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On the Problems Regarding the Functioning of the State's Fundamental Institutions

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Abstract. This paper deals with the issue of deficient functioning of the state's authorities in the context of the global economic crisis and the institutional and decision-making system within the European Union.
The problems related to the functioning of basic authorities are examined in three dimensions of principle for the Organisation of the State, namely: democracy, democratic system, the constitutional regulation of sovereignty, and re-evaluation of the principle of separation of powers in the State. The latest developments relating to the operation of the principle of representativeness and of the electoral system are also presented.
All these theoretical elements are illustrated with practical aspects, with a number of concrete examples of disruption, the conflict of fundamental State authorities.
At the end of the paper, several appreciations and conclusions are formulated, which show reasons, causes of failures from these principles, namely to formulate some suggestions and proposals for rethinking and amending the constitutional and political system.

Keywords: political system, the problems of democracy, deficient functioning of the state, Romania, EU

Currently we are passing through a period of global economic and financial crisis, which is without precedent in the past 50 years, and which is also accompanied by a political crisis in some countries. According to some studies, these troubles may have their roots in a profound moral crisis, in the uncertainty regarding the relativisation of fundamental human, moral and political values.

Beyond these undisputable phenomena and their extremely complex origins, we can detect another crisis that is less evident and even less recognized and acknowledged. This is the crisis of the political system, more precisely the systemic crisis of the political regime of democracy, or more explicitly the crisis of democracy and its institutional and functional system.

Under different aspects and to various degrees, this crisis is manifest in several member states of the European Union. At the same time, we may find some signs of political crisis and of functional institutional deficiencies – especially relating to decision-making – at the level of the European Union itself.

There are more and more symptoms of the deficient functioning of the state and EU institutional systems, which in some cases (like in the case of Romania) show us that, even though the fundamental principles of state power organisation may look sanctioned, consecrated and intangible (being formally recognized in the Constitution), they present serious functional deficiencies, sometimes incoherence and, on the whole, inefficiency.

As the subject of the conference concerns the EU, EU Law and EU policy – related challenges of the former socialist states which acceded to the EU in 2004 and in 2007 –, I will present some aspects regarding the dysfunctionalities of the political system in Romania, especially those regarding the organisation and functioning of state institutions and the inter-institutional relationships between them.

Apparently, the problem seems to be a strictly internal one; however, the way in which each individual state functions has repercussions on the integration process and may create serious difficulties for the functioning of the EU.

First of all, I think that we can say that any model of integration of states, activities and competences – as is the case of the European Union – supposes the existence of some coherent functional structures at the level of the new entity, but at the same time also at the level of the integrated systems (the member states).

In case there are serious dysfunctionalities at the EU level, or if there are structures with grave organisational and functioning deficiencies at state level (no matter if we are talking only about a few states), the integration model itself can also be affected.

I. The problems of democracy or of the democratic system

"The utmost degree of corruption of a word is to make it serve for anybody." (Bernanos 1961, 158) This is how, according to professor Dan Claudiu Dănişor, "the term democracy reached such a degree of corruption that it could be used just as well by westerners as by Stalin, so that today it seems to lack any concrete meaning and to designate a plain utopia." (Dănişor 2006, 158)

The problem is that we cannot give up this "utopia" until we do not create a new one. But, far from replacing democracy – even if we are aware of its imperfections –, we should rather find the mechanisms – maybe new ones compared to what has been applied until now – which are capable of making the "utopia" work.

Under the generally accepted but not the sole meaning, democracy means fair, legal and just procedures in diverse situations, especially in decision-making, and their strict observance.

Through a more extensive and profound analysis (that is not possible within the confines of this paper), we could draw the conclusion that beside clear procedures – which would represent the means and the instrument of democracy – we would also need, on the one hand, the set of values and interests of the political community (of the people), and on the other hand, the set of values of individuals, of citizens. The legitimacy of the system and that of the democratic mechanism (of state or supra-state level) is ensured through the combination of these values and interests through an entire set of mechanisms and procedures.

We are all aware of the debates and worries concerning the democratic deficit at the level of the European Union's institutional structures, especially in what regards the decision-making mechanisms. Nevertheless, there are states – among them Romania – which are confronted with great difficulties in the democratic functioning of their political and institutional systems.

Marcel Gauchet was the one who stated that "Democracy remains the indispensable horizon of our times" (Gauchet 2007, 20); nevertheless, it was also he who admitted that it was passing through an unprecedented crisis. The weaknesses of constitutional democracy in the Rechtsstaat are visible and it seems that we can talk of structural and procedural weaknesses suggesting the existence of a true crisis of the Rechtsstaat, which in fact would be the expression of the degradation of democracy.

In his classic work comparing the American and European political systems from the 17th century, Alexis de Tocqueville foresaw two possible directions for the development of democracy in Europe:

– one was to lead to the development of individuals' independence,

– the other was to lead to more and more centralisation of power. (de Tocqueville 1981, I, part II)

Europe took the latter path.

In the preface of the Romanian edition of the famous book of Tocqueville, *Democracy in America*, professor Francois Furet writes that "Thus 'democracy' is not the end of history or one of its universal phases, or it is even less the reconciliation of humanity with itself. It is a concept that enables Tocqueville to imagine a state of society and mores specific to Europe..." (Furet 1992, 20) At the same time, with all the difficulties that the democratic system is confronted with, we are convinced that – paraphrasing Francois Furet – history did not reach the end of democracy and that democracy, beside all the other fundamental principles of organisation of power and society – through its adaptation

and modernisation –, can represent a good chance for "the reconciliation of humanity with itself".

Being confronted with a series of problems of economic and political development and its only recently ended half a century history of totalitarianism, Romania practically has not yet entered truly in the democratic era, and it has kept the traditional centralised politics as its main direction.

For two decades, Romania "has been living in transition, remaining the advocate of the centralised state, also manifesting a dictatorial reflex that is clearly illustrated by the rigid separation between the left and the right, as well as by what is called elective autocracy and the personalization of power." (Alexandru 2008, 712)

The fact that the political notions of *left* and *right* have become irrelevant and strongly relativized is not a specificity of Romanian politics. Rightist or leftist ideologies often appear only as historic categories with some theoretical identification criteria existing in political science textbooks.

Finally, the parties and, especially, their leftist or rightist policies exist only as labels in the first case (the parties) or they create confusion through the use of meaningless words in the second case (the policies of the parties).

Regarding what the author of the quotation calls "elective autocracy", it designates a profound lack or a low level of political culture, an erroneous understanding and connection between the elected and the voters. For example, voters often identify (erroneously) the mandate given to the elected person with a private law mandate, being unable to understand that the public mandate is not (and cannot be) imperative, it cannot be revoked and it is not, as private law says, *intuitu personae*, that is relating to a given person, even in the cases of uninominal voting systems.

Finally, regarding the "personalisation of power", it represents a symptom and a specific trait of Romanian political thinking and practice. One of the manifestations of this way of thinking is that a series of state institutions, the government or even the political regime itself is excessively personalised. However, the institutions of the state cannot be transformed into the image of the head of the given institution. In case this cannot be totally avoided, a more pronounced de-personalisation should be carried out. An example of this phenomenon in the field of major constitutional decisions in Romania's political system was the choice – made out of personal considerations and political ambitions – for the semi-presidential system and the rejection of the idea of a parliamentary democracy. Similarly, at present, more and more advocates of parliamentary democracy are emerging, but again out of "personal" reasons. These advocates have made their choice because they do not agree with the authoritarian – and sometimes abusive and unconstitutional – ways of the President of the Republic, and not out of principles related to the efficiency of the political and constitutional system. Such personal decisions, taken out of political or economic interests, can be found at the level of other important or even fundamental institutions of the state.

II. The constitutional regulation of national sovereignty in the context of Romania's integration into the EU

According to constitutional law, sovereignty in its classic conception belongs to the people or to the nation, and it is one, indivisible, inalienable and imprescriptible. In some constitutional texts, sovereignty is directly used as *national sovereignty* (Romania), in others it is defined or explained as *power* (Belgium), *powers of the state* (Finland), *supreme power* (Poland and Hungary) or *state authority* (Germany). In the more specific case of the Netherlands, the constitution does not mention the concept of sovereignty neither explicitely nor implicitly, which is seen by experts in law as an attempt to avoid a "mystical and dangerous"[1] notion.

As the concept of sovereignty is currently passing through substantial modifications, it is necessary to reconsider, recontextualise and adapt it to the new conditions. The true problem is that of redefining the functions/competences of the state and not to regret the potential disappearance of sovereignty.

Sovereignty has not disappeared; it has rather become more limited, both in its internal and external dimension. Internal sovereignty does not equal discretionary powers in regulation matters anymore as it is limited by international regulations, especially in what regards human rights, and by EU regulations in many areas, which until recently were considered to be the realm of exclusive internal prerogatives and competences.

Human rights gained an objective character in the sense that a whole system of international legal instruments was created which refer to them and which are no longer subject to reciprocality.[2] We can thus ascertain that the international treaties on human rights penetrate the internal legal systems of signatory states, and their provisions are directly applicable to the subjects of law without any internal transposing legislation. The subjects of law can invoke ratified texts in front of internal courts and can use the guarantee mechanisms foreseen in them.

On a different note, it is not only human rights that have become universal, but also the need for international safety and security. A legal consequence of this form of globalisation is the tendency to establish a mechanism (or several mechanisms at global or regional level) of international coercion of states. All these aspects result not only in limited sovereignty, but also in the relativisation of the differentiation between internal and external sovereignty.

1 See: art. 2 (1) of the Constitution of Romania, art. 33 (1) of the Constitution of Belgium from 1970, art. 2 (1) of the Constitution of Finland from 1999, art. 4. (1) from the Constitution of Poland from 1997, art. 2 (2) from the Constitution of Hungary from 1949, art. 20 (2) from the Federal Republic of Germany from 1949.

2 The Vienna Convention on the Law of Treaties of 1969 foresees in art. 60, par. 5 that the breach by a signatory state of the provisions regarding the protection of the human person does not entitle the other parties to terminate the treaty or suspend its application.

Regarding external sovereignty, the meaning of state independence has changed because in reality interdependence among states has increased significantly. Isolationism has become exclusively the project of totalitarian states, of the toughest dictatorships in the world. By becoming a member of the EU, Romania – eventually also by virtue of sovereignty – renounced some of the external prerogatives of its sovereignty, or, in other words, it limited itself in the exercise of some external policy prerogatives, especially in the field of European and global security. These prerogatives are carried out in common or, more precisely, under the "command" of EU and Euro-Atlantic institutions.

This sovereignty is limited especially in the context of European integration and is reflected in different formulations in the constitutions of member states. Thus, various expressions were adopted such as: "the common exercise of some competences" (France, Romania and Hungary), "delegation of sovereign powers" (Germany and Slovenia), "delegation of competences" (Poland), "transfer of sovereignty" (Belgium), "limitation of the exercise of national sovereignty" (Greece).

The intention of national constitutional systems was to protect themselves from potential abuses by the European legal order.

Nevertheless, conflicts did appear, and constitutional courts have become the last strongholds for protecting national (internal and in this sense traditional) constitutional values. (Banu 2010, 112)

The entire economic and especially institutional crisis of the European Union arises from the different perception and sometimes contradictory interpretation of national sovereignty by the respective state's authorities and people, on the one hand, and by the institutions of the European Union, on the other hand.

The conflicts and divergences between Romania and EU institutions reflect the firm attachment of these authorities to the fundamental and founding values of the European integration project, on the one hand, but they also reflect serious deficiencies in formal and informal communication and information mechanisms regarding events in a given EU member state, on the other hand.

The European Union shows two "extreme" attitudes and influences, which can negatively influence the mechanisms for evaluating various situations and decision-making. These are, on the one hand, the excessive and sometimes aggressively extensive technicality of the bureaucratic apparatus from Brussels and, on the other hand, a relatively new phenomenon, the excessive politicisation of issues, sometimes very important ones, related to one state or another, depending on the power of party-families and not on "truth", or consecrated principles and values.

III. The need to reconsider the principle of the separation of state powers

"The principle of separation of state powers has become a dogma of liberal democracies and the fundamental guarantee of the individual's security in his/her relations with these powers." (Deleanu 2003, 45)

Even with all the modifications it suffered throughout the years, at present, this principle still represents the foundation of the democratic organisation of political power in the state. This is because a series of institutions are needed for carrying out the fundamental functions of the state, and these are organised and function as separate powers, according to a mechanism of balancing and reciprocal control.

The three fundamental and primary functions of the state according to the classic model are the legislature, the executive and the judiciary function. Without getting into the details and evolution of the principle of separation of powers, we can see that it is considered by many authors as being "old" because new factors and elements have emerged which modify the concept.

First, the role of political parties has increased substantially and they have become the main actors in the shaping of state institutions.

The traditional separation between the legislature and the executive power (parliament and government) has transformed into the separation between governmental majority with parliamentary support and parliamentary opposition.

Another new factor is represented by the new locus of power at local authorities, whose functioning is based on the principle of local autonomy and subsidiarity. In this case, we can observe a new model (or a new direction) of the separation of powers in the state. The traditional model was horizontally structured at the central level of the fundamental institutions of the state (Parliament, Government, Head of State, High Court of Cassation and Justice). With the strengthening and widening of local autonomy, a vertical separation of powers emerged, as these local authorities became decision-making and executive fora on local level. This way, the concept of centralised political power organization suffered transformations even in the case of unitary states, while the concept of decentralisation has come to the fore.

A third factor is the organised civil society, whose influence over the decisions taken by the legislature or the executive has become ever stronger.

Some dysfunctionalities or regulatory incoherencies in the observance of the principle of separation of powers constitute an important deficiency in the functioning of the state.

Some examples:

1. We can observe that most conflicts arise within the executive because the President of Romania assumes discretionary powers following the erroneous or distorted interpretation of some constitutional provisions.

a. The President considers that the appointment of some members of the government or their recall from their positions falls within his discretionary competences. Although the Constitution foresees that the president of Romania – at the prime minister's proposal – appoints or recalls ministers, this decision is not at the discretion of the head of the state. This provision has to be placed in the context of the entire set of roles and prerogatives of the President and of the Prime Minister. Hence, the responsibility for governing belongs to the Prime Minister and not to the President. If we invoke the principle of collective responsibility of the government, it becomes evident that the appointment and recalling of a member of government is a formal/protocolar act of the President, which in no way can be interpreted as an exclusive decision of the head of the state in the matter.

b. Not long ago, the unusual situation of cohabitation between the President and the Prime Minister developed: by way of a motion of no confidence against the government, the former opposition succeeded in overturning the balance between the former majority and the opposition. A symptomatic example of the incapacity to cohabitate is the dispute between the Prime Minister and the President regarding the representation of the Romanian state at various international fora.

These issues must be looked at carefully and analysed in detail. This way, in international organisations, such as the NATO or the UN, as well as in bilateral relations, the Romanian state is represented by the head of the state, as it is the President who decides in the field of foreign policy. With regard to the EU bodies that do not have an international character, the representation of the Romanian state belongs to the prime minister because he/she bears the whole responsibility regarding the putting into practice of the decisions taken at the level of the European Council.

c. The previous case is just one relevant example regarding the uncertainty and unclear definition of the political regime and of the political system. Of course, Romania is a democratic regime, even if democracy sometimes functions deficiently. With regard to the political system, in a superficial manner, Romania is considered a semi-presidential republic. However, if we make a comparison with a truly semi-presidential system, the one from France, we find more differences than similarities. Besides the fact that the President of Romania is directly elected by the citizens with voting rights and some prerogatives of the function in the field of foreign policy, defence, national security and public order (these being the similarities), all other attributes and government levers belong to the Prime Minister (these being the fundamental differences). In our constitutional system, the Prime Minister is the exclusive head of the government, even if, in some cases – expressly foreseen in the Constitution –, the President can participate at the sessions of the government. On such occasions, the sessions are chaired by the President. However, the President cannot be considered the head of the government and even less the head of the executive branch.

At the same time, the constitutional system did not produce either a typical parliamentary political system or an American type-presidential system, or an authentic semi-presidential system. The "original" solution, "an attenuated parliamentary system" can create serious dysfunctionalities. The excessive and abusive interpretation of the constitutional texts can lead to institutional conflicts or serious conflicts of competences, and this is exactly what happened here.

2. Between the legislative power represented by the Parliament and the executive power represented by the Government, a specific (and sometimes conflictual) relationship arose, which distorted the fundamental prerogatives of the two institutions. Thus, the rule, according to which "the Parliament is the only legislative authority of the country",[3] has become an exception in the legislative activity and the abusive practice of emergency ordinances of the Government[4] (it issues normative acts with law power), which according to the provisions of the Constitution should constitute an exception, but instead has become in its frequency the rule. This has distorted and even inversed the fundamental roles of the two authorities, implicitly violating the principle of the separation of powers.

3. Another problem is the position and role of the Prosecutor-General and of the Public Ministry in the system of state institutions. This otherwise very important institution for the rule of law has an extremely uncertain legal and constitutional statute in the sense that it is not clear whether it belongs to the judiciary or to the executive. This incertitude is also manifest in the dispute, according to which the Prosecutor-General and the prosecutor of the National Anticorruption Directorate (DNA) should be named by the President at the proposal of the Ministry of Justice (as it is currently the practice) or at the proposal of the Superior Council of Magistracy (CSM). The problem is not only a strictly formal-administrative one: it involves different concepts regarding the constitutional statute of the Prosecutor-General. If the Prosecutor-General is proposed by the Ministry of Justice, with only the consent of the CSM and appointed by the President of the Republic, the position is strongly bound to the executive and there is a danger that the institution might become politicised. In fact, this is what occurred in the case of the DNA, both in reality and at the level of public perception.

In turn, if the Prosecutor-General were proposed by the CSM, the office would be closer to the judiciary, and this would be more in line with the provisions and the spirit of the Constitution, which is conceived of both prosecutors and judges as magistrates. In our constitutional system, the idea according to which the Prosecutor-General should be proposed and/or appointed by the Parliament and should be under parliamentary control is inexistent. All these weaken the efficiency of the Magistracy and allow the persistence of the tendency or the intention to politicise this extremely important activity from the perspective of ensuring the rule of law.

3 Constitution of Romania, art. 61, par. (1)

4 Constitution of Romania, art. 115, par. (4), (5) and (6)

IV. The evolution of the electoral system

In the spirit of the Constitution, the electoral system must reflect and ensure the principle of proportional representation of the electoral body's political will. The advantages of this type of electoral system are in line with the most significant constitutional principles. Additionally, it also presents another series of advantages: "it emphasizes the usefulness of votes, because all votes cast are taken into consideration, all currents of opinion – even minor ones – are represented; it favours a multiparty system, regardless of the size of parties and their independence; it adequately represents reality, no matter how diverse that might be, expressing diverse tendencies and currents of opinion; and it is an equitable and just procedure, ensuring a complete representation of the majority and minority landscape or an almost complete one – in case there is an electoral threshold, a minimal percentage of representativeness." (Deleanu 2003, 182)

Following fifty years of mono-party communist dictatorship, after 1989, Romania switched to a democratic political regime that is based on political pluralism, which – as it is foreseen in art. 152, paragraph (1) of the Constitution of Romania – is considered an indisputable and intangible constitutional asset.

The first electoral law adopted the proportional system based on party lists (in force until 2008) and had the mission to form and strengthen the party system of Romania. The system was not perfect – but it created a proportional representation –, and the fact that all votes cast were used in the direction of the voter's will – as long as the 5% electoral threshold was attained – strengthened the idea of the "useful vote".

In 2008, a new electoral system was adopted – uninominal with a compensation procedure –, which reduced the level of proportionality. At the same time, this new electoral system also created many situations of inequity when, for example, one could win mandates from second and third places.

On a different note, the expectations from this system, that is, increasing the efficiency of the Parliament's activity, its moral cleansing and the creation of a new, more competent and morally cleaner political class were not met. On the contrary, the professional and moral level rather fell than improved and we could witness an unprecedented volume of migrations from one parliamentary group or political party to the other. Moreover, these migrations even gave birth to an entirely new political party lacking any electoral support.

Personally, I consider that the uninominal electoral system, as it was regulated in 2008, has proved to be a failure. This fact is not yet recognised by the political class and it is only reservedly admitted by specialists.

I am firmly convinced that, in the case of Romania, passing from the party list voting system to the uninominal one did not lead to an evolution of the system; on the contrary, it was rather a regress. Moreover, recently, the Parliament has

adopted a new modification of the current electoral system through which it further aggravated the current situation, practically intending to abolish the principle of proportionality and to transform the electoral system into a strictly majoritarian one. The severe consequence of this system is that a large number of citizens, hundreds of thousands or even millions, may remain unrepresented in the supreme representative forum of the people, as the Parliament is defined in the Constitution.

This translates into an obvious disproportion between the number and the percentage of votes cast and the number of mandates obtained. Consequently, this system creates even bigger inequities, fragmenting and atomising the Parliament, because through the suppression of the electoral threshold small parties – even if they can obtain a few mandates – will not be able to form parliamentary political groups.

The new regulation also contains a protection measure for minorities, but which only applies in the case of the Chamber of Deputies: in the counties where the proportion of a national minority is at least 7% and its representatives do not obtain mandates, the candidate from the respective minority with the most votes wins a mandate.

This measure may theoretically favour minorities or may offer a minimum guarantee to keep the current proportion of representation, but, on the whole, I believe that the system will not yield the expected results and will aggravate and perpetuate the state of crisis of the political system and of the political regime.

Meanwhile, the Constitutional Court found that the law modifying the electoral system is unconstitutional in its entirety. Consequently, two possibilities remain: either the elections in the autumn of 2012 will take place based on the 2008 regulation, or the Parliament (or, more likely, the Government through an emergency ordinance) will adopt a new regulation three months before the elections. This latter situation could affect or even endanger the fairness of the elections, as the citizens with voting right will not be adequately prepared for the new electoral rules.

Conclusions

1. Even in these few examples – and we could continue the list –, we can observe a crisis of the political system's democratic functioning, first of all, in the distortion of some fundamental principles of the state's functioning, as it is the principle of separation of powers, the rule of law or democracy itself.

2. Some of the causes of the democratic deficit lie in the perception of the roles and competences/prerogatives of the state's authorities, which is often manifest in some institutions taking over other institutions' tasks (sometimes leading to full substitution). Similarly, the loose, negligent and sometimes even abusive interpretation by the state's authorities of the constitutional texts represents a serious problem.

3. We are witnessing the misinterpretation and deformation of the intention of the legislature. This has become possible also because of some insufficiently clear and precise texts of the Constitution. Sometimes, we can observe the imprecise or incoherent definition of the legal status of some fundamental institutions like the Presidency, the Constitutional Court, the Prosecutor-General and of their relationships with other institutions. In other cases, as it is that of the Ombudsman, we consider that this institution has not yet grown roots in the institutional system and especially in the civic conscience of the society, in the sense that it is not used as efficiently as similar institutions in other states.

4. No mechanisms have been created, which could efficiently and swiftly correct the failings concerning the rule of law and to rapidly restore legal order.

It is necessary to rethink the political and constitutional system, especially because of the experiences accumulated throughout the years, to give a new foundation to the institutional system of the state and to clarify the institutional relationships, especially in the regards of respecting the principle of the separation of powers in the state, the rule of law and applying consequently and in good faith the rules of constitutional democracy.

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