

CONSTITUTIONALISING THE DEMOCRACY TRADITIONS OF THE ROMANIAN PEOPLE AND THE CONSTITUTIONAL LEGITIMACY ISSUE – A HISTORICAL RECOVERY

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Abstract

Turning to the democratic traditions of the Romanian people in the legislative process of enactment of the revision law on the Romanian Constitution, seems to indicate an unexpected need of re-affirmation of the legitimacy of the fundamental law and its constitutional and contemporary sources, as more as the constitutional moment is desired to be future oriented, this being dedicated mainly to the creation of the needed constitutional mechanisms for the Euro-Atlantic integration of the country. What was apparently just a legislative “happening” raises the question of some existing causes, of the motivation for turning to our historic past and of finding a relation between what is considered to be democratic tradition of the Romanian people and this type of legitimacy in the constitutional evolution of Romania in the framework of a longer debate about the concept and sources of legitimacy in general and about the constitutional legitimacy in special.

Keywords: constitutional legitimacy, democratic traditions of Romanian people, sources of constitutional legitimacy

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By the Law 429/2003, for reviewing the Romanian Constitution, entered in force at 29th of October 2003² according to the Decision of the Constitutional Court no.3 from 22nd of October 2003 for the confirmation of the results of the national referendum from 18-19 of November 2003³, article 1, paragraph 3, from Romanian Constitution revised and republished,⁴ got the following contain: „Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.”

Obviously, as any constitutional provision, this norm has not only a political value but, a legal indisputable force, of constitutional order (Popescu, 2005, p.25). As justly remarked in the constitutional doctrine, the immediate consequences of this constitutional commitment are the transformation of these real sources of law in formal sources, the assertion of a mandatory historical and teleological interpretation of some of the constitutional provisions, even of the whole normative constitutional body and, contingently, of a block of constitutionality (Dănişor, 2009, p.77).

The democratic traditions of the Romanian nation become the bases from which will be claimed, from now on, the supreme values of the Romanian state. The recurrence to these traditions during the adoption of the revision law of the Romanian Constitution in 2003 could have remained a simple sample of demagogy (Dănişor, 2009, p.77) if it would not reclaim, even not voluntarily, an unexpected need of reaffirming the legitimacy of the fundamental law and its conventional and contemporary sources, all the more so the constitutional momentum wished to be oriented to the future, being dedicated mainly to the creation of the constitutional mechanisms needed for the processes of Euro-Atlantic integration of the country.⁵

What apparently was just a legislative “happening”⁶ raises naturally the question of the existence of some causes, of the rational of this reference, even an unconscious one, to our historical past and a search for a relation of continuity between the democratic traditions of the Romanian nation and this type of legitimacy in the constitutional evolution of

² Published in the Romanian Official Journal, Part I, no. 758, 29th of October 2003 available online, at: <http://www.cdep.ro/pls/dic/site.page?id=341>

³ Idem.

⁴ Romanian Constitution updated and republished in the Romanian Official Journal, Part I, no. 767, 31st of October 2003.

⁵ See *Expunerea de motive a propunerii legislative de revizuire a Constituției României*, <http://www.cdep.ro/proiecte/2003/200/20/7/em227.pdf>

⁶ The tracking of the legal process of the legislative proposal for the review of the Romanian Constitution from 1991 reveals the fact that, in the version adopted by the Chamber of Deputies, the text for the paragraph 3, article 1 contains only the enumeration of the supreme values of the Romanian state. The remit to the spirit of the democratic traditions of the Romanian nation or the ideals of the Revolution from December 1989 appear in the debates per articles of the review draft from the Senate plenum and they returned the text together with the modification proposals to the Commission for the elaboration of the legislative proposal for the review of the Constitution in order to prepare a supplementary report. The P resident of the Chamber of Deputies together with the President of the Commission for the elaboration of the legislative proposal for the review of the Constitution, Valer Dorneanu, presented the text so rounded in the meeting of Senate from 1st of September 2003, mentioning for the first time the version of adoption of a preamble of the Constitution, but the idea did not suscite the senators interest. The public statements were just a few and superficial, maybe except the one of the senator C.V. Tudor. See, <http://www.cdep.ro/pls/steno/steno.stenograma?ids=5529&idm=9>

Romania, with a background of a larger debate about the concept and sources of legitimacy generally and about constitutional legitimacy especially.

Theoretical premises of the legitimacy and their constitutional reflection

The question of legitimacy, meaning what determines the legitimacy or the illegitimacy of a type or system of leadership, represents for a long time a topic of theoretical debate with divergent practical application, and the entire political philosophy seems to try to answer to the fundamental question of the *Social contract*: “what makes a governance to be legitimate?” (Stillman, 1974, p.33) In this framework, it is obvious that the legitimacy is a central attribute of the political power because the power and the domination constitute the central categories of the policy (Havadi, 2005, p.10-12). The contemporary sense of the legitimacy was established by Max Weber who sociologically put fundamentals for the issue of the justified character of the authority constituted as state authority (Havadi, 2005, p.3). In the support of our study, for making the connection between the question of legitimacy and its significances in constitutional frame, it is useful the review of the J. Habermas conception that says: “the development of the modern societies mark the differentiation of the social subsystems, that implement the teleological rationality before all of the economic subsystem and of the political administrative one. The justification of the domination organized at state level in the modern societies, post-traditionalists, is complex process that by virtue of the division of activities becomes the task of specialized groups...” (Havadi, 2005, p.25). also, the importance of D. Beetham ideas for the present study resides in the following: the legitimacy supposes a continue self-limitation from the governing side and a continuous self-control; the legitimacy is not an attribute that belongs exclusively to the political sphere, being possible in other spheres of the social life; the source of the authority of the central power may consist of stipulated rules of inheritance, in theocratic privileges, in the principle of popular elections or in the one of the national identity (Havadi, 2005, p.29-30)

Capturing the constants on which is based the multitude of definitions provided in the political and legal literature for the concept of legitimacy, but also the subjective perception of the subjects about this status, support or foundation of governance (for example, Charles de Gaulle stated that legitimacy lies not in the majority opinion, but in the existence of the elements that tend rather to unite the state and not to divide), confer to P.G. Stillman the following criteria in relation to which the concept in question can be determined:

1. if it is based on the beliefs of one or more of the following elements: all or some of the other nations, states or individuals; unanimity or majority of people; a king, dictator or other head of state; traditions, ancestry, unwritten law; God; other than those listed above; none or irrelevant.

2. if it is based on one or more certain attributes and only if it pursues a certain value or set of common values (Stillman, 1974, p.37). The axiological paradigm is the proposal of P.G. Stillman to address legitimacy because in his view the government is legitimate if and only if the results of his actions are compatible with the system of values of the society (Stillman, 1974, p.39).

Suggesting the need to review the definition of legitimacy, the author advances a tentative definition where the legitimacy of a government is based solely on the compatibility of its actions with the value system of the society in question, where the value system

represents the particularity, the hierarchy and the ordering of what the society respects and search and at the same time, the general criterion of desirability, evaluation standards, normative priorities, and actions of the government include not only laws passed, but any action that has an effect on society (Stillman, 1974, p39-40).

In other train of ideas, R. H. Fallon Jr. addresses the concept of legitimacy in a three-dimensional approach, analyzing it from a legal perspective, a sociological and a moral one. When legitimacy is measured in sociological terms, the entity so assessed, whether it is a political regime, a governmental institution or a formal decision, it is credited with legitimacy directly proportional to the extent that the public perception considers justified, right or serving as reasonable support beyond fear of sanctions or hope for personal reward (Fallon, 2005, p.1794).

But what we should remember as a bridge between the problem of legitimacy and the approach of the Constitution from this perspective is the following observation in terms of sociological view of R.H. Fallon Jr., about the physical nature of the concept of legitimacy that is a variable, so that decisions or institutions that enjoys a deep legitimacy within some groups might tend to lose legitimacy for other groups (Fallon, 2005, p.1796). The versatility of its content area requires its permanent upgrades to the new demands of society and the tireless search for new objective sources to report to.

For example, in the modern time, monarchical authority added as new element the legitimation by national tradition, and on the background with the development of capitalism, the ideology of exchange of mutual equal values, the measure of market rationality, ensuring minimal welfare, maintaining social security, all become sources of legitimacy (Havadi, 2005, p.21,26). In this evolving and morphological vision, the equation of political legitimacy of the modern government, belonging to Havadi N.I. becomes the turntable that is claiming the need to address the fundamental law of modern society from the perspective of ontological complexity: legality + satisfying political and axiological requirements + general welfare performance, stability and peace + adjustment to the traditions shared by community + recognition from the international centers of power + obedience from employers, trade unions and the majority of their citizens, the military staff and intelligence services and the police, respectively the public administration staff + resilience to the own legitimacy deficit (inherent in any government) + resilience to the delegitimization of the opposition, the media of the opposition and the protest groups + resilience to any external delegitimization (Havadi, 2005, p.79-80). That being, the reducibility of the legitimacy content to those "ultimate principles" on which can be found the validity of domination, as J. Habermas explained (Havadi, 2005, p.25), seems to become obsolete in front of profiling an interdisciplinary concept from the family of legal fictions that are claiming a *bootstrap* approach.⁷

Returning to the approaches of R.H. Fallon Jr., we apprehend that in his opinion the legal legitimacy of the constitution depends more on the sociological sense and on what is

⁷ "The *bootstrap* philosophy not only abandons the idea of fundamental bricks of the materiality, but it is not accepting any kind of fundamental entity – either constants, laws or equations. The material universe dynamic network of correlated events. Any of the attributes of any of the network parts is not fundamental; all are deriving from the properties of the other parts, and the general consistency of the mutual relations determines the structure of the entire network", *apud*, Fritjof Capra. *Înțelepciune aparte: dialoguri cu oameni remarcabili*. București: Ed. Tehnică, 2004. 44-45. For the influence of the *bootstrap* approach on the law field, see, <http://en.wikipedia.org/wiki/Bootstrapping#Law>, and, <http://definitions.uslegal.com/b/bootstrapping-rule/>

socially legitimate, more than on the legality of its formal ratification, here rising the effect of the legitimacy of constitutional interpretation effect pending on the current and common social sense. Secondly, the moral legitimacy of the constitution derives from what it exists, what is generally accepted as the law and right and from what is reasonably just. What affects the moral legitimacy of the Constitution is the vagueness of its rules and the contestability which stem from it, in the author's opinion the interpretation of the regulations being required to be made by its originating historical meanings (Fallon, 2005, p.1792). The same idea is found in the opinion of Prof. I. Muraru, which cautions that: "very important for the efficiency of the Constitution is the implementation of the letter and its spirit, more exactly the in depth perception in its dimensions. Is up to the authorities to observe what certain constitutional rules are not achieved in the meanings intended by the Constituent Assembly (...)" (Muraru, 1995, p.25).

In another apprehension, R. Barnett starts from the observation that the argument most commonly used to explain the foundations of legitimacy, namely, "consent of the governed" is wrong, in principle, because this notion is a fiction (Barnett, 2003) and it allows replacing the original meaning with any other particular and by conjuncture meaning, starting from the manipulation of the notion of majority. The main idea of this author is that legitimacy is a product of procedural guarantees that the legal imperatives are not unjust and, therefore, in order to assess the legitimacy of a given legal system would be required this procedural analysis and a theory of justice to evaluate the adequacy of lawmaking procedures (Barnett, 2003, p.3).

In turn, Fr. Michelman, from another legal fiction of constitutional nature, namely the popular sovereignty, represented best by the famous words: "*We, the people ...*", distinguishes between a constitutional regime ability to track and enforce the idea of justice and moral support they enjoy in society. This distinction stems from different conceptions of constitutional democracy objectives: the first is to design the constitution as an instrument for the promotion of justice, while the second seeks moral justification of the expressed support for maintaining the existing regime, including its coercive dimension, as the actual mechanism for social peace (Kuo, 2009, p.10).

In search of guiding marks for the contemporary constitutional legitimacy

The problem of political legitimacy, the legitimacy of institutions and public space was expanded by adding and changing some of his rational and moral grounds by Montesquieu, Rousseau and Sieyes on the eve of the French Revolution. Projecting an ideal political order, based on the social contract, popular sovereignty, separation of powers, supremacy and equality before the law, these guarantees were also arguments for the repudiation of the legitimacy and legality of Old Regime. Thus, constitutional guarantees of legitimacy and legality of the fundamental law represents a product of modern times and the first generation of written constitutions, starting with those of American States, even before 1776, contains a first set of such guarantees (Tanchev, p.75). For the contractualist philosophers the debate over the legitimacy was focused on the formation and representation of the will of the governed, while assessing government performance according with this will in the frame of the contract. However, their theory registers the passing from the justification

for killing of tyrants and the withdrawal of former leaders support towards the assertion of the right to resistance and insurrection of the people and civil disobedience (Tanchev, p.75).

We can say that legitimacy is one of the fundamental concepts of contemporary constitutional theory, whose practical significance lies in the opinion of M. Petrovici, in the paradox between the fact that some legal acts or unconstitutional actions may become legally valid if they are considered legitimate and, on the other hand, acts or actions under the Constitution become unconstitutional if they are illegitimate (Petrovici, 2004, p.9).

Seen in the Central and Eastern European context of its adoption, the Romanian Constitution of 1991 enrolled in the 90s in a wider current delimitation by the facade constitutionalism of the communist past, characterized by major discrepancies between the written text, on the one hand and, on the other hand, the viability and reality of fundamental law, by avoiding non - normative statements and programmatic regulations (Tanchev, p. 82).

In terms of chronological and historical view, the constitutions of the former socialist countries of Eastern Europe are late expression of the fourth generation of emerging democratic constitution after World War II (Tanchev, *op. cit.*, p. 82). Firstly, the identification of the historical moment of a new constitutional foundation is important for understanding the significance of cultural and political transformations (Breslin, 2009, p. 34). Designing constitutions in the spirit of recovery and adherence to the model of open, liberal and democratic Western societies, was one of the most important features of the movement of constitutional reforms in Eastern Europe in the early 90s (Breslin, 2009, p. 35).

In this context, popular sovereignty, national history heritage, cooperation between the democratic countries of the world, the rights, freedoms and human dignity were proclaimed as fundamental common sources of the legitimacy of the new constitution in the emerging democracies of the '90s. On the other hand, the legitimate goals of those constitution were declared as being, in various forms, freedom, democracy, political pluralism, national integrity, rule of law, market economy, prosperity, social solidarity, human dignity and security, which are extracted, in the vision of "founding fathers", from past experience and being designed to best preserve the independence, national sovereignty and own identity (Breslin, 2009, p. 83).

Secondly, equally, the new resorts of legitimacy represents also the constitutional aspirations of an imagined political community (in this respect, R. Cover noted that a constitution is an imagined future projection of reality) (Breslin, 2009, p. 46-47). From this point of view, the constitutional aspirations can be defined as "a mixture of traits that reflect what is distinctive in political culture, along with what can be shared to a universal culture of constitutionalism." (Breslin, 2009, p. 48). In other words, a constitutional text is more than a structure of insipid rules and procedures meant to limit the power, but a true promissory clause that links together the community and the political system in search of political perfection. In this respect, to remember are the words of K. Whittington, quoted by B. Breslin, who said: "written constitution should not be understood only as a fundamental law that structures and limits powers, but as the sacred text of a community of moral and rational people." (Breslin, 2009, p. 46)

In some cases these aspirations, which determines what we call "the spirit" of the constitution, are summarized and listed in the introductory section usually called "preambles", existing opinions saying that only when they are less notable, they are included

in the text of the fundamental law (Breslin, 2009, p. 46). Despite this view, the Romanian Parliament opted for including new resorts for legitimacy in the constitution body, that are closely linked to the Romanian state supreme values of meta-legal in nature (Dănișor, 2009, p.50), following, from our point of view, the spirit that must be propagated by a fundamental law of a state.

The invocation, quite late in our opinion, to a new historic moment important in the evolution of the country, which is also a true real source of law, namely the Romanian Revolution of December 89, also the democratic traditions of the Romanian people, open multiple perspectives for debate on its importance and conceptual nature, especially since in our constitutional doctrine it was expressed the view that the functions and contain of the values that are related to our constitutional system would not be clear enough (Dănișor, 2009, p.50), which would strike on their normative force. The premise of the approach that we propose to explain the normative and non-normative valence of the new resorts of legitimacy, which must be interpreted in light of the supreme values of the Romanian state, consist in that the primary purpose of a constitutional text is to assemble a given society around shared values and principles (Breslin, 2009, p.67). As rightly noted in recent constitutional doctrine, today the historical references are common themes of the preamble to the constitutions and, in particular, the separation by the political regimes of Soviet influences, represents one of the newest historical moments that have been chosen for the supreme consecration in the fundamental laws adopted in the 90s in the countries of Eastern Europe (Breslin, 2009, p. 58-59). Hereby, from this point of view, by the fundamentals of the new legitimacy and, implicitly, by repudiating the legitimacy of the old regime, the new democratic constitution of these countries are typical examples of fundamental reactive laws (Tanchev, p. 80).

If in terms of normative value (Dănișor, 2009, p.79) and, especially, ideals content of the Romanian Revolution of '89 (Popescu, 2005, p.25), the constitutional doctrine established its supreme character and the main source, invoking the democratic traditions of the Romanian people as the basis of legitimacy of the Constitution represents a real challenge to the diachronic research the Romanian constitutionalism for identifying them in their conceptual historical and legal dimension. More specifically, the issue of democratic traditions of the Romanian people may pursue, in our opinion, the causes of constitutional legitimacy founding on traditions, detachment of the democratic traditions among the indigenous traditions and their formative way, transformation of real sources of law into formal ones (with constitutional value) and its legal effects and, not least, the enunciation of legal documents expressing the popular will of traditional origins.

The causes of the permanent return to traditions can be found in the Weber's assertion: "valid order is a mixture of tradition and legality", in the features of the law supremacy of A.V. Dicey: "The Constitution is the result of a country's legal tradition" (Havadi, 2005, p. 22 and p. 38) and in the concept of "real constitution" by E. Burke that should be associated with specific conditions, attitudes, inclinations, moral civil and social practices of people that exists before the formation of the national state (Burke, 1914).

Regarding the Romanian legal and political literature, a first finding that emerges is that the recourse to national traditions, in its original meaning referring to the political international status of the Romanian Countries in the Middle Ages and the establishment of a true "theory of capitulations" (Georgescu, 1987, p.284), it is a real constant of the theoretical

construction for the Romanian political legitimacy, and it is designed by the politograms type dating from the eighteenth and nineteenth century from the area of constitutional acts previous the 1866 Constitution, also, the restart of the topic at constitutional level represents a reconnection to a vein that, then and now, allows "the junction between the historic law and the constitutional modernity." (Brătianu, 1995, p.275)

The formation of national traditions is "the result of an intellectual mutation due to the contact with French romantic historiography." (Carp et al, 2002, p.137) From our point of view it consist, in general, in the projection of an imaginary and idealized past: "writing on paper, clearly and boldly, the capitulations text, the boyars attributed to the old waivodes their own desires, imagining some contractual Romanian-Turkish relations which could not exist in the fourteenth and fifteenth centuries, but that would be very helpful if there had been in the eighteenth century" (Georgescu, 1987, p. 286), and in the progress of adding new rights and political objectives: "anticipating a direction that reaches its peak in the era of ad-hoc Divans", *nationalist party desires* realizes the junction between the two dimensions implied by "the regeneration": Principalities autonomy and its corollary... (...), the union of the Romanian Countries, possible under a "constitutional state." (Stanomir, 2004, p. 237).

Regarding the nature of the democratic traditions of the Romanian people, they have to be detached from the will of the people shown in the traditions relating to the exercise of power, raised, as D.C. Dănișor underlines, "to the rank of normative wills, meaning of the material sources of law, resulting directly legal norms for the law-maker, for the constitutional justice when it interprets the Constitution and even when, revising certain constitutional provisions, it touches the sphere of the supreme characters and values of the Romanian state. in the normal direction legal legislature to interpret the Constitution and constitutional justice." (Dănișor, 2009, p. 78). This solution imposes also the identification for the material proof of these traditions, and the incumbent task goes to the doctrine and jurisprudence of the constitutional court. We subscribe to the remark that: "the constitutional court intends to introduce in the acts from which can be detached the democratic traditions of the Romanian people and there are not normative acts, in a strict sense, what could lead to the imposition of revolutionary proclamations as a vector of interpreting the traditions referred to art. 1, para. (3) of the Constitution and therefore as vector of interpretation of the current Constitution, at least when they are relevant for judging the supreme characters and values of the Romanian state referred to that provision." (Dănișor, 2009, p. 81)

The invocation and the care for reflecting the rights of Romanians in official acts with constitutive value is not recent concern because, as Mihail Kogălniceanu highlighted: "The institutions that we want are clearly belonging to our country for the most part, and this is proved in the public Romanians acts." (Carp et al, 2002, p. 136) The operation to broaden the sphere of official acts that can show the democratic traditions of the Romanian people that the Constitutional Court has agreed to perform by the invocation, for example, of the Resolution of the National Assembly in Alba Iulia on December 1, 1918 regarding the unification of Transylvania with Romania (Dănișor,2009, p. 80), it appears to represent a genuine reinstatement of a national political tradition started with the "discovery Kuciuk-Kainargi generation" (Brătianu,1995, p. 275), as Gh. I. Brătianu name it, of the "ancient treaties" („vechilor tractaturi”) of the Romanians.

Conclusions

The legitimacy of the constitution is a specific concept quite recently emerged from the political legitimacy and whose interdisciplinary analysis starts from the identification of the general legitimacy grounds. The peculiarity of the legitimacy resorts consist in the fact that they are not immutable, they being in a permanent state of search and reinvention. The relationship between the constitution and the national traditions of a country is, as noted above, indissoluble and organic. The appeal that the Romanian Constitution is doing to the democratic traditions of the Romanian people confirms this thesis and makes our fundamental law the legatee of the national historical legacy, as a prerequisite for a legitimate and perfect order. From another perspective, we can say that the historical and teleological interpretation of the Constitutional Court in the spirit of the democratic traditions of the Romanian people represents an assumed trigger for new process jus-generative (Breslin, 2009, p. 46).

To some extent, the characteristics and sources of legitimacy generally, and the progressive formation path of the democratic traditions of the Romanian people that the Constitution revised in 2003 turned to, by a necessary recovery movement, allow us to characterize the relationship between them as hysteresis, each between the two concepts being dependent on the value and importance of the other and the previous values in their historical becoming.

Finally, the constitutional doctrine has the mission to identify, retrieve, interpret and place chronologically all normative and non-normative documents which express the will of the Romanian people in a background of Romanian constitutionalism and which shows its links with the major programmatic documents and declarations of rights belonging to the universal constitutionalism.

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