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The Impact of Constitutional Reforms in Romania on the Balance between Legislative and Executive Powers and on the Independence of Justice

LUCIAN MIHAI
University of Bucharest, Romania

The article analyses the constitutional processes in post-communist Romania. It particularly addresses the impact of constitutional reforms on the balance between the legislative and executive powers and on the independence of justice. The only 2003 Revision of Romanian constitution is qualified as a total success from a political point of view, and a partial success only from a legal point of view. With regard to judicial reforms, a phenomenon called "The Prosecutors' Revolution" can be singled out. It ensured courageous and not-politically-biased investigations having exceptional importance in terms of justice. Due to these changes and their full implementation, Romania came to be viewed as a democratic country, and became a member of NATO and EU.

Keywords
Constitution of Romania, constitutional reforms, balance between legislative and executive powers, independence of justice, "the Prosecutors' Revolution"

Introduction

The Constitution of Romania, as originally worded, was adopted in the sitting of the Constitutional Assembly of November 21, 1991 and came into force after its approval by a national referendum held on 8 December 1991. It contained 152 articles divided in seven Titles covering: General Principles; Fundamental Rights, Freedoms and Duties; Public Authorities; Economy and Public Finance; Constitutional Court; Revision of the Constitution; Final and Transitory Provisions.

Pursuant to the main rules regarding the Revision of the Constitution, such revision can be initiated by the President of Romania upon the proposal of the Government, or by at least one quarter of the total number of the Lower House (named Chamber of Deputies) or of the Senators, or by at least 500,000 citizens who have the right to vote. The bill of proposal for revision must have been adopted by the Chamber of

Deputies and by the Senate, by a majority of at least two-thirds of the members of each Chamber. If an agreement cannot be reached following the mediation procedure, the Chamber of Deputies and the Senate shall, in a joint session, decide by the vote of at least three-quarters of the total number of Deputies and Senators together. The Revision shall be final after its approval by a referendum held within 30 days from the enactment of the bill or proposal concerning such revision.

There are limits regarding the matters that can be revised. Thus, it is expressly forbidden the revision of any provision in the Constitution adopted in 1991 which concern the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, the territorial integrity, the independence of judiciary, the political pluralism, or the official language. Likewise, no revision shall be possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards. In addition, the Constitution may not be revised during a state of siege or a state of emergency, or at wartime.

Since its adoption in December 1991, the Constitution was revised only once, namely by Law no. 429 of October 23, 2003, which was approved by national referendum of October 18-19, 2003. It was a quite massive revision, as the amending law contained 79 points of amendment, covering each of the 7 initial Titles of the Constitution, to which one more Title was added, namely the current Title VI concerning the Euro-Atlantic Integration.

To prepare the technical draft of the revision bill, the Parliament established in June 2002 a special parliamentary commission composed of 21 Deputies and Senators with voting powers appointed pursuant to a political algorithm, plus 3 other members without voting powers, namely one Government member, one representative of the President of Romania, and the Ombudsman. Additionally, a group of specialists was also established, whose members were appointed by each parliamentary political party, by the two Standing Bureaus of the Parliament, as well as by the Government, the President of Romania and the Legislative Council. The secret vote was forbidden. The working sessions of the special commission were not public; however the access of media was permitted pursuant to the rules adopted by the special commission itself.

The successive versions of the technical draft prepared by this special commission were submitted to the review of the Venice Commission, which adopted opinions in July and October 2002 as well as in March 2003. On the basis of the improved technical draft and following a political compromise, a bill of proposals was filed with the Parliament in March 2013 by 215 Deputies and Senators representing all the political groups of the Parliament. After the technical review and the control of constitutionality carried out by the Legislative Council and the Constitutional Court respectively, the bill of law was debated and adopted by the Chamber of Deputies in late June and by the Senate in early September 2003. A mediation process between the two Chambers followed, and the agreed final wording was adopted separately by the Chamber of Deputies and the Senate on September 18, so the national referendum could take place on October 18-19, 2003.

Today, after 11 years, the Revision of 2003 can be qualified as a total success from a political point of view, and a partial success only from a legal point of view. However the overall qualification is that the 2003 Revision was a very important democratic step forward, a historical progress which contributed essentially to the international acknowledgment that Romania managed to become a democratic state, able to continue its modernization. On this basis, Romania accessed the NATO membership one year later and became a member of the European Union in 2007.

The progress brought by the 2003 Revision is reflected in various directions, out of which I am going to briefly address the following two: **the balance between the legislative and the executive powers** and **the independence of justice.**

1. As far as the balance between the legislative and the executive powers is concerned, one of the most important amendment regards Article 1 to which the paragraph (4) was added in order to expressly provide that "*The State shall be organized based on* ***the principle of the separation and balance of powers - legislative, executive, and judicial*** *- within the framework of a constitutional democracy*". Previously, the absence from the 1991 version of an open and clear statement of this fundamental constitutional principle had been the subject matter of much criticism, despite the attempts of certain important politicians and

scholars to affirm its virtual existence and implicit operation through the general structure of relationships between various state entities.

2. Another important modification is the prolongation of the term of office of the President of Romania from 4 to 5 years. The rationale behind this decision was the necessity to create a temporal separation between the legislative elections (which take place at each 4 years) and the presidential ones, because the latter could influence the outcome of the former. Unfortunately, the practice accumulated within the latest 11 years shows that such separation increases the number of electoral years – a result which is not only more expensive in terms of financing but, what is more important, determines for a longer time the focus of the public activities towards political fights instead of the management of the economic and social problems encountered by the country.

3. Pursuant to Article 85 of the 1991 version, the appointment of the Government operates as follows: "*(1) The President of Romania shall designate a candidate to the office of Prime Minister and appoint the Government on the vote of confidence of Parliament.(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.*"

In 2003, these two paragraphs were maintained but the paragraph (3) was added to state that "*If, through the reshuffle proposal, the political structure or composition of the Government is due to change, the President of Romania may only exercise the power stipulated under paragraph (2) based on the Parliament's approval granted on the Prime Minister's proposal.*"

This way, the Parliament control over the Government is fortified.

4. According to Article 106 of the 1991 version (currently Article 105), "*Membership of the Government shall cease upon resignation, removal from office, disenfranchisement, incompatibility, death, or in any other cases provided by law.*" In December 1999, the President of Romania took advantage of this constitutional text which does not make any distinction between the Prime-Minister and the other members of the Government, and removed from office the Prime-Minister. In order to prevent similar future conflicts, the following text was added in 2003 as

paragraph (2) of the current Article 106 (named "*Prime-Minister*"): "*The President of Romania cannot remove the Prime Minister from office*".

5. The 1991 Constitution states that "*Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country*" (Article 61 paragraph (1)).

Nevertheless the Constitution also institutes a scheme for legislative delegation. There are two mechanisms to delegate legislative powers to the Government, so it can issue normative acts (named ordinances) which have the same legal force as the one attached to the laws passed by the Parliament.

The first system (named the system of regular ordinances) operates as stipulated by paragraphs (1) – (3) of Article 115: *"(1) Parliament can pass special laws under which the Government is delegated powers to issue ordinances in matters which fall outside the object of organic laws.(2) Delegating laws must expressly specify the subject area and time-limit for issuing ordinances.(3) If the enabling law so requests, ordinances shall be submitted to Parliament for approval as is required by legislative procedures, however not later than prescribed by the time-limits of delegation. Failure to observe such limits will discontinue all effects of the ordinance in question.*" This system is mostly used during the parliamentary holidays, and it has not caused major problems. On the other hand, the second system (named the system of emergency ordinances) caused problems even from its inception. According to the initial constitutional provisions, "*In exceptional cases, the Government may adopt emergency ordinances, which shall come into force only after their submission to Parliament for approval. If Parliament does not sit in a session, it shall obligatorily be convened*" (former paragraph (3) of the former Article 114). This constitutional text was abusively used by the Government to issue very numerous emergency ordinances even during the working sessions of the Parliament and not necessarily for real emergency situations.

This is the reason for which this system was amended in 2003, and currently paragraphs (4) – (8) of Article 115 provide as follows:

"(4) The Government may adopt urgency ordinances solely in exceptional cases which call for regulations without delay, and must set forth the reasons for that urgency in their very content.(5) Urgency

ordinances shall only take effects after their tabling for debate in the Chamber which is competent to be referred to, in an urgency procedure, and after publication in the Official Gazette of Romania. If not in session, the Chambers shall be convened within 5 days after tabling or, as the case may be, after forwarding. Where the Chamber thus referred has failed, within 30 days of the tabling date, to decide on that ordinance, such shall be deemed as having been approved and shall be sent to the other Chamber which shall likewise decide in an urgency procedure. An urgency ordinance which comprises norms pertaining to the rank of organic laws must be approved by a majority as is stipulated under Article 76 paragraph (1).(6) Urgency ordinances cannot be adopted in fields pertaining to constitutional laws, nor may these affect the status of the State fundamental institutions or any of the rights, freedoms and duties set forth in the Constitution, the electoral rights, or envisage any measures for the forcible transfer of assets into public property. (7) Ordinances referred to Parliament are approved or rejected through a law that shall include the ordinances which ceased to be effective according to paragraph (3). (8) Such law on approval or rejection shall regulate, where applicable, any necessary measure concerning the legal effects engendered during the effective time of the ordinance in question".

Unfortunately, the experience of the latest 11 years reveals that the amendments made in 2003 were not able to prevent the Government's abuse to issue too numerous emergency ordinances. Furthermore, because the Constitution fails to provide a deadline (and sanctions in case of delay) for the Parliament to approve or reject by law the emergency ordinances sanctions, there have been some situations when several years passed until the Parliament debated certain emergency situations.

Another problem regarding the emergency ordinances refers to the lack of an efficient control over their constitutionality, as the Constitutional Court has the power to control only the Parliament laws that approve or reject the emergency ordinances. Only the Ombudsman can file submissions regarding the constitutionality of the emergency ordinances before they are debated in the Parliament, but there were several doubtful instances when the Ombudsman failed to exercise his right. To conclude, (1) the still existing deficiencies regarding the

emergency ordinances and (2) the prolongation of the term of office from 4 to 5 years for the President of Romania appear to constitute the most important failures of the 2003 Revision in the field of **the balance between the legislative and the executive powers.**

The most important aspects of the impact regarding the **independence of justice** brought by the Revision carried out in 2003.

There is an entire Chapter named "Public Authorities" which is assigned to the "Judicial Authority" (currently, Articles 124 – 128). It deals with the courts of law, the Public Minister (composed of public prosecutors), and the Superior Council of Magistracy. The Constitutional Court of Romania does not belong to the Judicial Authority, as it is regulated by a distinct Title, named "The Constitutional Court".

1. According to the initial wording of 1991, paragraph (1) of Article 124 named "Statute of judges" provided as follows:

"*Judges appointed by the President of Romania shall be irremovable, according to the law. The President and other Judges of the Supreme Court of Justice shall be appointed for a term of six years, and may be reinvested in office. Promotion, transfer, and sanctions against Judges may be decided upon only by the Superior Council of the Magistracy, in accordance with the law*."

In comparison, the wording adopted in 2003 brought a major progress: "(*1) Judges appointed by the President of Romania are irremovable, according to the law.(2) Proposals for appointment, and the promotion, transfer, or sanctions applied to judges shall be within the competence of the Superior Council of Magistracy, as provided by its own organic law"*.

2. Another important modification refers to the Superior Council of Magistracy. Thus, paragraph (1) of Article 132 states now that "*The Superior Council of Magistracy shall be the guarantor of the independence of justice*."

The Superior Council of Magistracy consists of 19 members, out of whom: (a) 14 are elected in magistrates' general meetings, and validated by the Senate; they shall belong to two sections, one for 9 judges, another one for 5 public prosecutors; (b) 2 representatives of civil society, specialists in the legal field, who enjoy high professional and moral reputation; (c) the Minister of Justice, the President of the High

Court of Cassation and Justice, and the General Prosecutor of the Prosecution Office attached to the High Court of Cassation and Justice.

The length of office for membership of the Superior Council of Magistracy shall be 6 years. As far as its powers are concerned, the Superior Council of Magistracy submits proposals to the President of Romania for the appointment of judges and public prosecutors, except for junior judges and prosecutors. Also, the Superior Council of Magistracy is competent to sit in judgment on disciplinary proceedings against judges and public prosecutors. However the Minister of Justice, the President of the High Court of Cassation and Justice, and the General Prosecutor of the Prosecution Office attached to the High Court of Cassation and Justice shall have no vote in like instances.

These two amendments (regarding the unconditional irremovability of judges and the strengthening of the Superior Council of Magistracy) have been proved as essential factors for achieving the independence of the judges and public prosecutors, protecting the judiciary from external and internal factors of influence. Based on these clear and imperative constitutional provisions, the magistrates (especially the judges), supported by media and some segments of the civil society, pressed for the adoption of a new legal framework regarding judiciary. Such process was also very much favored by the requirements involved by the process of Romania's accession to the European Union and, after such accession, by the so called "Mechanism for Cooperation and Verification" which was established with the agreement of Romania and consists of periodical reports prepared by the European Commission regarding the status, the progress and the problems pertaining to the rule of law and justice in the country. The activism of the judges took such an unusual extent that they even went on strike in the summer of 1999, so obliging the executive and legislative branches to informal dialogue. Several important achievements were obtained then and later on, out of which it is worthy to mention the shift from a professional promotion based on direct oral interview to a complex system which consists of a transparent competition where the professional tests have the highest role. Also, the judges and prosecutors managed to elect and impose to the Senate a new generation of members of the Superior Council of Magistracy, more informed, ambitious, committed to changes and

combative – so this representative body of the judicial branch was able to inter-react on an equal basis with the other powers in state and (when necessary) with media.

Furthermore, the courts of law and the public prosecutors offices obtained more funds for professional training, equipment, infrastructure in order to become more efficient. Special structures were established within the Public Ministry for the purpose to fight against the organized crime and the high level corruption. The result is that nowadays media speaks about a phenomenon called "The Prosecutors' Revolution", name which describes the wave of massive, courageous and not-politically-biased investigations and indictments issued by the prosecutors and imprisonments decided by the courts of law, where the High Court of Cassation of Justice is the number one. Media also developed comments comparing the current activity of the Romanian judiciary in respect of the political class with famous similar processes occurred in other countries, as the "Mano Pulite" in Italy. What is really remarkable is that the judiciary fight is directed not only towards external factors (as it is the political class and the state corruption) but equally towards its internal problems, as an unexpected number of arrest-warrants and court sentences were made against judges and prosecutors too, which shows the commitment of the judiciary to clean out its own structures.

After 10 years elapsed from the Revision of the Constitution made in 2013, a second revision process started in 2013. This new process is currently *de facto* suspended, and its final outcome is very difficult to be predicted. The political initiative to revise the Constitution appeared after an electoral coalition won the parliamentary elections in December 2012 with about 70% of the Parliament seats. On February 13, 2013, a special joint commission for the preparation of the bill proposals for the Revision, composed of 23 deputies and senators (mainly lawyers, but not only) was established by the Parliament. Although this commission is composed mainly of lawyers, none of its members is specialized in constitutional law. Furthermore, no group of legal specialists was assigned to work with this parliamentary commission. A so called "Constitutional Forum" was initiated in order to favour and organize debates regarding the Revision proposals. After a couple of

weeks, the works of the special commission were abandoned by deputies and senators representing the parliamentary opposition.

In February 2014, the special joint commission finalized a draft law referred for the review by the Venice Commission, which adopted an opinion on the occasion of its 98th Session of March 2014. Following the negative conclusions of this Opinion, the parliamentary process to revise the Constitution has been tacitly suspended for a not specified duration. It is not an unrelated accident that this suspension occurred just during 2014, which is an important political year in Romania considering the presidential elections which took place yesterday.

Conclusion

The analysis of constitutional processes in post-communist Romania reveals that

1. The only Revision of Romanian constitution in 2003 mostly addresses three issues – establishment of balance between the legislative and executive powers, insurance of the independence of justice, and the Euro-Atlantic integration. These changes can be qualified as a total success from a political point of view, and a partial success from a legal point of view.
2. Among the amendments, designed to address the establishment of balance between the legislative and executive powers, the adoption of emergency ordinances by the Government and the term of the office of the President of Romania constitute the most important failures. The experience of the latest 11 years reveals that these amendments were not able to address the shortcomings of the given problems.
3. With regard to judicial reforms a phenomenon called "The Prosecutors' Revolution" can be highlighted for it ensured courageous and not-politically-biased investigations and fair judgments based on them.
4. Due to these changes and their full implementation Romania came to be viewed as a democratic country, and became a NATO member in 2004 and EU member in 2007.