andreas FISCHER-LESCANO, Gunther TEUBNER, *Regime-Kollisionen-Zur Fragmentierung des globalen Rechts*, Suhrkamp Verlag, Frankfurt am Main, 2006.

bi-annual monitoring within the framework of the Cooperation and Verification Mechanism and the Venice Commission by way of an collaborative expert opinion<sup>1</sup>.

There are, to be sure, notable differences between the two instances of external Constitution intervention, concerning the status of the concerned institutions and the strictly legal nature and effect of the acts involved. The Venice Commission, a consultative body of the Council of Europe, adopted, after the fact, an opinion on the "compatibility with the with constitutional principles and the rule of law" of the actions taken, in view of expediting the impeachment process, by the Parliament and the Government in power. This opinion is drafted in primarily narrative form and detached, normative-constitutional terms. Indeed, the document reads on occasion much like a professorial brief on the compatibility of the Romanian Constitution with general "constitutional principles". Nominally, the act has no binding legal traction in Romania. However, recent judicial and jurisprudential events – references to documents issued by the Venice Commission in high-stake constitutional adjudication and a number of official letters by the Constitutional Court to the Commission, soliciting the latter's help against domestic political pressures – have raised the actual relevance of such interventions, including their potential manipulation in local political contests. Moreover, the EU Commission cited in its last progress report the findings in the Venice opinion. Perhaps aware of their enhanced status, the members of the Venice Commission, in spite of the purported, relatively modest purview of the act, undertook not only to assess the impugned legal actions, but also suggest a number of remedies, among which various amendments to the Romanian Constitution as such.

Conversely, the EU Commission is a supranational administrative institution. Its documents are formal acts adopted within a EU law mechanism, upon a legal basis in the Act of Accession<sup>2</sup>, and designed to monitor the progress undertaken by the two last members of the Union, Romania and Bulgaria, in terms of judicial and anti-corruption reforms (Bulgaria is also monitored with respect to progress in combating organized crime). The exact effects and status of the monitoring are somewhat unclear, given that, in spite of the three-year deadline set forth in the Accession Act (Arts. 36-38) and the specific benchmarks itemized in the initial 2006 decision of the Commission, the monitoring has not yet been lifted, whereas – paradoxically – its initial purview has seeped into ever further areas of interest and inquiry.

In spite of these differences between the two bodies and their respective systemic-legal contexts, a comparative treatment is warranted by the methodological constraints and epistemological endeavor of this argument, namely, seeking a qualified answer as to whether and to what extent older conceptual frameworks of references are useful if detached and abstracted from the context of nation-state constitutionalism. The argument will proceed by a brief introduction of the general problematics of constitutionalization and constitutionalism beyond the classical nation-state, continuing with a summary chronology of the Romanian events over the summer of 2012, and closing with an analysis of the international reactions to this crisis.

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<sup>1</sup> Opinion no. 685/2012 of 17 December 2012, CDL-AD (2012) 026.

<sup>2</sup> C (2006) 6569 final.

## CONSTITUTIONALISM IN TRANSLATION: AN INTRODUCTORY GLOSSARY

When the modern form of Constitution appeared in America and France, at the close of the eighteenth century, it represented a break with previous Western legal traditions. Its evolutionary achievement was the legal regulation of the sovereign nation state in a comprehensive and to a certain extent reflexive manner. Rationally devised foundational norms predetermined now, for the first time, not just the form of subsequent norm production but also the juridical conditions for the possibility of legitimate political rule. The cleft between medieval and absolutist legal arrangements, on the one hand, and modern limited government, on the other, resided in the fact that the normative Constitution regulated both legality (the reproduction of the legal system, constitutional renewal included) and legitimacy (the validity preconditions of political rule) in a jurisdictionally comprehensive, hierarchical, and impersonal manner<sup>1</sup>. As post-revolutionary creations of the Age of Reason, modern constitutional law as a practice and the rise of the normative Constitution as a phenomenon were from the beginning charged with rational and universalistic demands and implications. To wit, in order to understand the clash of paradigms brought about by the rationalistic impetus of Enlightenment-derived constitutionalization, one has only to recall the starkly contrasting accounts of the developments in the contemporaneous tracts by Thomas Paine and Edmund Burke.

The rational-universal facet of the modern legal transformation is captured by the umbrella notion of constitutionalism. Constitutionalism, the "political theory that generally accompanies the technique"<sup>2</sup>, developed in conceptual lockstep with the rise and spread of constitutional forms, as a reservoir of ideological/philosophical accounts and justifications of the limited government and its central apparatus of concepts and institutions: "the rule of law", "representation", "separation of powers", "judicial independence", "fundamental rights", "equality under the law", etc. However, due to the conceptual ambiguities, dichotomies, and paradoxes of the Enlightenment ("modernity")<sup>3</sup>, the residue of context and emotion in constitutional design<sup>4</sup>, and the related and overhanging parochial/democratic implications of political sovereignty<sup>5</sup>,

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<sup>1</sup> On the "reflexivity" of law under the modern constitution, see Niklas LUHMANN, "Verfassung als evolutionäre Errungenschaft", *Rechtshistorisches Journal*, vol. 9, 1990, pp. 176-220. On the qualitative difference between pre-modern ("descriptive") Constitutions and the modern, "normative" form, see Dieter GRIMM, *Deutsche Verfassungsgeschichte 1776-1866*, Suhrkamp, Frankfurt a.M., 1988, and IDEM, "The Achievement of Constitutionalism and its Prospects in a Changed World", in Petra DOBNER, Martin LOUGHLIN (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford, 2010, pp. 1-22.

<sup>2</sup> Martin LOUGHLIN, "What is Constitutionalisation?", in Petra DOBNER, Martin LOUGHLIN (eds.), *The Twilight...cit.*, pp. 47-69/p. 55.

<sup>3</sup> Neil WALKER, "The Place of European Law", in Gráinne de BÚRCA, J.H.H. WEILER (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge, 2012, pp. 57-104.

<sup>4</sup> On the role of collectively held emotions in constitutionalism, see András SAJÓ, *Constitutional Sentiments*, Yale University Press, New Haven and London, 2011.

<sup>5</sup> Carl SCHMITT, *Verfassungslehre*, Duncker & Humblodt, Berlin, 1993 (1928); Dieter GRIMM, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin University Press, Berlin, 2011.

constitutionalism never reached, in a world of nation-states, a satisfactory level of notional precision. Indeed, in extreme and from the standpoint of analytical accuracy justifiably, this ambiguous term has been described as "one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse"<sup>1</sup>. The usefulness and limitations of the conceptual vocabulary provided by constitutionalism to the actual practices of constitutional law in the various jurisdictions resided primarily in the creation of a structuring discursive-doctrinal framework of reference, used for comparison across and polemical contestation within jurisdictions. Thus, to put it in more exacting terms, the universal and abstract drive embedded in the language of constitutionalism was moored to and hedged within the concretely situated constitutional events and practices of the nation-state. This was all the more possible since, until relatively recent times, states coexisted, from a juridical point of view, to extrapolate Disraeli's metaphor, in an insularly "splendid isolation" from each other<sup>2</sup>. The overarching principle of modern public international law, *pacta sunt servanda*, is after all based on the formal contractualist assumptions of perfect equality among sovereigns. By the same token, direct interventions in the constitutional arrangements of foreign jurisdictions (e.g., the regime of capitulations), inasmuch as they took place, were primarily predicated upon considerations of opportunity (state interest) rather than principle<sup>3</sup>.

Starting from the end of WWII and trading an increasingly accelerated pace over the last two decades or so, a process of de- and trans-nationalization of legal practices has been underway, to the effect that the language of constitutionalism was progressively detached from the state-centered practices of constitutional law. The exact normative implications of this general development are somewhat arcane, as evidenced by the overlapping and cacophonous multiplicity of imprecise and tentative descriptions of the unfolding events: "transnational", "multi-level", "post-modern", "global", "polyarchic", "societal", "international", "pluralist", and, alas, even "mosaic"<sup>4</sup> constitutionalism (constitutionalization; constitutional law)<sup>5</sup>. But, if the

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<sup>1</sup> T.C. GREY, "Constitutionalism: An Analytical Framework", in J.R. PENNOCK, J.W. CHAPMAN (eds.), *Constitutionalism: Nomos XX*, NYU Press, New York, 1979, pp. 189-208/p.189, quoted after Martin LOUGHLIN, "What is Constitutionalisation?", cit., at p. 55.

<sup>2</sup> "With the constitution being a set of norms given by a state, for a state, and which is valid within a state, it is coextensive with the state. The constitutional order ends at the borders of a state, with both of them, state and constitutions, having to give way to other states, people, and constitutions, at these borders." Petra DOBNER, "More Law, Less Democracy?-Democracy and Transnational Constitutionalism", in Petra DOBNER, Martin LOUGHLIN (eds.), *The Twilight...cit.*, pp. 141-161/p. 143.

<sup>3</sup> See generally, Rosalind DIXON, Vicki C. JACKSON, "Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests", *Wake Forest Law Review* (forthcoming); UNSW Law Research Paper No. 2012-53. Available at SSRN: <http://ssrn.com/abstract=2174134>, last accessed March 4, 2013.

<sup>4</sup> See, Neil WALKER, Jo SHAW, Stephen TIERNEY (eds.), *Europe's Constitutional Mosaic*, OR: Hart Publishing, Oxford and Portland, 2011.

<sup>5</sup> Such debates are not confined to the Anglophone legal world; complementary conceptual descriptions abound in contemporary legal discourse across legal systems. In German public law literature, one also uses, for example, the concepts of "*Teilverfassung*" ("partial- or complementary- Constitution") and "*grenzüberschreitende Konstitutionalisierungsprozesse*" ("cross-border constitutionalization processes"). See, for a forensic chart of the debates and a

legal-normative import of the transformations cannot be at this stage authoritatively gauged, as one can gather from this taxonomical litany, the general causes and effects of the phenomenon are identifiable with relative ease. On the one hand, the increasing global, risk-based "community of fate and faith"<sup>1</sup> across governments has resulted in the creation of governance instruments whose legal acts have binding effect within or at least compelling force on local jurisdictions. At the same time, the decisional processes of the adopting institutions escape the direct political-democratic control under the national Constitution.

Such inter-, trans-, or supranational instruments range, on a spectrum delineated in terms of the respective degrees of structural density and decisional purview, from sectoral regulation and/or adjudication mechanisms (human rights protection under the Council of Europe system, free trade regulation under the WTO) to a level of normative and institutional integration that approximates classical federal arrangements (the case of the EU). On the other hand and by the same token, as the decisional clout and level of integration increased and as more competences migrated to decisional structures located outside the perimeter of the nation state, juridical and participatory protections were added to those supranational and international bodies. Changes were undertaken in recognizably inherited patterns, seeking to compensate for the erosion of constitutional statehood and the countervailing deficits of legitimacy and responsiveness by transposing in adapted form some of the institutions of classical, government-related fundamental law. This general process of mimetic adaptation and inchoate rapprochement is nowadays ubiquitously dubbed constitutionalism or constitutionalization (of the EU, WTO, ECHR, etc.<sup>2</sup>).

However, by detaching the conceptual language of constitutionalism from its customary nation-state contextual environment and heaving it to the level of a constitutional Esperanto for use by and among international or supranational structures, the vocabulary suffered an interesting metamorphosis. Firstly, inherited concepts such as the rule of law, judicial independence or separation of powers needed of necessity to be abstracted to a sufficiently high level of generality, in order to (self-) describe the newer, changed practices of the global institutions and to allow these systems to communicate in a common language with their more idiosyncratic classical counterparts. Secondly and related, newer, quasi-constitutional terminologies have arisen, as cosmopolitan, surrogate conceptual translations for or replacements of the

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skeptical take on the transplant-translation possibilities, Ulrich HALTERN, "Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende", *Archiv des öffentlichen Rechts*, vol. 128, 2003, pp. 511-557.

<sup>1</sup> Cf. Andrés SAJÓ, "Comment-The Judicialized Handling of Global Risk", in Bogdan IANCU (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication*, OR: Eleven International Publishing, Utrecht and Portland, 2009, pp. 85-88.

<sup>2</sup> The literature on EU constitutionalism has predated and flourished in spite of the Constitution Treaty failure. Thus, a recently updated authoritative collection edited by Bogdandy and Bast is audaciously titled "European Constitutional Law" (*Europäisches Verfassungsrecht*, zweite, aktualisierte und erweiterte Auflage, Springer, Heidelberg, Berlin, 2009). See, on the "constitutionalization" of the ECHR and WTO systems, Christian Walter's optimistic "Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, Bd. 59, 1999, pp. 963-983 and the skeptical article by Jeffrey L. DUNOFF, "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law", *European Journal of International Law*, vol. 17, no. 3, 2006, pp. 647-675, respectively.

older state-centered notions (e.g., "good governance", "integrity", "transparency", "anti-corruption" and the like).

## THE CONTEXT

Over the summer 2012, an attempt was made by a newly formed parliamentary majority, hostile to the President of Romania, to remove the incumbent, Traian Băsescu<sup>1</sup>. According to the Romanian Constitution (Art. 95), the President can be suspended from office for "committing grave acts infringing constitutional provisions". A third of the MPs can initiate the procedure. Following the receipt of an advisory opinion by the Constitutional Court, an absolute majority must vote on the articles of impeachment, in joint sitting of the two Houses, for the suspension to take effect. A popular referendum is held within thirty days and, if the impeachment is confirmed in the referendum, the president is removed from office. The Speaker of the Senate (or, in this order of succession, that of the House of Representative) serves as acting president (Art. 98). An interim president exercises almost the full gamut of presidential attributions and can also be impeached, for the same reasons and following the same procedure (Art. 99).

A number of procedural hurdles stood in the way of the new majority. The Speakers of the two Houses had been appointed by the former party in power. According to two constitutional decisions of 2005, the symmetrical removal provisions of the Standing Orders of the Houses had been declared unconstitutional. According to the two almost identical holdings, a purely political removal of the Speakers contradicted "the constitutional principle of [electing the Speakers in conformity with] the political configuration resulting from the parliamentary elections"<sup>2</sup>.

The removal of a parliamentary Speaker, as well as the vote to suspend the President, are effected by parliamentary decisions (*hotărâri*). According to the text of the Constitution, such decisions are not subject to constitutional review but the Court's attributions can be increased by amendments to its organic law. Art. 47 (1) in the Constitution reads: "[The Constitutional Court] exercises other attributions, as provided in its organic law". Article 27 in the Constitutional Court Law (Law 47/1992) had been amended in 2010, adding the review of parliamentary decisions to the jurisdictional competence of the Court. Constitutional control of parliamentary decisions meant in practice that not only the removal of the two Speakers but also the decision to suspend the President could be judicially reviewed. In the latter case, the review of the legislative decision would have provided the Constitutional Court with the possibility to intervene twice in the parliamentary impeachment procedure (advisory opinion for the Parliament and a decision on the resolution to suspend the president), the second time with binding legal effect.

A third hindrance concerned the legislative and constitutional regime of the impeachment referendum. The Constitution entrenches neither a validity condition

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<sup>1</sup> For an earlier, extended version of and comment on this chronology, in the context of the July 2012 MCV Commission report, see Bogdan IANCU, "Romania under EU Influence: Note on the Constitutive Limits of External Constitutional Interventions", *PolSci-Romanian Journal of Political Science*, vol. 12, no. 2, 2012, pp. 53-76.

<sup>2</sup> Decision Nos. 601 and 602 of 14.11.2005, OJ Nos. 1022 and 1027 of 17 and 18.11.2005, respectively.

(quorum) nor a clear decisional rule (majority) for the procedure, and thus Article 10 (impeachment referendum) in the Referendum Law 3/2000 has been, over the years, repeatedly tinkered with by all parties in power. In 2007, during a prior attempt to impeach President Băsescu, the parliamentary majority amended the law, providing for an absolute majority (i.e., a majority of voters registered on the electoral lists) to remove a president elected in the first ballot and a relative majority (a majority of those actually taking part in the referendum) to confirm the impeachment of a president elected in the second ballot (Băsescu's case). The amendment was declared unconstitutional. Nonetheless, as the court noted in obiter, nothing prevented the Parliament from opting for the same legal solution (i.e., absolute or relative majority) in all these hypotheses<sup>1</sup>. Upon a change in the parliamentary majority, the law was again modified by the new government, politically close to the President: Emergency Ordinance 103/2009 amended Article 10, so that a quorum (the majority of registered voters) was set again as the validity condition of all constitutional referenda, including impeachment. Subsequently, the law that approved the ordinance (L. 62/2012) modified the article again, raising the procedural bar higher. The new form of the provision read: "The impeachment of the President is approved if voted for by a majority of the citizens registered on the electoral lists".

In the Romanian constitutional system laws can be amended either through the ordinary legislative process or by means of delegated, i.e., executive legislation (Art. 115). Whereas ordinary delegations are authorized by the Parliament within a certain time-limit and within the domain of ordinary legislation, "constitutional delegations" by emergency ordinances are in practice a prerogative of the executive. An emergency ordinance needs no enabling law as legal basis, takes effect immediately (it must only be "laid before parliament", and is considered adopted if neither of the legislative chambers takes action within 30 day-periods). Furthermore, emergency ordinances can amend organic legislation (such as the Referendum and the Constitutional Court Laws). Due to the fact that the current constitutional regime immunizes such measures from timely review, ordinances are a wieldy political weapon. Unlike ordinary laws, whose constitutional validity can be challenged before promulgation, ordinances can be reviewed only *ex post*, through an exception raised by a party in the course of ordinary litigation and referred to the Constitutional Court by the case adjudicator (an ordinary court of law or commercial arbitration tribunal). This means in practice that, until the dispute is submitted to constitutionality review, the political context and stakes would have changed considerably. However, the Ombudsman can bring an exception of unconstitutionality against provisions in an ordinance directly before the Constitutional Court (Art. 146 [d]). According to the Constitution (Art. 58 [1]), the Ombudsman ("Advocate of the People") is appointed for a term of office of 5 years "to defend the natural persons' rights and freedoms".

On July 3, the Parliament revoked the Speakers and the Ombudsman. The Ombudsman was accused of challenging the constitutionality of a number of ordinances that regulated purely administrative matters and thus of exceeding the constitutional mandate of the institution. The likely circumstantial motive was to replace the incumbent with an officeholder more sympathetic to the new power. At the same time, amendments to the Constitutional Court Law and the Referendum

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<sup>1</sup> Decision No. 147 of 2007, OJ No. 162 of 7 March 2007. This obiter appreciation was restated in Decision 420 of 3 May 2007.



Law were made, in the simultaneous form of parliamentary bills and emergency ordinances. The most probable rationale for this normative duplication was that, in the event that the bill would have been declared unconstitutional, the analogous provisions in the ordinances would have remained in force due to the lack of an effective remedy. The Constitutional Court was subsequently asked to render its position on the impeachment within 24 hours. Following the receipt of a rather ambiguous advisory opinion<sup>1</sup>, the President was suspended on the same day, the 6<sup>th</sup> of July.

The objections of unconstitutionality regarding the legislative proposals to amend Law 47/1992 and Law 3/2000 and the constitutional complaints against the removals reached the Court and decisions were rendered during early July 2012. The decision on the Referendum Law declared the law as amended "constitutional...insofar as it ensures the participation in the referendum of fifty percent plus one of the number of citizens registered on the electoral lists"<sup>2</sup>. This departure from the 2007 jurisprudence, which had left the matter at the appreciation of the legislature, was explained with a selective reference to a Code of Good Practice in Referenda adopted by the Venice Commission, recommending stability in electoral legislation<sup>3</sup>. But the Court ignored the express warning in the same report against quorum provisions in referenda. As the Court noted, the provision of a quorum was needed to give effect to popular sovereignty and to bolster wide participation of the citizenry as an expression of "civic duty".

The decision on the constitutionality of the Constitutional Court Law amendment declared the impugned provision unconstitutional with the reasoning that the Court's jurisdiction cannot be removed for instrumental reasons, while cases are pending. The holding added however that only parliamentary decisions that affect "constitutional values, rules, and principles" would be subjected to judicial scrutiny<sup>4</sup>. Yet, in the cases regarding the constitutionality of the actual parliamentary decisions removing the two Speakers, the justices did not find a breach of constitutional principles or values, in contradiction with the 2005 constitutional jurisprudence referred to above<sup>5</sup>.

The events that unfolded in the month of August gravitated around the constitutionality of the referendum. The permanent electoral lists for presidential elections comprised at the time the figure of 18.292.464 registered voters. Eventually, 8.459.053 citizens (46,24 % of the baseline figure) took part in the referendum on the 29<sup>th</sup> of July. Among these, over 87% voted in favor of dismissal. The vote was influenced by the impeached President, who, initially supporting participation, changed tactics campaigned for a boycott of the procedure. In a ruling of early August, the Court

<sup>1</sup> Advisory Opinion No. 1 of 6 July 2012, OJ No. 456 of 6 July 2012. The Court rejected most of the articles of impeachment, upon the general reasoning that the expression of political opinions was not covered by the constitutional impeachment provision, which sanction actual deeds. A number of arguments in the impeachment proposal were however validated and the appreciation of their seriousness was left at the political discretion of the legislature.

<sup>2</sup> Decision No. 731 of 10 July 2012, OJ No. 478 of 12 July 2012.

<sup>3</sup> See Code of Good Practice in Referendums, adopted by the Council for Democratic Elections at its 19<sup>th</sup> meeting (Venice, 16 December 2006) and the Venice Commission at its 70<sup>th</sup> plenary session (Venice, 16-17 March 2007) on the basis of contributions by Pieter van Dijk, François Luchaire, and Giorgio Maliverni, CDL-AD (2007)008rev, at p. 23.

<sup>4</sup> Decision No. 727 of 9 July 2012, OJ No. 477 of 12 July 2012.

<sup>5</sup> Decisions Nos. 728 and 729 of 9 July 2012, Of Nos. 478 and 480 of 12 July 2012.

declared the boycott fully conformant with the Constitution and equally expressive of sovereignty and civic duty. This was especially the case, as the Court observed, when "the applicable legislation requires participation"<sup>1</sup>.

What remained unsettled for a few more weeks was whether the validity of the referendum was to be measured in terms of the permanent electoral lists applicable by virtue of the Law on the Election of the President (370/2004) or of the general electoral laws. The difference is that, whereas the permanent electoral list for presidential elections comprises all Romanian citizens over the age of 18, only citizens whose residence is registered in their respective constituencies are on the other permanent electoral lists. The Court awarded the Government time to update the lists prior to a final ruling on the validity, but neither the text of the Referendum Law nor the August 2 ruling gave guidance as to what the recount would actually have to bear on. A reference in the text intimated that Romanian citizens residing abroad vote on "supplementary electoral lists". In view of massive immigration from Romania over the past decades, subtracting the diaspora (1.101.809) voters from the recount figure would have decisively tilted the balance. Nonetheless, on the 6<sup>th</sup> of August, while the Court was out of session, an "errata" making a specific reference to Law 370/2004 was sent by the justice on duty to the *Official Journal* and inserted retroactively in the original decision; three of the justices, which had taken part in the initial ruling, were not informed by the Court President of this change. After a few more weeks, the Court invalidated the referendum for lack of quorum<sup>2</sup>.

## CHANGED VOCABULARIES

### *The Metamorphoses of Corruption and Judicial Independence*

Unlike in the case of the previous wave of accession, the last two members of the Union have been subjected both to pre-accession scrutiny of the adoption of the *acquis*, including the political conditionality, and to a post-accession monitoring under the CVM mechanism. The continued scrutiny reflected the conjoined desire to extend the Union and a degree of distrust on the part of the Commission and older Member States that the two countries were ready to serve as full-fledged parties in the common venture. Judging from the above illustration of the most recent vagaries of Romanian constitutionalism, this cautious attitude appears justified. The crux of the matter is, however, if the chosen instrument is fit to nudge the fledgling newer additions unto the path of requisite civility.

The chosen benchmarks were ostensibly targeted at precise tasks, expressed in neutral, apparently non-political categories: the establishment of a transparent and

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<sup>1</sup> Ruling No. 3 of 2 August 2012, OJ No. 546 of 3 August 2012.

<sup>2</sup> Ruling No. 6 of 21 August 2012, OJ No. 616 of 27 August 2012. See the dissenting opinion by Justices Toader, Gașpar, and Predescu: "Our disagreement with the ruling...rests on the fact that it has been adopted by reference to the provisions of Art. 2 (1) of Law 370/2004 on the election of the President of Romania, a solution anticipated through the 'errata' of August 6, 2012, referring to the Ruling of the Constitutional Court No. 3 of 2 August 2012, an 'errata' regarding the adoption of which we were not consulted, a procedure unprecedented in constitutional jurisprudence".

efficient judicial process by enhancing the capacity and accountability of the Superior Council of the Magistracy and the adoption of new civil and penal procedure codes, the establishment of an integrity agency with the capacity for issuing mandatory decisions, and the continuation of the fight against high-level and local government corruption.

Prior to the accession, in 2003, the Constitution had been amended, largely at the behest of the Commission, to insulate the judiciary from political encroachments, by granting the representative institution of the body of magistrates constitutionally entrenched autonomy. At the time, the Commission had perceived this arrangement as the perfect guarantee of judicial independence and, in turn and somewhat circularly, judicial independence thus understood as the optimal guarantee for fostering "capacity and accountability". The problem is that the principle as such, at this level of abstraction, is a very imperfect proxy for determining an optimal institutional setting at the constitutional level. On the one hand, the individual independence (immovability) of judges is not coextensive with the autonomy of the judiciary as a body. In fact, before the constitutional amendments the Commission had to defend the judiciary against political decisions by the executive. Soon after the constitutional insulation of the structure the dangers of institutionalized corporatism became apparent, whereas the solution to this newer configuration (internal in-fighting for influence and occult forms of politicization within the judiciary and the Council) had by then become much more intractable at the systemic level<sup>1</sup>. On the other hand, magistrates are not, in the Romanian constitutional system, so to speak, "equally independent". The Council of Magistracy is indeed the representative body of both judicial and prosecutorial magistrates. The latter category form, nonetheless, a hierarchical structure with some apparent executive connotations and attributions, recognized in terms of their constitutional and legislative status; the structure is designated as "Public Ministry" and, moreover, the activity of prosecutors is placed "under the authority of the Minister of Justice"<sup>2</sup>.

This setting resulted in a degree of structurally determined irresolution as to the proper balance of political (Ministry of Justice) and corporate judicial (Superior Council of Magistracy) attributions with respect to the control over the prosecutorial body. Furthermore, since the appointment to the higher prosecutorial positions is made by the President, whose position within the Executive Branch is, due to gaps in the constitutional text, under continuous contention, the situation further is complicated in times of cohabitation.

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<sup>1</sup> See, on the Romanian case, Bogdan IANCU, "Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania", *European Constitutional Law Review*, vol. 6, no. 1, 2010, pp. 28-58. See generally, on the perils of working with abstract ready-made molds in technical legal assistance programs, Stephen HOLMES, "Judicial Independence as Ambiguous Reality and Insidious Illusion", in Ronald Dworkin (ed.), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis*, CEU Press, Budapest, 2004, pp. 3-14.

<sup>2</sup> For instance, according to Art. 63 (h & i) of Law Regarding Judicial Organization No. 304/2004 (as republished), prosecutors "act for the prevention and combating of criminality under the coordination of the minister of justice, for the realization of the unitary penal policy of the state" and "study the causes generating and favoring criminality, elaborate and propose to the minister of justice measures to eliminate such". The public law literature in Romania is divided on the exact nature of the Public Ministry (i.e., executive, judiciary or mixed). The European models offer no trenchant answer to the question, with perhaps a tilt towards the executive.

The same difficulties or antinomies obtain in the case of anti-corruption measures, particularly with respect to the constitutional status of the integrity agency, whose independence from direct majoritarian decisions does little to guarantee its effectiveness. The Commission used corruption as a proxy for systemic reform and the constitutionally guaranteed institutional autonomy of the National Integrity Agency as a proxy for optimal output efficiency. Aside from the elusiveness of "corruption" as a reliable, objective indicator of positive systemic change, the mandate of the agency has been dramatically altered as a result of constitutional decisions assessing the functional implications of institutional independence from the branches of power. For instance, the initial attribution of the National Integrity Agency (ANI) to bring unjustified asset confiscation actions directly to the administrative court was declared unconstitutional since "jurisdictional" in its nature<sup>1</sup>. In response to the decision, a "buffer" was provided by legislative amendments, so that the administrative acts are now screened, prior to the actual adjudication by a Court of Appeals, by Wealth Investigation Commissions composed of two judges and a prosecutor<sup>2</sup>. As a result, the cases are in effect pre-judged by a quasi-judicial/quasi-administrative body which, in this configuration, serves as a mixture of kangaroo court and Star Chamber. This development was to be expected, both in view of prior decisions of the Romanian Constitutional Court with respect to the status of autonomous institutions and in consideration of the general problematics of administrative autonomy. The perplexing dilemma of tabulating in normative-constitutional terms the precise functional implications of administrative "independence" is somewhat of a riddle in all constitutional systems (witness the irresolution of "formalist" and "functionalist" decisions on the matter in American jurisprudence). But the Commission continued unabated to perceive the normative impasse in pure policy terms and recommended amendments to the organic law regulating the agency, as follows:

"It appears that the Wealth Investigation Commissions established under the revised ANI law at the level of courts of appeal de facto rule on merits of cases transmitted by ANI to the same evidential standard as the trial court. Such a procedure not only delays the judicial decision-making process but also duplicates the role of the Courts of Appeal, which should be competent to rule on ANI cases. For this reason, measures will need to be taken to avoid inconsistent practice by the Wealth Investigation Commissions. There is a need for a further amendment to the law to allow ANI to appeal decisions of the Wealth Investigation Commission. Since the Commission's last annual assessment, only two cases of unjustified assets have been confirmed by courts in first instance"<sup>3</sup>.

If this recommendation would be heeded, the amended law would most likely be once vulnerable to a finding of unconstitutionality, aside from the additional problems of jurisdictional coordination/duplication. By virtue of making their decisions

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<sup>1</sup> Decision No. 415 of 14.04.2010, OJ No. 294 of 05.05.2010.

<sup>2</sup> This structure was provided as enforcement mechanism by Law 155/1996, an earlier (and largely ineffective) anti-corruption measure. Nonetheless, in the current legislative framework, it functions as a screening interface between the agency and the court; this setting raises completely different constitutional implications.

<sup>3</sup> Commission Cooperation and Verification Mechanism Progress Report of July 20, 2011, COM (2011) 460 final.

subject to appeal, the Wealth Investigation Commissions would arguably become, by definition, either extraordinary jurisdictions, forbidden by the Constitution or special jurisdictions, which must be, according to an odd provision in the Romanian Constitution (Art. 21 (4)), "gratuitous and optional".

Behind these apparently technical constitutional conundrums and the endless nitpicking lurks the deeper problem that the categories used by the Commission to scrutinize the fitness of the Romanian system for equal membership in the European club do not appear to yield satisfactory results. To wit, the constitutional events of the past few years, culminating in the crisis over the past summer, appear to indicate a degree of "institutional corruption" (in the sense of general and systematic political and judicial manipulation of rules and institutions)<sup>1</sup> in the face of which a few findings of incompatibility and a few successful prosecutions in high stake corruption-related cases, commendable though they may be, arguably have diminutive, primarily theatrical and decorative effect.

The Commission seems however to have perceived the deficiency and started, in the middle of the crisis, to issue openly constitutional recommendations to the Romanian government<sup>2</sup>. This approach, commendable though it may be in principle, is fraught however with perils of its own making. On the one hand and at the most trivial level of perception, the Commission lacks an appropriate legal basis for its newfangled constitutional proclivities. A first report, over the summer, sought to relate the judicial reform attributions to the rule of law and judicial independence, these lofty ideals to the Constitutional Court as an independent judicature, and the recent constitutional jurisprudence to the functioning of the Romanian constitutional system. The last report includes a special sub-heading on "The Romanian Constitutional order"<sup>3</sup>. This elongated conceptual chain is, of course, hardly unassailable.

On the other and related, the more the Commission intervenes professedly in constitutional matters, the higher are the knowledge costs and legitimacy burdens it takes upon itself. In the last report, one can for instance read that: "The Ombudsman has an important role in safeguarding the checks and balances of the system, and in particular to control the power of the executive to legislate through ordinances". This assertion is, in the logic of the Romanian Constitution, imprecise to the point of error. According to the fundamental law, the role of the Ombudsman is not that of a separation of powers umpire but the more modest one of "defending the rights and liberties of *natural persons*" (Art. 58 [1], emphasis added). The attribution of bringing exceptions of unconstitutionality to the Court, according to even a lay reading of the constitutional text, is subordinated to this specific mandate.

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<sup>1</sup> On the concept of institutional corruption, Barry HINDESS, "International Anti-corruption as a Programme of Normalization", in Louís de SOUSA, Peter LARMOUR, Barry HINDESS (eds.), *Governments, NGOs and Anti-Corruption: The New Integrity Warriors*, Routledge, New York, NY, 2009, pp. 19-32. Of particular interest in this context is the following remark, at p. 24: "[T]he restriction of press freedom might itself be seen as a clear case of [...] 'institutional corruption' in which the gain is political rather than personal....This kind of corruption is hardly something that can be compensated for by a crackdown on corruption in other areas".

<sup>2</sup> See generally, on the July 2012 MCV report, Bogdan IANCU, "Romania under EU influence... cit."

<sup>3</sup> COM (2013)47 final, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, Brussels 30.1.2013.

Another recent recommendation is more problematic still. In the last country report, under the heading of "Independence of the judiciary", upon a general, unsubstantiated reference to media "pressure on judicial institutions and lack of respect for the independence of the judiciary", an entreat to the government is placed to "ensure that freedom of the press is accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress". Leaving aside the fact that institutions are not possessed of fundamental rights and that few constitutional systems limit free speech to protect institutions (such rules were common in the criminal code under the empire of the Constitution of the Social Republic of Romania of 1965 but have been abandoned in the meanwhile), what constitutes effective redress with respect to libel or slander depends on a deeply political-constitutional choice with respect to the public sphere. Whether, for example, more privacy to speech (France) or more speech to privacy (the U.K. or the U.S.) is preferred is a political value judgment for which there no general constitutional recipe is at hand, ready-made for bureaucratic application. Consequently, very little legitimacy can be found for a choice located beyond the democratic reach of the concerned political community. Furthermore, the lowest pan-European common denominator in human rights respects, the ECtHR jurisprudence, seems to indicate rather the opposite, namely, that one should err on the side of free speech, and protect political debate, even when it is unpalatable or even insulting or aggressive, and especially when it is directed at a public person<sup>1</sup>.

### *The Values of Serenity*

A number of recommendations in the Venice Commission report duplicate the misgivings in the EU Commission monitoring assessments. For instance, it is stated in this latter document that

"If the Advocate of the People were not able to appeal to the Constitutional Court against government emergency ordinances in all cases – not only in human rights cases –, a serious gap in the necessary control of such ordinances would occur. No other state body than the Advocate of the People can directly appeal against such ordinances to the Constitutional Court and, consequently, all emergency ordinances, which do not relate to human rights, could not be controlled at all"<sup>2</sup>.

Aside from the reasons already iterated above, it is unapparent how the specific action, ultra vires and thus plainly unconstitutional, of one institution, could remedy general and potential unconstitutionality problems.

Other considerations in the opinion are equally troubling. Reviewing the succession of events in the impeachment process, the authors express their concern that "the procedure as a whole implie[d] that the dismissal of the President may have been *politically motivated rather than based on a sound legal basis*"<sup>3</sup>. Nonetheless, unlike the

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<sup>1</sup> See *Lingens v. Austria* (1986), 8 EHRR 407.

<sup>2</sup> Opinion no. 685/2012 of 17 December 2012, CDL-AD (2012) 026, Par. 55.

<sup>3</sup> *Ibidem*, Par. 45 (emphasis supplied).

case of presidential suspension from office subsequent to a conviction for high treason, where even though the procedure is triggered by a political vote in Parliament serving as formal indictment before the High Court of Cassation and Justice, the decision as such is judicially determined and has a sound legal basis in criminal law (Art. 96), impeachment follows a majoritarian-democratic course throughout. Such procedures are in fact commonly regarded as political in nature. In the case of the United States, for instance, where the entire impeachment process takes place within the legislature, the Supreme Court has explicitly stated, that such matters fall outside its judicial capacity and, as long as the procedure as such is followed, the substantive outcome as such is a result of pure political choice. In other words, according to the Supreme Court, whether the US Senate "tries" properly an impeachment is a "political question"<sup>1</sup>. Just like "other High Crimes and Misdemeanors", the meaning of the Romanian counterpart expression, "grave acts in breach of the Constitutional provisions", cannot be read in a purely juridical key. This is all the more evident in view of the fact that many of the attributions of the Romanian President are broadly formulated (e.g., Art. 80 [2], "mediation between the powers of the state and between state and society"). The "legal basis" is therefore covered by following the constitutional procedure itself, with its steps concluding in a popular referendum.

In closing, the Venice report includes a general section on "Mutual respect and loyal co-operation between institutions"<sup>2</sup>. Within it the reader can find, amid benevolent digressions on the values of harmony, the following sentence:

"Only mutual respect can lead to the establishment of mutually accepted practices, which are in compliance with the European Constitutional Heritage and which enable a country to serenely overcome crises"<sup>3</sup>.

The concert that was expected by the fathers of classical constitutional theory (Montesquieu, Madison, etc.) to follow from checks and balances was a dynamic one, arising from power arresting power, not from anthropomorphic expectations of gentlemanlike demeanor in institutional relations. Furthermore, one does not necessarily have to be a dyed-in-the-wool Schmittian to notice the slightly oxymoronic overtones of the expression "serenely overcome crises" and not much of a legal historian to know that there is little in the name of "European Constitutional Heritage" to give authoritative directions on the general issue of democratic tranquility. If anything, examples abound of lack of serenity in constitutional politics and, as long as procedures and judicial decisions are duly followed, it is in good democratic tradition and hefty Jeffersonian temper to experience crises from time to time.

## CONCLUSION

One could of course choose to oversee most of the occasional missteps in the reports, attributing them to incompetence or insufficient information. Proceeding upon the sound assumption that it is impossible to recommend specific changes to

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<sup>1</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>2</sup> Pars. 72-76.

<sup>3</sup> *Ibidem*, Par. 73.

a legal system until one first understands it well, the more affable reader would thus place her hopes in more competent future research work by the EU Commission and their counterparts in Venice. Indeed, if competent assistance were at hand, few locals would deny in good conscience that the country is in need of it. Romania is an unsettled democracy and has arguably, apart from a brief period of relatively successful, albeit incomplete and superficial modernization between the end of the Great War and the rise of authoritarianism, always been so. More particularly, the Union is not to blame for this state of facts or for the constitutional and parliamentary orgy over the summer, although the Commission can be partly blamed for the abrupt further decay of democratic standards in the immediate aftermath of the accession. This state of play can be partly attributed to the disappointment of high local Europe-related expectations which are at least partly a result of the Commission's myopic, slapdash pre- and post-accession monitoring.

The most troubling aspect of this interaction, however, does not reside in the indicated technical errors but in the deeper implications of the general approach. There is, in both instances, a general tendency to substitute an abstract understanding of law for democracy and to push majoritarian politics into the background. Powers ought to cooperate, democratic choices must be subdued, free speech (against institutions) is to be gagged on the basis of innuendos.

The Janus-faceness of the Constitution, straddling particularity and universality, membership and exclusion, political and juridical forms, could be tamed as long as the debates were carried in the framework of the national state which served in turn as a stable location for the dynamic interplay of these antinomies. As soon as the inherited terms and vocabularies are lifted in the airy space of Platonic forms, one perceives immediately the extent to which they are voided of stable sense and open for endless manipulation.