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THE REVISION OF THE ROMANIAN CONSTITUTION: CURRENT ISSUES

Emil BOC[1]

Abstract

The process of revision the Romanian Constitution is initiated by the President of Romania on the proposal of the Government. The objectives of this revision proposal are to sanction at a constitutional level the results of the 2009 popular referendum, to impose several constitutional rules generated by the effects of the economic crisis, to establish a new constitutional framework arising from Romania's status as EU and NATO Member State, and at the enhancing the power separation mechanism. The revision proposal does not intend to change the semipresidential Romanian system. The revision of the Constitution responds exclusively to the need to modernize the Romanian society, as it is a new Member State of the European Union. The transition to a unicameral Parliament, the reduction in the number of the members of the Parliament, strict budget rules, the restriction of parliamentary immunity or the confiscation of the assests acquired by acts or deeds of corruption are stringent needs of the Romanian public life and represent the core of the present proposal of revision of the Constitution. The revision of any constitution at a given time responds to the needs of development of the society itself. Unlike the modification or revision of the laws inferior to the Constitution, the revision of the Constitution entails a special procedure, even more complex than in the case of ordinary or organic laws.

Keywords: constitution; parliament; separation of powers; economic crisis; parliamentary immunity; popular referendum.

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Originators of the initiative of revision of the Constitution

The revision of the constitution[2] may be initiated by the following subjects of law:

(a) *The President of Romania on the proposal of the Government*. The following question arose in our constitutional practice: can the President of Romania amend and complete a governmental proposal or is he compelled to promulgate it as such, i.e., as it was initiated by the government? The Constitutional Court has explicitly stated that "The *President of Romania, upon receiving the proposal of revision of the Constitution, is entirely free to decide whether or not to initiate the revision of the Constitution; should he decide to initiate the procedure, he may choose to advance the governmental proposal as such, in part, or to complete it*[3]*"*. Practically, were he denied such an option, the President's right to initiate the revision of the Constitution would be moot and void. However, we estimate that the new constitutional solutions proposed by the President must not be in contraction with those put forward by the Government, since the proposal of revision must be based on the institutional agreement between the Government and the President. For the current proposal of revision of the Constitution, the President of Romania completed the Governmental proposal of revision of the Constitution, without coming into disagreement with the Government's initial solutions.

(b) *At least one quarter of the number of the Deputies or the Senators*. Unlike in the case of a regular legislative initiative, when a senator or a deputy can initiate a legislative proposal, for an initiative of revision of the Constitution the signatures of at least a fourth of the total number of deputies or a fourth of the total number of senators are required. An initiative of revision of the Constitution may be signed by both senators and deputies, as long as the signatures of **either** at least a fourth of the number of deputies **or** at least a fourth of the number of senators are included[4].

(c) *The Citizens*. The people, as repository of the national sovereignty, can exercise its right of initiative for the revision of the Constitution. The citizens – at least 500,000 citizens with the right to vote – who initiate the revision of the Constitution must belong to at least half of the country's counties, while, in each of those counties or the Municipality of Bucharest, at least 20,000 signatures

[2] According to the complexity of the procedure of their revision, constitutions can be broadly assigned to one of two categories: flexible or rigid (Deleanu, 1998; Drăganu, 1998; Dănișor, 2007).

[3] Decision no 799 of the Constitutional Court of 17 June 2011 regarding the bill concerning the revision of the Constitution of Romania.

[4] The initiative for the 2003 revision of the Constitution belonged to the Parliament, and was signed by 215 Senators and Deputies.

should be registered in support of the initiative of revising the Constitution. This prerequisite regarding the territorial distribution of the revision initiative aims at securing a certain degree of representativity within the country's population, considering that what is at stake is the revision of the country's fundamental law[5].

The procedure for the revision of the Constitution

This procedure differs from the customary legislative procedure and has the following characteristics:

- A qualified majority of two thirds of the number of members in each of the two Chambers is required for the initiative of revision of the Constitution to be adopted. In other words, while in the case of normal legislative initiatives one can speak of a decision-making Chamber (be it the Senate or the Chamber of Deputies), when the revision of the Constitution is at stake the proposal must be debated and adopted by each of the two Chambers. Moreover, ordinary legislative initiatives are adopted by simple majority[6] and organic legislative initiatives by absolute majority[7], whereas the initiatives of revision of the Constitution are adopted by qualified majority of two thirds.
- If both Chambers of Parliament adopt the proposal of revision of the Constitution, but under different forms, then the mediation procedure is set in motion[8]. The mediation procedure implies appointing an equal number of deputies and senators to a mediation committee, which is then granted the competence to reach a settlement on the diverging texts. The report of the mediation committee must be adopted by each of the two Chambers by a majority of at least two thirds of the members of each Chamber. If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of Deputies and Senators.

[5] It is important to keep in mind that after the 2003 revision of the Constitution, the minimum number of signatures needed in the case of an ordinary legislative initiative of the citizens was lowered from 250,000 to 100,000. With regard to the popular initiative for the revision of the Constitution, the threshold of 500,000 signatures was maintained.

[6] The simple majority requires the vote of at least a half plus one of the number of those present, provided the quorum of the sitting is met. Ordinary laws are passed by a simple majority.

[7] Absolute majority requires the vote of at least half plus one of the total number of the members of the Chamber. Organic laws are passed by an absolute majority.

[8] The 2003 revision of the Constitution eliminated the mediation procedure with respect to the ordinary legislative procedure, and instituted the mechanism of the decision-making Chamber. The mediation procedure was maintained for the case of the process of revision of the Constitution.

- By the referendum procedure, the people have the last word on the procedure of revision of the Constitution. The referendum is held within 30 days of the date of passing the draft or proposal of revision in the Parliament[9].

The limits of the revision of the Constitution

The doctrine categorizes the limits of the revision of the Constitution into formal and material safeguards. The formal limits of the revision seek to prevent the revision of the fundamental law under certain exceptional circumstances. The Constitution of Romania shall not be revised during a state of siege or emergency, or in wartime. The material limits of the revision aim to safeguard fundamental and perennial constitutional values, and to guarantee the protection of citizens' rights and liberties. Therefore, in this perspective, the provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, and independence of justice, political pluralism and official language shall not be subject to revision. Likewise, with regard to the citizens' fundamental rights and freedoms, no revision shall be made if it results in their suppression, or in the suppression of the safeguards thereof.

Under this rigid constitutional framework, the Constitution of Romania was only revised once in the 20 years since its inception. The revision of the Constitution in 2003 was mainly aimed at preparing the constitutional framework of Romania's accession to the European Union, and, secondly, at enhancing the constitutional mechanism for the functioning of the Powers in the state.

The current proposal for the revision of the Constitution belongs to the President of Romania upon a proposal from the Government. This is the first time since 1991 that the executive power initiates a proposal of revision of the Constitution.

The objectives of the current proposal of revision of the Constitution are: 1) The constitutional endorsement of the results of the popular referendum of November 2009; 2) Imposing new constitutional rules, as engendered by the effects of the economic crisis; 3) Establishing a new constitutional framework derived from Romania's status as Member State of the European Union and of the North Atlantic Treaty Organization, and 4) Enhancing the mechanism for the functioning of the Powers in the State.

[9] The 30 day – term provided by the Constitution for the organization of a referendum is one of lapse – if the referendum is not organized within the mentioned period of time, the parliamentary decision is invalidated.

The constitutional endorsement of the results of the popular referendum of November 2009

The popular referendum of November 2009 was initiated by the President of Romania, after having consulted the Parliament, and envisaged the passing from a bicameral parliament to a unicameral Parliament, and setting the maximum number of members of parliament at 300 (as compared to 471, the number of Members of Parliament elected in 2008). The results of the referendum showed the overwhelming will of the Romanians to pass to a unicameral Parliament[10] and to see a reduction in the number of MPs[11]. The fact that the Constitutional Court confirmed the results of the referendum does not automatically and *de facto* mean changing the structure of the Parliament or operating a reduction in the number of MPs. An initiative for a law of revision of the Constitution is mandatory in order to carry out the will of the electoral body as it was expressed in the referendum.

The proposed revision of the Constitution stipulates the following content for Article 61 paragraph 2: *"(2) The Parliament consists of a sole Chamber."* Article 62 paragraph 3 is proposed as follows: *"(3) The number of the Parliament's members shall be established by the electoral law, in proportion to the population of the country, and cannot be higher than 300 persons."* The constitutional option for a unicameral Parliament (Boc, 2000; Muraru, 2005; Deleanu, 2003; Drăganu, 2003) is supported by at least the following arguments:

- The current Parliament of Romania, although bicameral in structure, functions, in fact, as a unicameral Parliament. Why? On the one hand, there are many prerogatives that the Chamber of Deputies and the Senate can only carry out in common sittings, according to the Constitution, and on the other hand the system of the decision-making Chamber enhances the de facto unicameralism of our parliamentary system. Without pretending to produce a complete inventory, let us mention the following prerogatives that the Parliament can only exercise in joint setting of the Chamber of Deputies and of the Senate: (1) To debate upon the program and the list of the Government, and to grant confidence to the Government by a vote (Article 103 paragraph 3 of the Constitution); (2) To withdraw the con-

[10] At the national referendum of 22 November 2009, 9,320,240 persons have participated out of the total 18,293,277 people that appear on the official permanent electoral lists, that is, approx. 50.94 % of the number of people that appear on these lists. With regard to the question "Do you agree to Romania's adoption of a unicameral Parliament?", 6,740,213 of the answers were favourable, that is 72.31 % (Source: Decision of the Constitutional Court no 37 of 26 November 2009 concerning the compliance to the procedure for the organization and the holding of the national referendum of 22 November 2009 and the confirmation of its results).

[11] On the same occasion, the 22 November 2009 referendum, the question "Do you agree to the reduction of the number of the members of the Parliament to a maximum of 300 persons?" received 7,765,573 favourable answers, that is 83.31 %.

fidence granted to the Government, by carrying a motion of censure (Article 113 paragraph 1); (3) To assume the Government's responsibility upon a bill, a program or a general policy statement (Article 114 paragraph 1); (4) To approve the State budget and the State social security budget (Article 65 paragraph 2 point b); (5) To reconsider the law, at the request of the President of Romania, had it passed when the Government assumed responsibility (Article 114 paragraph 4); (6) To establish the status of the Deputies and Senators (Article 65 paragraph 2 point j); (7) To examine the reports of the Supreme Council of National Defence and to approve the national strategy of homeland defence (Article 65 paragraph 2 points g and f); (8) To declare total or partial mobilization, as well as to declare a state of war (Article 65 paragraph 2 points c and d); (9) To receive the message of the President of Romania (Article 65 paragraph 2 point a); (10) The suspension from office of the President of Romania and the impeachment of the President of Romania for high treason (Article 95 paragraph 1 and Article 96 paragraph 1); (11) To appoint the Advocate of the People (Article 65 paragraph 2 point i), to appoint, based on proposals by the President of Romania, the directors of the intelligence services (Article 65 paragraph 2 point h), and the advisors of the Court of Audit (Article 140 paragraph 4), as well as to appoint the leadership structure of other autonomous administrative structures under parliamentary control. It may be noticed that the most important attributions of the Parliament are exercised in the joint sitting of the two Chambers, that is, in a "*de facto unicameral system*". The system of the decision-making Chamber, instituted by the 2003 revision of the Constitution[12], enhances the "de facto unicameralism" instead of mitigating it. Why? Because the pronounced political debate on the laws takes place, in the overwhelming majority of the cases, only in the decision-making Chamber. Also, in many situations, there is not even a debate that takes place in the first notified Chamber, the laws being passed by tacit acceptance procedure. In conclusion, if in many situations the bicameral parliamentary system does function, as we have shown, as a unicameral system, why would we not pass from a "de facto unicameralism" to a "de jure unicameralism" by the revision of the Constitution?

- Both Chambers of the Parliament are elected by the same type of electoral system, thus instituting a double representativity of the electoral districts.

[12] Until 2003, each bill had to follow the same procedure in both Chambers of the Parliament. The divergences were solved with the help of the mediation commissions or in the joint sittings of the Chambers. To avoid the duplication of the attributes of the Chambers, by the 2003 revision of the Constitution, the second notified Chamber – the decision-making Chamber – has the last word in the process of the passing of the laws.

The double responsibility is not justified, and the unicameral Parliament permanently eliminates this problem.

- The present bicameral system slows down the adoption of the laws by heavy and long procedures. The obligativity for each bill to pass through both Chambers of the Parliament, in spite of the tacit acceptance procedure and of the decision-making Chamber system, leads to consistent delays of the legislative process. The unicameral system, together with the second reading of a bill responds to the present legislative needs of the Romanian society.
- In general, the bicameral parliamentary system is specific to the federal states (USA, Germany, to cite a few), and the unicameral system represents the basic rule in the unitary states. True, there are unitary states that have adopted the bicameral parliamentary system (France, Italy) out of diverse historical and political reasons. In Romania, a unitary state, the unicameral parliamentary system would be entirely justified also from this point of view.
- Budget expenses. While it is certainly not the most important argument in favour of the instituting of a unicameral Parliament, the decrease of the budget expenses by reducing the number of the members of the Parliament would represent a sign of responsibility and solidarity from the present political class towards the present needs of the Romanian society.

New constitutional rules generated by the effects of the economic crisis

Establishing ceilings to the budget deficit and to the public debt

A new article is introduced after Article 138, namely 138^1, with the following content: "(1) The State must avoid the excessive budget deficit. The budget deficit cannot exceed 3% of GDP, and the public debt cannot exceed 60% of GDP. (2) The external debts can be incurred only in the investments sector. (3) In the event of a natural catastrophe or of exceptional circumstances that have a negative impact on public finance, the maximum values referred to in paragraph (1) may be exceeded, with the agreement of the majority of the members of the Parliament, only if the excess can be compensated in a maximum of 3 years. (4) By exemption to the provisions of paragraph (2), other external loans can be contracted in order to prevent the consequences of a natural calamity or of an extremely severe disaster, with the agreement of the majority of the members of the Parliament."

The proposed modification is in agreement with the rules of the European Union regarding budget deficit and public debt. At European level, the following reference values concerning the deficit and the public debt were laid down by the Treaty of Maastricht[13]: (a) 3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices; (b) 60 % for the ratio of government debt to gross domestic product at market prices. In 2010, according to Eurostat data, Romania had a 6.9 % budget deficit and a 31 % public debt to GDP.

The constitutional amendment aims at preventing the re-opening for Romania of the excessive deficit procedure, maintaining the country's public debt within the bounds of the maximum level allowed by the European Union through the Treaty of Maastricht and using all the money from loans for investments only. The new constitutional rule allows exemptions only in the case of a natural disaster or of exceptional circumstances that have a significant negative impact on public finance.

The European Union opened the excessive deficit procedure for Romania based on the 2008 economic data when, despite a 7.3 % economic growth, a 4.8 % level of the budget debt to GDP was reached. According to the commitments taken by Romania, the closure of the excessive deficit procedure is supposed to take place in 2012, when a 3 % budget deficit is forecast. Although Romania does not have a high level of public debt, maintaining of large deficits and of high interest costs on loans, given a rather small GDP, may quickly lead to the maximal debt level allowed by the European Union.

Respecting the budget deficit and the public debt criterion takes on a particular importance in the light of the new provisions of the European economic governance, where the concept of prudent budgetary policy becomes central[14]. In

[13] Article 104c of the Maastricht Treaty – The Treaty on European Union and Article 1 of the Protocol on the excessive deficit procedure.

[14] In 2010 the largest government deficits in percentage of GDP were recorded in Ireland (-31.3%), Greece (-10.6%), the United Kingdom (-10.3%), Portugal (-9.8%), Spain (-9.3%), Latvia (-8.3%), Poland (-7.8%), Slovakia (-7.7%), France (-7.1%), Lithuania (-7.0%) and Romania (-6.9%). The lowest deficits were recorded in Luxembourg (-1.1%), Finland (-2.5%) and Denmark (-2.6%). Estonia and Sweden (both 0.2%) registered a slight government surplus in 2010. In all, 21 Member States recorded an improvement in their government balance relative to GDP in 2010 compared with 2009, five a worsening and one remained unchanged. At the end of 2010, the lowest ratios of government debt to GDP were recorded in Estonia (6.7%), Bulgaria (16.3%), Luxembourg (19.1%), Romania (31.0%), the Czech Republic (37.6%), Lithuania (38.0%), Slovenia (38.8%) and Sweden (39.7%). Fourteen Member States had government debt ratios higher than 60% of GDP in 2010: Greece (144.9%), Italy (118.4%), Belgium (96.2%), Ireland (94.9%), Portugal (93.3%), Germany (83.2%), France (82.3%), Hungary (81.3%), the United Kingdom (79.9%), Austria (71.8%), Malta (69.0%), the Netherlands (62.9%), Cyprus (61.5%) and Spain (61.0%). (Eurostat Newsrelease Euroindicators, 2011)

this context, other European states intend to impose a constitutional limit to the level of the public deficit and debt[15].

Provisions concerning the financial and the budget State policy

Paragraph 6 of Article 126 of the Constitution shall have the following content: "(6) The judicial control of the administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding the relations with the Parliament, for the military command acts, *as well as for those regarding the fiscal and budgetary policies of the Government, according to the law of the contentious business falling within the competence of administrative courts.* The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional." The proposed constitutional amendment aims at the strengthening of the prerogatives and responsibility of the Government with regard to financial and budgetary policies. In the context of the economic crisis, Romania had to take harsh measures in order to rebalance the budget. Although the financial and budgetary austerity measures were adopted by law by the Parliament and were validated by the Constitutional Court as for their constitutionality, some courts have ignored the legal provisions that had been adopted and the decisions of the Constitutional Court. It should be mentioned that the constitutional amendment does not impinge on the citizen's right to bring cases before the court to establish or rectify the value of her/his retirement benefits or salary, an administrative act that remains under judicial control. Without the proposed constitutional modification, there is the risk that the financial and budgetary policy of the State be adjudicated by the courts, while the responsibility continues to lie with the Government. The proposed amendment consolidates the constitutional provision according to which "*the observance of the Constitution, its supremacy and the laws shall be mandatory*" (Article 1 paragraph 5 of the Constitution).

Constitutional requirements arising from Romania's status of EU and NATO Member State

The transmission by the Government to the institutions of the EU of the project of the State budget and of the State security budget

[15] Germany included such regulations in the Constitution, and a similar constitutional law is under discussion in the French Senate.

It is proposed that Article 138 paragraph 2 of the Constitution be formulated as follows: "(2) The Government shall annually draft the project of the State budget and the State social security budget, which shall be transmitted to the institutions of the EU, after previously informing the Parliament of their content." The transmission by the Government to the institutions of the EU of the project of the State budget and of the State security budget, after previously informing the Parliament, aims at ensuring the compatibility of Romania's legislation with the EU's regulations.

The NATO membership

It is proposed that Article 149 of the Constitution be formulated as follows: "Romania is part to the North-Atlantic Treaty. The incumbent obligations will be fulfilled by the Parliament, the President of Romania and the Government." In 2003, the Constitution was revised as to provide the constitutional framework for the adoption by the Parliament of the law with regard to Romania's accession to the North-Atlantic Treaty[16]. According to the 2003 revised Constitution, the accession to NATO was to take place by means of a law adopted in the joint setting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators[17]. Now, as Romania has become a NATO member state, the proposed constitutional text establishes that Romania, through its institutions, has the duty to carry out the obligations that derive from this status.

The removal from the Constitution of the presumption of legality of the acquired assets

The present constitutional text: "Legally acquired assets shall not be confiscated. The legality of acquirement shall be presumed." (Article 44, paragraph 8). Text proposed by the current project of revision of the Constitution: "Legally acquired assets shall not be confiscated." (Article 44, paragraph 8). This is one of the most important issues related to the revision of the Constitution. The importance of the theme is given by the need to ensure the legal and constitutional framework for the confiscation by the State of the amounts of money or of the proceeds from crime (especially in trials involving high-level corruption cases)

[16] On the occasion of the NATO Prague Summit of 21 November 2002, Romania is invited to commence the discussions in view of accession.

[17] On 26 February 2004, the Parliament of Romania passed, by unanimous vote, in joint sitting of the Chamber of Deputies and of the Senate, the Law on Romania's accession to the North Atlantic Treaty, promulgated by President Ion Iliescu on 1 March 2004 (Law 22/2004). On 2 April 2004, the ceremony of hoisting the National Flags of the seven Member States of the Alliance took place at the NATO Headquarters in Brussels, in the presence of the NATO Secretary General.

and for the fulfilment of the obligations assumed by Romania in relation to the EU under the Mechanism for Cooperation and Verification addressing the Legal system. In order to be efficient, an illicit money recovery system requires for the national legislation to allow in specific situations the reversal of the onus of proof. This allegation is based on the premise that it is impossible for the State, in any legal system, to establish clearly and convincingly the illicit source of all the assets held by an offended, at the same standard of proof required for the conviction of a person. It is impossible to always prove the entire criminal record of a person – in the majority of the cases, the drug dealers are convicted only for the last transaction they made, and the corrupt officials are convicted only for the last bribe they received. Sometimes, they have colossal fortunes registered on their name or on the name of a third person, yet even if convicted for corruption or organized crime, their fortune is not confiscated, in spite of the fact that they cannot justify it. In situations like these, the State cannot afford to have the convicted persons keep the goods they have acquired but fail to justify. Such an approach would be inequitable and would deprive the budget of significant due resources.

Most of the European states have reached this conclusion. The answer they gave was to create institutions according to which, in cases clearly stipulated by law, a person must prove the origin of the assets previously acquired; otherwise, these goods are confiscated. The solutions are diversified. In Great Britain, the presumption is reversed in the case of the persons convicted for serious offences or of the persons convicted repeatedly in a given frame period. In the same time, Great Britain has introduced the so-called civic forfeiture, according to which the confiscation may be carried out in the absence of a criminal conviction; the State must only prove the probability for some goods to be the proceeds of a crime. Another regulation allows the confiscation of the cash that cannot be justified found on the persons. In Spain, the crime of money laundering is interpreted in an extended sense, so that it refers to any transaction in goods whose source cannot be justified and which are under the suspicion to proceed of a crime. Such institutions were adopted in the last years by the majority of the European states – England, France, the Netherlands, Belgium, Spain and, recently, Bulgaria. Some of these provisions were examined by the European Court of Human Rights, which concluded that they do not infringe the fundamental rights of the person.

What is more, *the European Union imposed to all Member States, through the Council Framework Decision 2005/212/JHA of 24 February 2005, to enable through their legislation the extended confiscation and so to allow the reversal of the onus of proof with respect to the source of assets held by persons convicted of an offence.* Romania needs such institutions, too, and it must also fulfil its obligations as a Member State. There were, lately, many cases that enjoyed intensive media coverage when persons involved in organized crime or corruption activities, although condemned, kept their fortune, a fortune they could not have

justified by legal sources of revenue (the case of the border control agents or the case of the Argeș driving licenses). We need instruments that would allow those persons to be held fully responsible for the illegal activities. Yet for the moment the implementation of such instruments is obstructed by the Constitution's provisions regarding the presumption of legality of the acquired assets.

As interpreted by the Constitutional Court, those provisions do not allow the reversal of the onus of proof and, as a consequence, do not allow Romania to adopt one or several of the solutions already identified by the other Member States. There were many cases when persons from Romania that have never worked had large fortunes (houses, luxury cars); when summoned by the judicial organs to give explanations in cases of money laundering, they invoked the presumption stipulated by the Constitution, the judicial organ being the one that had to prove that the fortune was not legally acquired. In England, for instance, in a similar situation, the persons that are checked must prove they had sufficient revenues to acquire such a fortune: the burden of proof does not lie with the judicial organ. The modification of the Constitution would therefore create an opportunity for us to fulfil the obligations contracted as a Member State of the European Union, to eliminate a situation of social inequity which produces frustration in the midst of the society and, in the same time, to bring a significant amount of money to the State budget.

Enhancing the mechanism for the functioning of the Powers in the State

The constitutional amendments proposed in this chapter are generated by the direct political/constitutional experience as well as by the jurisprudence of the Constitutional Court with regard to the relationship between the branches of the State.

Relationships between the Executive and the Legislative branches of Government

The relationship between the Executive and the Legislative branches represents the "*keystone*" of the model of governance based on the separation of powers. According to the Constitution, the Government perform its activities under parliamentary control. The analysis of both the constitutional practice and of the jurisprudence of the Constitutional Court lead us to believe that the following constitutional amendments are necessary in order to improve the relationship between the executive and the legislative branches:

- *Placing limits to the procedure of assuming responsibility by the Government.* It is proposed that Article 114 of the Constitution be formulated as

follows: (1) The Government may assume responsibility before the Parliament, *only once in a session*, upon a programme, a general policy statement, or a bill. **(1[1])** *The limits to the assuming of responsibility provided by paragraph (1) do not apply to the State budget and to the State social security budget.* (2) The Government shall be dismissed if a motion of censure, tabled within three days of the date of presenting the programme, the general policy statement, or the bill, has been passed in accordance with the provisions under Article 113. (3) If the Government has not been dismissed according to paragraph (2), the bill presented, amended, or completed, as the case may be, with the amendments accepted by the Government, shall be deemed as passed, and the implementation of the programme or general policy statement shall become binding on the Government. *(4) In case the President of Romania demands reconsideration of the law passed under the provisions of paragraph (3) above, the debate thereupon and the vote shall be carried by the Parliament, in a single reading, for each of the articles invoked, followed by a vote for the bill taken as a whole.* By assuming responsibility, the Government may obtain the passing of a bill without complying with all of the ordinary procedural stages, but it risks its own existence. The present paragraph from our Constitution concerning the assumption of responsibility by the Government is inspired by Article 49 of the French Constitution. The constitutional amendment proposes that the Government be entitled to make use only once in a session, except for the budget laws, of his right to assume responsibility upon a bill, a programme, or a general policy statement. At present, the Government may use the procedure of assuming responsibility any time he deems it necessary, incurring the risk to be dismissed. In France too, from 1958 (the year when the present French Constitution was adopted) to 2008, the procedure could be used unrestricted. Following the 2008 revision of the Constitution, the procedure can only be launched once per session, except for the budget bills. In Romania, between 1991 and 2011 the procedure of assuming responsibility by the Government was used 24 times. Mention must be made of the fact that 14 of the 24 assumptions took place between 2009 and 2011, because of the necessity to adopt urgently the legal measures in the context of the economic crisis.

- *Making more flexible the procedure of forming the Government.* It is proposed that Article 103 of the Constitution be formulated as follows: "(1) The President of Romania shall designate a candidate to the office of Prime Minister, as a result of his consultation with the party which has obtained absolute majority in Parliament, or – unless such majority exists - with the parties represented in Parliament. (2) The candidate to the office of Prime Minister shall, within ten days of his designation, seek the vote of con-

fidence of Parliament upon *the programme and the list with the proposals for the members of the Government. The Parliament shall pronounce by vote on the formation of the new Government within 10 days from the date when the vote of confidence was sought. Otherwise, after the 10 days are gone, the proposed candidate, together with the programme and the list with the proposals for the members of the Government shall be deemed rejected by the Parliament, and the President of Romania shall designate another candidate to the office of Prime Minister.* (3) The programme and list of the Government shall be debated upon by the Parliament. The Parliament shall grant confidence to the Government by a majority vote of the parliamentarians." This constitutional amendment aims at establishing clearly the fact that if the Parliament shall not pronounce by vote, within 10 days from the request, on the formation of the new Government, then the candidate to the office of Prime Minister is deemed rejected, and the President of Romania designates another candidate for the office of Prime Minister. At present, the text of the Constitution imposes only the obligation for the candidate to the office of Prime Minister to seek, within ten days of his designation, the vote of confidence of the Parliament upon the programme and the complete list of the Government. The text of the Constitution does not impose any term for the Parliament to pronounce by vote on the request to form the Government and does not provide any constitutional sanction[18].

- *The diminishing of a period of time concerning the procedure of dissolving the Parliament.* It is proposed that Article 89 of the Constitution be formulated as follows: After consultation with the president of *the Parliament* and the leaders of the parliamentary groups, the President of Romania may *dissolve* the Parliament, if no vote of confidence has been obtained to form a government within *45* days after the first request was made, and only after rejection of at least two requests for investiture. At present, the President of Romania may exercise the prerogative of dissolving the Parliament if no vote of confidence has been obtained to form a government within 60 days after the first request was made, and only after rejection of at least two requests for investiture. The constitutional amendment proposes only the diminishing from 60 days to 45 days of the period of time elapsed from the first request for investiture to the moment when the President may exercise the prerogative of dissolving the Parliament. In fact, the aim is to shorten the political crisis caused by the impossibility to form a new Government

[18] In our constitutional practice, in November 2009, the designated Prime Minister Liviu Negoiță sought the vote of confidence of the Parliament yet he received no answer, as there was no term stipulated by the Constitution to force the Parliament to pronounce on the request of the designated Prime Minister.

and to solve this crisis by the electoral body through the mechanism of anticipated elections.

- *Clarifying some aspects concerning the procedure of the organisation of the referendum.* It is proposed that Article 90 of the Constitution be formulated as follows: "(1) The President of Romania may, after consultation with Parliament, ask the people of Romania to express, by referendum, their will on matters of national interest. *(2) The matters submitted to the referendum and the data of the referendum shall be regulated by the President of Romania, by decree. (3) The Parliament's point of view on the initiation of the referendum by the President of Romania shall be expressed by a decision adopted by the Parliament, by the vote of the majority of the members present, within no more than 30 working days from the President's request. (4) If the decision of the Parliament is not adopted within the term stipulated under paragraph (3), the procedure of consultation with the Parliament is considered fulfilled, and the President of Romania may issue the decree concerning the organization of the referendum."* In 2008 and 2009, the Parliament delayed and postponed the issuance of the necessary authorization for the organizing of the referendum, authorization that had to be issued according to Article 90 paragraph (1) of the Constitution. It is true that the present text of the Constitution does not stipulate a deadline for the Parliament to state its opinion. In order to avoid in the future such institutional miss functions, the constitutional amendment proposes the establishment of a 30 day- term for the Parliament to express its point of view with regard to the referendum initiated by the President of Romania, under reserve of tacit acceptance procedure. A negative point of view of the Parliament cannot stop the president from issuing the decree concerning the organization and the holding of the referendum.
- *Transforming the advisory opinion of the Constitutional Court in a mandatory opinion, in the case of the procedure aiming to suspend from office the President of Romania.* It is proposed that Article 95 of the Constitution be formulated as follows: "(1) In case of having committed grave acts infringing upon constitutional provisions, the President of Romania may be suspended from office *by the Parliament, by a majority vote of its members***,** after obtaining the mandatory opinion of the Constitutional Court about the gravity of the acts and the infringement of the Constitution. (1^1) The continuation of the suspension procedure is conditioned by the favourable opinion of the Constitutional Court. The President may explain before Parliament with regard to imputations brought against him. *(1^2) If the opinion of the Constitutional Court is negative, the suspension procedure shall cease.* (2) The proposal of suspension from office may be initiated by at least one third of the number of the members of the Parliament, and the

President shall be immediately notified thereof. (3) If the proposal of suspension from office has been approved, a referendum shall be held within 30 days, in order to remove the President from office." At present, the Constitutional court issues an advisory opinion during the procedure of suspending from office of the President of Romania. The advisory opinion is issued with regard to the President of Romania having committed grave acts infringing upon constitutional provisions. As a consequence, even if the Constitutional Court considers that the President did not break the Constitution, the suspension procedure goes on and a referendum could be held in order to remove the President. Practically, if governmental cohabitation occurs, the parliamentary majority can arbitrarily suspend the President, without infringing upon the constitutional provision. Or, the role of the constitutional institution is to ensure the functioning of the State of the rule o law and not to stimulate the conflicts between the institutions and to fuel the political tensions. With regard to the present procedure of suspending from the office of the President of Romania, it is proposed that the judicial nature of the opinion of the Constitutional Court be changed. If the opinion of the Constitutional Court is negative, the suspension procedure shall be stopped. The advisory opinion of the Constitutional Court shall be replaced by the mandatory opinion. Such a solution is entirely in accordance to the constitutional logic. The Constitutional Court must have the final saying when infringement upon the Constitution is to be determined. According to Article 142 paragraph (1), the Constitutional Court is the guarantor for the supremacy of the Constitution.

Aspects concerning the executive power

The jurisprudence of the Constitutional Court and the political practice require certain clarifications with regard to government reshuffle and to the liability of the members of the Government.

- *Clarifying the government reshuffle procedure according to the jurisprudence of the Constitutional Court*. It is proposed that Article 85, Paragraph (2) of the Constitution be formulated as follows: "(2) In the event of government reshuffle or vacancy of office, the President shall dismiss and appoint, on the proposal of the Prime Minister, some members of the Government. (21) The proposal of the Prime Minister to dismiss and appoint some members of the Government can be done only after the preliminary consultation with the President."The government reshuffle means a modification of the composition of the Government, already approved by the Parliament (Muraru, Tănăsescu, 2008, p. 798). The hypothesis of governmental reshuffle stipulated by Article 85 paragraph (2) concerns the situ-

ation when no modification of the structure or of the political composition of the Government is intended[19], but only the situation when a member of the Government is discharged from a given ministerial post and replaced by another person onto the same post, without changing the configuration of the ministries. In this case, the President of Romania dismisses and appoints some members of the Government on the proposal of the Prime Minister. In our political and constitutional practice, the question was raised whether the President of Romania may refuse the proposal of the Prime Minister with respect to government reshuffle, or is the President forced to accept the proposals made by the Prime Minister without any possibility to intervene? By the Decisions of the Constitutional Court, the following coordinates of the relationship between the President and the Prime Minister with regard to the government reshuffle were established: (a) The President of Romania does not have a right of veto with respect to the Prime Minister's proposal, but he may ask the Prime Minister to discard the proposal when ascertained the fact that the proposed person does not fulfil the legal conditions required in order to become a member of the Government[20]. (b) The President of Romania may refuse, only once, motivated, the proposal of the Prime Minister to appoint a person in a vacant ministerial position. The Prime Minister is forced to propose another person[21]. Based on the explicit jurisprudence of the Constitutional Court, the proposed constitutional amendment institutes the procedure of consult between the President and the Prime Minister in the case of government reshuffle without the change of the structure or of the political composition of the Government.

- *Establishing by an organic law of the procedure of the criminal liability of the members of the Government*. It is proposed that Article 109 of the Constitution be formulated as follows: "(1) The Government is politically responsible for its entire activity only before Parliament. Each member of the Government is politically and jointly liable with the other members for the activity and acts of the Government. (2) *Abrogated.* (3) *Criminal liability of the members of the Government for acts committed in the exercise*

[19] If the reshuffle proposal changes the structure or the political composition of the Government, the President of Romania shall dismiss and appoint some members of the Government based only on the Parliament's approval, granted following the proposal of the Prime Minister.

[20] Decision of the Constitutional Court no 356 of 5 April 2007 on the demand to solve the juridical conflict of a constitutional nature between the President of Romania and the Government of Romania, formulated by the Prime Minister Călin Popescu Tăriceanu, published in Monitorul Oficial no 322 of 14 May 2007.

[21] Decision of the Constitutional Court no 98 of 7 February 2008 on the demand to solve the juridical conflict of a constitutional nature between the President of Romania and the Government of Romania, formulated by the Prime Minister Călin Popescu Tăriceanu, published in Monitorul Oficial no 140 of 22 February 2008.

of their office shall be decided by organic law. The case shall be within the competence of the High Court of Cassation and Justice." The present Article 109 paragraph (2) of the Constitution states that only the Chamber of Deputies, the Senate and the President of Romania have the right to demand legal proceedings to be taken against members of Government for acts committed in the exercise of their office. In the applying the constitutional text, Law 115/1999 on the responsibility of the ministers was adopted, with the subsequent amendments and additions. It detailed the procedures according to which the Chamber of the Deputies, the Senate and the President of Romania can request legal proceedings to be taken against a member of the Government. The President of Romania may demand legal proceedings to be taken against a member of the Government only at the proposal of the special commission instituted in order to analyze the notifications concerning offences committed in the exercise of the office by the members of the Government. The President of Romania must be notified by the Prime Minister, by the general public prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice or by the chief prosecutor of the National Anti-Corruption Directorate in order to exercise his constitutional right to demand legal proceedings to be taken against a member of the Government. Taking into consideration the fact that the present constitutional text unconditionally institutes the right of the Chamber of the Deputies, of the Senate and of the President of Romania to demand that legal proceedings be taken against the members of the Government for acts committed in the exercise of their office, the Constitutional Court has decided that "*both the two Chambers of the Parliament and the President of Romania have the freedom to decide upon the way of exercising this right, without any external regulation, by following the Constitution"*[22]. As a consequence of several of the articles of Law 115/1999 being declared unconstitutional, two categories of ministers were created: ministers that are also members of the Parliament (they enjoy parliamentary immunity) and ministers that do not have this quality. The proposed constitutional amendment aims at removing from the text of the Constitution the procedure of the criminal responsibility of the members of the Government for acts committed in the exercise of their office, as this procedure is to be decided by organic law.

[22] Decision of the Constitutional Court no 1.133 of 27 November 2007, Monitorul Oficial no 851of 12 December 2007.

Aspects concerning the legislative power

The most important constitutional amendment concerning the legislative power is, as we have seen, the transition towards a unicameral Parliament and the reduction of the number of the members of the Parliament to a maximum of 300. In addition to it, it is also proposed that the parliamentary immunity be restricted.

The restriction of the parliamentary immunity to the votes and the political opinions expressed in the exercise of the office. It is proposed that Article 72 paragraphs (1) and (2) of the Constitution be formulated as follows: "(2) The investigation and prosecution of the members of the Parliament for acts that are not connected with their votes or their political opinions expressed in the exercise of their office shall only be carried out by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. The High Court of Cassation and Justice shall have jurisdiction over this case." According to the 1991 Constitution, parliamentary immunity was practically absolute. Why? Because the deputy or the senator could not be detained, arrested, searched or criminally prosecuted, without the consent of the Chamber they belonged to. After the 2003 revision of the Constitution, the institution of parliamentary immunity was attenuated (Constantinescu, Muraru, Iorgovan, 2003). According to the (present) constitutional text revised in 2003, the deputies and the senators can be investigated and criminally prosecuted for acts that are not connected with their votes or their political opinions expressed in the exercise of their office, but cannot be searched, detained or arrested without the consent of the Chamber to which they belong. The present constitutional proposition takes a step even further towards the restraining of parliamentary immunity, according to the expectations of the Romanian society, and maintains the parliamentary imunity only for the votes and for the political opinions expressed in the exercise of office.

Aspects concerning the judicial authority

- *The reform of the Superior Council of Magistracy*. It is proposed that Article 133 of the Constitution be formulated as follows: "(1) The Superior Council of Magistracy shall guarantee the independence of justice. (2) The Superior Council of Magistracy shall consist of 19 members, of whom: (a) *10* are elected in the general meetings of the magistrates, and validated by the Parliament; they shall belong to two sections, one for judges and one for public prosecutors; the former section consists of *5* judges, and the latter of *5* public prosecutors; (b) *6* representatives of the civil society, who enjoy a good professional and moral reputation, elected by the Senate: *3 are named by the Parliament and 3 by the President of Romania;* (c) The Minister of Justice, the president of the High Court of Cassation and Justice, and the

general public prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice. (3) The president of the Superior Council of Magistracy shall be elected *from among the members listed under paragraph (2) points (a) and (b),* for one year's term of office, which can be renewed only once. Its term of office cannot be prolonged. (4) The length of the term of office of the Superior Council of Magistracy members shall be 6 years *and cannot be prolonged or renewed*. (5) The Superior Council of Magistracy shall make decisions by *public* vote *and shall motivate them.* (6) *Abrogated.* (7) Decisions by the Superior Council of Magistracy shall be final and irrevocable, except for those stipulated under Article 134 paragraph (2)." The constitutional amendment that refers to the Superior Council of Magistracy aims at reforming this fundamental institution of the state of the Rule of law and of the judicial authority, by: (a) Enhancing the number of the members of the Civil Society in the Superior Council of Magistracy by reducing the number of the representatives of the magistrates. The number of the representatives of the civil society in the SCM rises from 2 to 6, while the number of the representatives of the magistrates decreases accordingly from 14 to 10. (b) Eliminating the right of the President of Romania to preside over the proceedings of the Superior Council of Magistracy. (c) Rendering compulsory the adoption by public vote of the decisions of the Superior Council of Magistracy, and the inclusion of a written motivation. The adoption of this constitutional amendment would allow the society to exercise a real control over the activity of the Superior Council of Magistracy. At present, only self-control is being exercised and, by consequence, the performance of justice is still far from the expectations of the seekers of justice, of society in general.

- *The regulation of the responsibility of the magistrates by organic law.* It is proposed that Article 124 of the Constitution be formulated as follows: "(1) Justice shall be rendered in the name of the law. (2) Justice shall be one, impartial, and equal for all. (3) Judges shall be independent and subject only to the *Constitution*, to the law *and to the decisions of the Constitutional Court.* (4) *The responsibility of the judges and of the public prosecutors shall be regulated by organic law.*" The constitutional amendment solves a long-term problem of the Romanian society: the establishment of the liability of the judges and of the public prosecutors. At present, Romania does not have a law on the responsibility of the magistrates. This is not natural, because nobody is above the law and any professional category must be liable for its activity. The new constitutional text institutes the obligativity of regulation by organic law of the responsibility of the judges and of the prosecutors. The constitutional amendment also grants the fact that the judges are independent, but they are not independent with respect to the

law, to the Constitution and to the decisions of the Constitutional Court. The project of the revision of the Constitution initiated by the President of Romania, on the proposal of the Government, does not aim at changing the architecture of the Romanian constitutional and political system. The constitutional relationships that define the Romanian semi-presidential system remain unchanged: the direct election of the President of Romania by the citizens, the Government being politically responsible before the Parliament, the right of the President to designate a candidate for the office of prime minister. The problem of the conflict between the legitimacy of the President of Romania, elected by direct vote, and the specific constitutional prerogatives of the President needed in order to apply the political programme for which this President was elected is not solved yet. This potential conflict shall remain and will aggravate in the periods of cohabitation between the President and the Government[23]. The present proposal for the revision of the Constitution responds, first of all, to the needs of modernization of the Romanian society in the new context of its statute as Member State of the European Union. The transition towards a unicameral Parliament, the reduction in the number of the members of the Parliament, strict budget rules, the restriction of the parliamentary immunity or the confiscation of the proceeds of acts or deeds of corruption represent stringent needs of the Romanian public life. It remains to be seen whether the present political class will pass the test of political maturity and will rise to the expectations of the citizens, by promoting the solutions for the reform of the Romanian state from a constitutional angle. This test is not too far away. The project for the revision of the Constitution is being debated by the Judicial Commission of the Chamber of the Deputies.

[23] The only period of cohabitation between the President and the Government was between 2007 and 2008 and was marked by profound political and constitutional tensions: the President of Romania was suspended from office, a referendum was held in order to remove him from office, there were divergences with respect to the government reshuffles, the Constitutional Court was notified on the judicial conflicts of a constitutional nature, conflicts occurred concerning the implementation the law on the criminal liability of the members of the Government, the initiative of the President to organize a referendum was blocked, and divergences arose concerning some economic policies and the representation of Romania to the European Council.

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