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Uniunea Europeană ca
paradigmă a statalității viitoare

Proceedings of the symposium organized at
The New Europe College, Bucharest
on May 15-16, 2006

Edited by / volum coordonat
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The publication of this volume was made possible
through funding from the Hertie Foundation

Text Editor: Irina VAINOVSKI-MIHAI

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ISBN 978-973-88304-0-0

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ROMANIAN CONSTITUTIONALISM AND THE STATE OF THE EUROPEAN UNION

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“L’histoire est une galerie de tableaux où il y a peu d’originaux et beaucoup de copies.”

Alexis de Tocqueville, *L’Ancien Régime et la Révolution*

1. Introduction

The European Union accession represents a meeting of two legal worlds. From a socio-legal viewpoint, this process of acculturation and transfer of juridical norms, attitudes, values, is a feat of unprecedented dimensions; even for a national jurisdiction well accustomed to fast-paced modernization by way of Western legal transfers,¹ adoption of the approximately 80.000 pages of the *acquis communautaire* (*acquis de l’Union*) is a task of momentous proportions.²

¹ The Civil Code is a slightly modified translation of the Napoleonic model, the 1866 Constitution a fairly faithful copy of its 1831 Belgian counterpart, etc.

² Nonetheless, accurate empirical studies of the actual implementation of this legislation will probably be of the essence, for public lawyers and legal sociologists alike, in the years to come. See Miriam Aziz, “Constitutional Tolerance and EU Enlargement: The Politics of

This brief study is not and cannot be just a technical lawyerly survey of specific legal transformations undertaken by the Romanian political and constitutional system in view of the accession. Such a survey would in the present setting at the same time largely surpass and fall short of the task at hand. Neither will we undergo a review of all the transformations related to the so-called “political conditional” *acquis* requirements (an area which is of more direct interest to a constitutional and administrative lawyer). The scope of this paper is more limited; legislative and institutional developments will be reviewed only insofar as they are exemplary of the broader argument.

The questions posed are, nonetheless, foundational. The development of the European Union seems to have already transformed or at least critically challenged both the classical constitutional practices modeled on the ‘ideal-typical’ structure of limited government in the nation state (e.g., in terms of separation of powers, hierarchy of norms, forms and structures of representation) and the conceptual justifications underlying those practices (the understanding of state, sovereignty, democracy, legitimacy, accountability, deliberation, legal/political, public/private etc.). In this respect, the sheer fact that the *Treaty establishing a Constitution for Europe* has failed in the course of the ratification process is largely immaterial from the respective standpoints of future European constitutionalism and the future of constitutionalism in Europe. The process of adopting this treaty commonly referred to as the “European Constitution” reflects tensions and ambiguities which lie deeper

Dissent?” in W. Sadurski, A. Czarnota & M. Krygier (Eds.), *Spreading Democracy and the Rule of Law: The Impact of EU Enlargement on the Rule of Law, Democracy, and Constitutionalism in Post-communist Legal Orders* 237 (Dordrecht: Springer, 2006).

in the making of the Union and thus will not disappear with the demise of one legal document. Most of these ambiguities can be reduced and related to the vacillations of the European project between a form of supranational “governance” (politically quasi-neutral economic and social regulation) and a form of “government” (a state-like structure of political union).

These ambiguities are further complicated in the newer member states and accession countries. Clashes of paradigm are compounded in legal systems where the paradigms themselves are largely ‘inherited,’ without sufficient prior internalization, by means of forced and fast cultural and legal translations. As a result, the ‘overnight modernization’ brought about by means of the political conditionality *acquis* adoption, although beneficial overall, is not an unqualified good. One could reasonably argue that the process and substance of this modernization do not necessarily always represent the proper and unquestionable demands of liberal constitutionalism. To wit, in Romania, the top-down and wholesale nature of the ‘political conditionality’ reforms, undertaken usually without public debate, pushed rapidly through the parliamentary legislative machine under pleas of necessity or (most commonly) sped up by the circuitous means of governmental regulation, added a number of peculiar antinomies and further complications to the preexistent contradictions created by the post-communist instrumental attitude towards the rule of law.

It should in all fairness be restated that the accession process has by now already had many beneficial effects on the Romanian legal, social, and political system.³ Yet, the benefits

³ See, for a comparative analysis, the persuasive defense of the positive effects of “political conditionality” by Wojciech Sadurski, “Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe,” 10 (4) *European Law Journal* 371 (2004).

are well known and there seems to be little shortage of panegyrics in the literature on the EU ‘constitutional process’. Moreover, a public lawyer committed to constitutionalism must of necessity focus on the shortcomings, dangers, and tensions of a given legal development. The cast of mind presupposed by the theory and practice of limited government is, after all, one of healthy pragmatic skepticism. In what follows, therefore, the downfalls only will be heeded.

2. European Constitutionalism between Governance and Government

“‘Governance’ is the standard buzzword for the perplexing maze of order and edict, directive and regulation, and administrative law and judicial interpretation that comprises the purportedly sacred and irreversible corpus of law and administrative fiat—the *acquis communautaire*—by which Brussels tries to rule Europe. It must be disentangled to be understood.”

John Gillingham, *Design for a New Europe* (2006)

“The despot is not a man. It is the ... correct, realistic, exact plan... that will provide your solution once the problem has been posed clearly... It is the Plan... drawn up well away from the frenzy in the mayor’s office or the town hall, from the cries of the electorate or the laments of society’s victims. It has been drawn up by serene and lucid minds. It has taken account of nothing but human truths.”

Le Corbusier, *The Radiant City: Elements of a Doctrine of Urbanism to be Used as the Basis of Our Machine-Age Civilization* (1967 (1935))

2.1. The Uses and Abuses of Terms

Many have wondered, especially after the French and Dutch 'No' votes on the Treaty establishing a Constitution for Europe, whether it had been wise to proceed with such fanfare to the adoption of a "European Constitution". Might it not have been better, prudentially speaking, to let the changes occur slowly and organically, perhaps even, as the historian Seeley famously described the creation of the British Empire, "in a fit of absent-mindedness". Others have been wondering, with good reason, why the document is so voluminous, more verbose than the longest constitution in the world, that of India. Other observers still have pointedly opined that a proper constitution should be comprehensible to those subject to it. For instance, in contrast with the clarity, precision, and concision of the American 1787 fundamental law, deciphering the European document poses a challenge even to a specialized legal audience.

Yet, in spite of the punctual correctness of all these observations, the most surprising development is precisely that language and conceptual frameworks have been distorted to such extent that an informed conversation about the European Constitutional Treaty could unselfconsciously and indiscriminately analogize by building on assumptions properly attached to nation-state constitutionalism. Simply put, most commentators do not question the labeling ("constitution", "constitutionalism") as such.

This state of affairs is perhaps not completely accidental but rather the crowning of a long process of taking liberties with terms and concepts. As an American observer of the European developments has noted (I will take the liberty of citing at some length):

The subject of integration has a distinctly postmodern flavor; for much of its fifty-year history, the argument that only words have meaning is often persuasive. Language capture has been an important part of the European story.... Euro words may imply either more or less than evident, mean different things to different people, or simply mean nothing at all. It is thus necessary to cast official language aside whenever possible and use standard terms and common measurements in order to demystify ideas, events, and deeds as well as provide bases for comparison.⁴

While there are many factors which influenced the precise unfolding of events in the adoption and ratification process of the document, on a more fundamental level the change was an inevitable consequence of the EU evolution. It can be neatly categorized as yet another wavering of the European project between governance and government.⁵

2.2. Governance and Government

What follows is not an empty exercise in nominalism. Terms, especially in public law, have a telling power with respect to the ways in which they showcase the realities for

⁴ John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?* (Cambridge: Cambridge University Press, 2003), - Preface, xvi.

⁵ The original idea for this project and the basic groundwork for research were first explored in a presentation on "Governance, Government, and the Nature of the European Constitution" for the *Roundtable 'Canada between the US and the EU,' "Role of Government"* Session, organized by the Delegation of the European Commission in Canada and the Institute for European Studies (McGill Faculty of Law, February 2003). I wish to thank the participants and the organizer, Professor Armand de Mestral of McGill University, for questions and comments related to the argument.

which they serve as referents and especially with regard to the manner in which they structure our understanding of the underlying implications that they short-hand. Even terminological confusion or interchangeable use of terms tells us something about the world we are living in. Namely, it shows that our conceptual framework fails to master the facts, perhaps as a result of the fact that our practices are straying too far from their initial justifications.⁶

In English, the word “governance” was used until the late Middle Ages to refer to, define or describe the overlapping normative orders within and across each polity and also the interaction of Church authority and secular power within European Medieval Christianity. As a trite reminder, Medieval Europe was a normative ‘pluriverse’ and a ‘polyarchy.’ The etymological sibling of governance, the word “government” ‘replaces’ slowly the use of the term governance, as far as the present author could find out by undertaking a cursory etymological search, after the advent of Reformation and the

⁶ See, e.g., an exception to the muddled use and related conceptual confusion regarding the two terms and their respective phenomenal referents in Martin Shapiro, “Administrative Law Unbounded: Reflections on Government and Governance” 8 *Ind. J. of Global Legal Stud.* 369 (2000-2001). Also see, Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *Transnational Governance and Constitutionalism* (Hart: Oxford and Portland, Oregon, 2004). The concept of *governance*, central to the analysis of all contributors to the volume, is defined as encompassing network structures of regulation, not hierarchical (but heterarchical), and ‘non-state-centered’ (transcending the boundaries of classical nation-state forms of *government*). The term is used here in a larger acception, i.e., as referring to all forms of economic and social regulation which depart (in terms of institutional structure and legitimative paradigm) from the classical nation-state pattern of hierarchical political domination and democratically-derived legitimacy.

appearance of the state as a locus of sovereignty. I am not a linguist but one could venture to think that the word as such, in and of itself, is perhaps better fit to describe a new reality, since, unlike “governance,” which is a pure noun of action and therefore has an alluring neutral overtone, a breezy sort of abstractness attached to it, “government” speaks of actions which have somehow already been consolidated or solidified into an institution. “Government” has therefore more authoritative overtones.⁷

Tellingly, to exemplify this transition, Cromwell’s written constitution, adopted right after the Civil War and before the Protectorate, in 1653, is styled *An Instrument of Government*. It may also be telling to observe, in relation to the interconnectedness of the use of the word “government”, the notion of sovereignty, and the appearance of the modern state that, for instance, whereas in 1628 Lord Chief Justice Coke writes that “good governance and full right is done to every man”, two decades later, in 1651, Hobbes would know nothing of the sort. A mere twenty years divide the two writings and yet, since the Civil War had answered with finality the question of sovereignty (I regard the Glorious Revolution to be a mere re-assertion of an already given answer), Hobbes’s *Leviathan* is replete with use of the term “government”.

And rightly so, since what the word truly conveys, besides overtones related to new command and control normative mechanisms and authoritative leadership is sovereignty, political unity. The state is the embodiment of political unity and such a unity which stands above all factions, a

⁷ It refers (to use the Oxford English Dictionary definition) to “the action of ruling; continuous exercise of authority over the action of subjects or inferiors; authoritative direction or regulation; control, rule”.

self-contained political universe. This terminology corresponds fairly well to the post-Westfalian European political reality. The role of government of course differs largely from Absolutism through to the liberal state (Benjamin Constant's *pouvoir neutre*) but the difference is one of degree or scope rather than kind, since the main assumption is that the state will stand above society and its various subdivisions. The issue is not just that the state governs in the sense of administration, that it steers the community or that it has a demarcated sphere of reach (liberal constitutionalism) but rather that the state has a monopoly – to paraphrase the well-known Weberian definition – on legitimate domination ('violence') and potential conflict. It decides political issues with finality.

It is quite interesting that all of a sudden, especially during the second half of the 20th century, the word governance becomes fashionable once again. And once again, it is used to describe a shift in reality and a corresponding need for a shift in terminology. This time, interestingly enough, its use enters public law from the private domain. Within national jurisdictions, the term "governance" is commonly employed in reference to politically autonomous regulatory structures, such as, for instance, the American independent agencies, British *quangos* or French *autorités administratives indépendantes*.⁸

⁸ See, generally, Cushman, Robert E., *The Independent Regulatory Commissions* (New York: Pentagon Books, 1972 (c1941)) and Claude-Albert Colliard and Gérard Timsit, Eds., *Les autorités administratives indépendantes* (Paris: Presses Universitaires de France, 1988). Also see, for an interesting history of regulation through independent agencies, in the American context, Thomas K. McCraw, *Prophets of Regulation* (Cambridge, Mass, and London, England: Belknap-Harvard University Press, c1984).

2.3. Neutral Regulation and Political Control-A Page of Comparative Legal History

“Upon this point a page of history is worth a volume of logic.”

New York Trust Co. v. Eisner, 256 U.S. 345 (1921), per Oliver Wendell Holmes, J.

The terminological shift (or ambiguity) corresponds to an ambivalent standpoint on the divide between public and private, an uncertainty regarding the role of politics, and – related – a view of administration as either (i) an exercise in neutral expertise or (ii) as an independent and impartial aggregation and balancing of interests (or perhaps a mix of these two).

Ideologically and along a broader scope of analysis, the issue is related to different emphases on the proper role or purview of the state and the corresponding place of the market (regulatory function/regulatory state as different from the redistribution function/welfare state or stabilization function/Keynesian state or a combination of the latter two, the Keynesian welfare state). A regulatory state is one whose intervention in the economic domain is legitimized in a limited fashion, primarily in terms of market failure.

Policy-wise and at the institutional level, the problem is related to the in-built credibility and time consistency downfalls of majoritarian decision-making. A political scientist and an economist, Juan Linz and Giandomenico Majone, can be credited for giving two of the clearest renditions of the argument. Governance through politically independent regulatory bodies is an attempt to de-politicize certain social and economic domains, and thus to solve problems of long-term coordinated political action by delegating

policy-making regulatory discretion, under statute (or, in the case of the EC/EU, under treaty) to politically neutral bodies.⁹ This kind of delegation outside the scope and reach of electoral politics is thought to also serve, incidentally, the main purpose behind the theory of separation of powers/checks and balances, by deflecting or circumventing the peculiarly modern trend towards a constant aggrandizement of the executive branch by legislative delegations.¹⁰ Yet, this latter function of independent agencies is only an epiphenomenal and secondary consequence. The main reason and justification for insulating institutions from the ordinary course of majoritarian politics rests on the belief that the tasks they perform, for considerations of impartiality/independence of judgment, expertise, or both, need to be placed in the realm of 'rational' decision-making and taken out of the 'irrationality' of day-to-day prudential political choices or aleatory aggregations of votes.

The European Union was designed as a supra-national agency delegated a certain regulatory discretion by the

⁹ Juan J. Linz, "Democracy's Time Constraints", 19 (1) *International Political Science Review* 19 (1998), Giandomenico Majone, *Regulating Europe* (London and New York: Routledge, 1996); "Temporal Consistency and Policy Credibility- Why Democracies Need Non-Majoritarian Institutions," Working Paper, EUI Working Papers of Robert Schuman Centre 96/57 (Florence: European University Institute, 1996).

¹⁰ See Giandomenico Majone, "Delegation of Regulatory Powers in a Mixed Polity", 8 (3) *European Law Journal* 319 (2002). Also see, for similar remarks in this respect, András Sajó, "Constitution without the Constitutional Moment: A View from the New Member States," 3 (2-3) *International Journal of Constitutional Law* 243 (2005). Also see relevant, András Sajó "Neutral Institutions: Implications for Government Trustworthiness in East European Democracies", in *Building a Trustworthy State in Post-Socialist Transition*, János Kornai and Susan-Rose Ackerman, Eds. (New York, N.Y.: Palgrave Macmillan, 2004).

principals, the member states, as a form of governance across, among, perhaps above governments. The European Community/European Union served, therefore, at the European level, the same functions that are served within a national jurisdiction by a politically autonomous agency, such as an independent national bank or, arguably, even a court. It was meant to neutralize specific domains of state action, and take certain decisions out of the political process, thus solving by a type of quasi-constitutional self-binding, the time inconsistency and credibility problems posed by the ordinary political process. The reasons for politically 'neutralizing' these institutions are, once again, expertise, professional discretion, policy consistency and fairness or independence of judgment.

As a helpful reminder, the question which has often been posed is why a European constitution was needed at all. Why, in other words, would the European project need to seek this transition from a neutral instrument of supra-national European governance to a form of political government? The logically subsequent questions are of course what this transition would require and whether it is possible at all. My limited argument at this point is that this transition was from the onset inevitably inscribed in the project, since many if not most regulatory issues are inherently political, in the classical sense of the word.

I will exemplify this claim with an elaboration on several recent changes of legal and judicial paradigm in American administrative policy and law. American regulatory policy and administrative law are particularly important for purposes of analogy, for two reasons. Firstly, American influence on the EC/EU is well known. In the field of economic regulation, for instance, the anti-cartel mechanism of the European Coal and Steel Community Treaty (ECSC) – considered by Jean Monnet

as the first European antitrust provisions, had been crucially influenced by American legislation (Sherman Act, the Clayton Act, and the Federal Trade Commission Act). Partly because of American effort, the Treaty of Paris establishing the ECSC in 1951 rejected the option of internationalizing the means of production in coal, iron, and steel, opting instead for a common market. American models of social and economic regulation remained important for European regulators even in the 1960s and 70s (e.g., environmental and consumer protection regulations).¹¹

Secondly and moreover, American independent agencies are the paradigmatic example of governance within government. The idea of economic and social regulation through politically independent bodies is, so to speak, an American patent. A 1935 US Supreme Court decision, *Humphrey's Executor v. United States*¹² 'constitutionalized' the politically neutral, 'fourth branch of government' status of these institutions. In that case, the incumbent President, Franklin Delano Roosevelt, had fired Humphrey, the Chairman of the Federal Trade Commission, in spite of statutory provisions protecting the office of Federal Trade Commissioner, by specifying limited removal grounds. The constitutional issue in contention was whether the President could remove at will a Federal Trade Commissioner, contrary statutory provisions notwithstanding, by virtue of the Art. II constitutional provision vesting the entire Executive Power in the President. The Supreme Court held the removal unconstitutional, partly on grounds related to the neutrality that was allegedly ensured by the expertise of the commission. That is to say, since the

¹¹ Cf. Majone, *Regulating Europe*, supra note 9, *passim*.

¹² 295 U.S. 602 (1935).

Commission was performing an expert, non-political function, the commissioners could and properly should have been insulated from *direct* political control by means of removal.¹³

The ideological belief parallel to and underlying these legal-constitutional developments was that, as expert regulation legitimizes itself through the intrinsic impartiality of an outcome, there is no discretion problem, and thus there is no need for politics to intervene in the regulatory-administrative process. In the words of an eminent American scholar of administrative law:

For in that case the discretion that the administrator enjoys is more apparent than real. The policy to be set is simply a function of the goal to be achieved and the state of the world. There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled physician.¹⁴

Indeed, to give an example preceding by half a century the *Humphrey's Executor* decision, the first federal regulatory commission, the Interstate Commerce Commission, established in 1887, had been given the functions of locomotive inspection and train safety standards and maximum rate regulation. These two attributions were apparently perceived as similar in their nature, i.e., as "objective, scientific

¹³ *Indirect* political control over the institution does of course still exist, e.g., by means of appointments, budget apportionment, legislative oversight committees.

¹⁴ Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harv. L. Rev.* 1667 (1974-1975), at 1678.

assessments based on exact, nondiscretionary standards”.¹⁵ Namely, the administrative setting of “reasonable” railroad rates by independent state and federal commissions had been seen as an instantiation of exact science, regarded as the computation of the fair rate of return on the market through economic science and the application, by the accountant, of that formula to the exact facts at hand (particular railroad, particular commodity), the result enforced by the administrator was of necessity as “beyond human manipulation...as the astronomer charted Venus’s sidereal movement”.¹⁶ After a while, nonetheless, the assumptions that had validated the expertise model would become untenable. For example, safety standards, which in the 19th century paradigm were regarded, like all engineering, as a realm of science, embodying scientific

¹⁵ Both locomotive inspection and rate setting were perceived as one and the same issue essentially, i.e., Martin Shapiro, “The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science-Based Decision-Making”, *EUI Working Papers*, European University Institute RSC No. 96/11 (1996).

¹⁶ *Ibid.* As the locomotive safety standards were set scientifically (since the cost-risk trade-offs incorporated in the standard and based on professional conventions were then unapparent), so too was maximum rate-setting an objective application of science (economics and accounting) to facts (market value): “Economics would determine what a fair rate of return was on investment. That rate was a phenomenon as ‘natural’, that is, beyond human manipulation, as the transit of Venus. The economist would observe the free market as the astronomer did the heavens, and measure fair rate of return, that is the return that any investment in the market would yield, as the astronomer charted Venus’s sidereal movement. The accountant would then determine the amount of the railroad’s costs to be properly attributed to the hauling of a particular commodity over a particular track, add the appropriate fair return figure provided him by the economist and arrive at the correct rate. In this realm of accounting, all was quantified and accurately measurable. Nothing was uncertain. Rate regulation was a matter of science rather than discretion.”

objectivity, would be perceived as “standardized responses to risk based on professional conventions based on cost risk trade-offs”.¹⁷

That mental template corresponded to the classical economical view and the classical legal attitude, according to which the economy was considered self-correcting and – respectively- property was considered a natural relation between a man and a thing.¹⁸ Yet, even after this paradigm

¹⁷ *Ibid.*

¹⁸ Within the Lockean conceptual framework, the classical philosophical articulation of the practices of classical constitutionalism, the state cannot legitimately interfere with my property, save in terms of limited, exceptional, and principled justifications, by definition. The state is by ‘natural,’ pre-political consent our creation for limited and specified purposes. The same logic can be found in the arch-authority on the Anglo-Saxon common law, Blackstone’s *Commentaries*, where the right of property is presented as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” (Ch. 1- “Of Property, in General”) This concrete (physical) and personal notion of property had come under various attacks already by the end of the 19th and beginning of the 20th. To give just one example, in a criticism of railroad commissions regulatory practice, Gerald Henderson observed that the Supreme Court’s announcement, in review of rates cases, of the rule that rate reasonableness would be a factor of the railroad property’s fair market value was in fact circular, since market value was, conversely, a function of the rates established: “If we reduce your rates, your value goes down. If we increase them, it goes up. Obviously, we cannot measure rates by value if value is itself a function of rates.” Property had conceptually become, in the new logic expounded and exemplified by Henderson’s argument, a legal abstraction, an expectation of gain on the market, protected by state coercion, rather than a tangible thing protected from the state by the constitutional limitations. (Cited by Morton J. Horwitz, *The Transformation of American Law 1870-1960 -The Crisis of Legal Orthodoxy* (New York, London: Oxford University Press, c1992), p. 163).

subsided, with the collapse of the nineteenth-century faith in 'natural', principled, limits between the individual and the state, the belief as such in the capacity of experts to solve objectively (i.e., non-politically) economic and social problems persisted. For a while, the idealization of expertise actually bloomed and became sort of a progressive cult in the new welfare state. This increased reliance on the power of science and bureaucratic expertise to correctly tabulate and offer solutions to the various social and economic problems of the new era was fueled by the experience of massive display of planning and allocation of resources by state bureaucracies during the Great War, the Depression, and WWII. On the ideological level, the various strands of meliorism which marked the long course twentieth century would shatter the reliance on "order of things" justifications and benchmarks and would popularize belief in social and economic evolution by means of efficiency-rationalization and social engineering.¹⁹

Nonetheless, it did not take very long for congratulation to turn into unease and then vociferous complaint, as it grew more and more evident that bureaucracies, when they are not

¹⁹ See Herbert Hovenkamp, "Evolutionary Models in Jurisprudence", 64 *Tex. L. Rev.* 645 (December, 1985). Also see by the same author "The Mind and Heart of Progressive Legal Thought" (Presidential Lecture given at the University of Iowa), available for download at <http://sdr.lib.uiowa.edu/preslectures/hovenkamp95/>, last visited September 12, 2006). Hovenkamp relates legal Progressivism to the transposition to social sciences of Darwin's evolutionary theories. According to him, *The Descent of Man*, published in 1871, which linked humans to Darwin's general theory of evolution, produced both a right- (Herbert Spencer is here the epitomic example) and a left-wing or Reform Social Darwinism. The Progressives, as Reform Darwinists, believed that the specific difference of the human species is that it can understand and thus control or 'manage' scientifically its evolutionary process.

politically responsible, tend to distort their initial mandate, develop organizational pathologies and then run astray in a number of ways. Firstly, any bureaucracy has a tendency to develop a “tunnel effect” vision, that is, to translate its enabling law mandate into policy imperatives. An independent highway agency, for instance, will see the world as a highway and build as many highways as possible, even if, when, and where unneeded. A rulemaking agency will over-regulate. Budgetary considerations and the logic of organizational self-interest add a number of obvious complications to these deleterious tendencies. Also, at the other end of the ‘behavioral’ spectrum, when insulated from political control, independent administrative agencies tend to either ‘ossify’ (fall into bureaucratic torpor) or become hijacked by the regulated constituency (this is commonly referred to as “agency capture”).²⁰ The outer limits of expertise have also become clear. In the crucial field of risk regulation, for instance, it has become clearer nowadays that the quantification-extrapolation of risks is uncertain and that, once tabulated, risks necessitate final judgments of prudence or of value which, in turn, are not subject to expert valuation.²¹

The next step was to legitimize the political independence of the administration through procedure. That is to say, the new argument for insulating regulatory administration from

²⁰ Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955). Also see the clear elaboration of these themes in Martin Shapiro, *Who Guards the Guardians-Judicial Control of Administration* (Athens and London: Georgia University Press, c1988).

²¹ See Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, c1993) and Jerry L. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985).

politics would not be that the administrator's task is non-discretionary and thus politically neutral—an exercise of scientific rigor. Conversely, the neutrality-objectivity of the bureaucratic decision would derive from the fact that, when adopting a policy, the administrator could best pool and aggregate knowledge by 'balancing' through the policymaking procedure all the possible interests and positions held by all possible stakeholders in the given matter (e.g., standard-setting, environmental regulation, licensing etc.). Thus, in his 1975 classic, "The Reformation of American Administrative Law",²² Richard Stewart described the contemporaneous province of American administrative law through the conceptual placeholder of the "interest balancing model". That is, the tendencies he then observed revealed a strong emphasis on taming the administrative process through the widest possible interest representation.²³ The provision of the broadest possible

²² Supra note 14.

²³ It is nonetheless still true that American administrative law, as its specific difference, emphasizes participation, thus differing from the European tendency or model of administrative law, which stresses judicial protection of rights. See, for instance, in this respect, Susan Rose-Ackerman, "American Administrative Law under Siege: Is Germany a Model?", 107 *Harv. L. Rev.* 1279 (1993-1994), arguing that German (and European) administrative law could *not* be a model, due to its de-emphasis on participation. Proposals to the contrary have nonetheless been made effect, namely, arguing for an importation of the American participatory processes, most notably, notice-and-comment rulemaking, into European (domestic or E.U.) administrative law. Whether and how that could be achieved, given the distinct nature of the legislative process and democratic will formation in Europe is a more problematic matter. See Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Aldershot, England: Ashgate, c2001) and Francesca Bignami, "Accountability and Interest Group Participation in Comitology: Lessons from American Rulemaking", *European University Institute Working Paper*, Robert Schuman Centre No. 99/3 (1999).

participation in administrative processes was so pronounced that the administration as such had, according to Stewart, begun to resemble an aggregation of mini-legislatures providing a form of “surrogate representative process”. Both his description and diagnosis are well summated by this following passage, which needs to be cited at some length:

“[T]he problem of administrative procedure is to provide representation for all affected interests; the problem of substantive policy is to reach equitable accommodations among these interests in varying circumstances; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations. These difficulties are ultimately attributable to the disintegration of any fixed and simple boundary between private ordering and collective authority. The extension of governmental administration into so many areas formerly left to private determination has outstripped the capacities of the traditional political and judicial machinery to control and legitimate its exercise. In the absence of authoritative directives from the legislature, decisional processes have become decentralized and agency policy has become in large degree a function of bargaining and exchange with and among the competing private interests whom the agency is supposed to rule.”²⁴

The problem with the interest representation model of a-political administration resides in its incapacity to generate limits and standards. Without an external yardstick, it is impossible to tell what weight should be given to the various competing interests; in the abstract, the epistemological burden placed on the administrator (and, consequently, on the court

²⁴ Stewart, *supra* note 14, pp. 1759-1760.

which supervises the administrative process) is almost impossible to meet, as it inevitably tends towards (to use the term coined by Martin Shapiro) 'synopticism'.²⁵ This common problem with procedural solutions is beautifully shorthanded by Jeremy Bentham's characterization of procedure as mere "adjective law". Just as an adjective needs a noun as its referent, likewise, in any field of human decision-making, an increased level of procedure cannot as such provide an answer to the problem at hand. Conversely, the level of process which is due is a direct function of the importance of the issue to be decided.²⁶ In other words, even though it is perhaps true that "procedure is to law what 'scientific method' is to science",²⁷ procedure as such, in and of itself, cannot provide either a surrogate form of legitimacy or a sound decisional outcome.

²⁵ Martin Shapiro, *Who Guards the Guardians-Judicial Control of Administration* (Athens and London: Georgia University Press, c1988).

²⁶ To stress the parallelism between the development of American and EU regulatory policy and administrative law, various proposals to adapt 'staple' American "interest balancing" mechanisms of notice and comment rulemaking to EU regulatory practices have been put forward. See, in this respect, Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Aldershot, England: Ashgate, c2001) and Francesca Bignami, "Accountability and Interest Group Participation in Comitology: Lessons from American Rulemaking", *European University Institute Working Paper*, Robert Schuman Centre No. 99/3 (1999) and "The Democratic Deficit in European Community Rulemaking", 40 (2) *Harv. Int'l. L. J.* 451 (Spring 1999). The proponents hope that the notoriously opaque EU regulatory processes would thus be made more accessible and responsive to the public. The disillusionments of American rulemaking practices should, nonetheless, also be heeded. *But cf.*, on a much more cautionary note, Peter L. Lindseth, "'Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union", 21 (1) *Oxford Journal of Legal Studies* 145 (2001).

²⁷ Henry H. Foster, "Social Work, the Law, and Social Action", cited in *In Re Gault*, 387 U.S. 1 (1967), opinion of the Court, per Fortas, J.

Thus, in spite of the New Deal faith in expertise and belief that expert regulation legitimizes itself through the intrinsic impartiality of an outcome or later arguments regarding legitimacy through interest balancing, if anything, the more recent conclusion or trend seems to be that the primary legitimation mechanism of independent agencies is the governing statute of an agency and political (Presidential) supervision.

Belief in the self-legitimizing capacity of expertise and interest balancing has been constantly under attack and was more recently curtailed by decisions like *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,²⁸ holding that deference is due to reasonable agency interpretation of the scope of its statutory authority, provided Congress has not precisely 'spoken' on the matter forming the object of litigation, and *Lujan v. Defenders of Wildlife*,²⁹ holding that pure regulatory injury is not a sufficient standing requirement. The controlling part of both decisions is not faith in the administrators' in-built *a-political* objectiveness, predicated upon independence and neutrality attained as a function of expertise or – respectively – interest balancing and aggregation but rather, contrariwise, the argument in both cases rests upon *political control* by the elected Executive, control which is taken to ensure both public accountability and democratic legitimacy.³⁰

²⁸ 467 U.S. 837 (1984).

²⁹ 504 U.S. 555 (1992).

³⁰ These decisions arguably mark a constitutional recognition of the Office of the President as the central legitimating mechanism in the administrative sphere. A number of executive orders, for instance Executive Order 12.866 (1994) provided also for streamlining and increased presidential control through the Office of Management and Budget (Office of Information and Regulatory Affairs).

2.4. *Parturient montes, nascetur ridiculus mus* – Constitution, Constitutionalism, Governance and Government Revisited

“On one side, the yawning abyss of failure. On the other, straight is the gate to success.”

Valéry Giscard d’Estaing, “Introductory Speech to the Convention of the Future of Europe” (2002)

“It is clear that the Union has the potential, at least, for a new form of governance, where the political element of government is replaced with alternative forms of interest-group politics that develop within the elaboration of policies.”

András Sajó, “Constitution without the Constitutional Moment: A View from the New Member States”, 3 (2-3) *International Journal of Constitutional Law* (2005)

Similar considerations as those which we have observed while reviewing the American developments have led *-mutatis mutandis-* to the constitutionalizing rhetoric implied in the passing references in ECJ decisions to a European constitutionalism and finally to the European Convention and its -apparently ill-fated- progeny, the *Draft Treaty Establishing a Constitution for Europe*. The European Union grew in size and competencies self-referentially and in a very elitist manner.

Firstly, it developed by regulation breeding ever more regulation. In this respect, an extreme though somewhat amusing example of overregulation is Commission Regulation 2257/94 laying down with fastidious minutiae quality standards for bananas that are fit for marketing in the Community.³¹

³¹ Consolidated text available online, http://europa.eu.int/eur-lex/en/consleg/pdf/1994/en_1994R2257_do_001.pdf.

Secondly, the Union grew in legal competence by means of aggressive activist adjudication spawning judicial law-making. Indeed, all the essential elements which are usually referred to as EU constitutionalism have been developed by judicial doctrine, so that, to paraphrase Alec Stone Sweet, we could deem the Union to be a classic case of “governing with judges”.³² Problem is, nonetheless, that, although both judicialization of politics/politicization of justice and over-bureaucratization of governmental processes are problems that plague all modern polities, the EU is not (at least not yet) even a polity. Hence, the democracy and legitimacy deficits are its level compounded. The growth of the project has reached the point when the aloofness from the public began to pose the questions of democratic legitimacy and accountability in imperative and undelayable terms. Possible solutions could have been the scaling down of the Union in terms of attributions, the revision of the mandate and procedure of the Commission, and the strengthening of democratic control at the point where democratic legitimacy exists (the level of the Member States). The European political and bureaucratic establishment sought to provide a different answer, by building an imaginary democracy through an increase in the role and attributions of the European Parliament and by the artifice of “constitutionalization”. In retrospect, one could safely argue that, in spite of the high-flown rhetoric (analogies of the European Convention with Philadelphia were the *cliché du jour* at the time) and vigorous declamatory attempts at constitutional ‘bootstrapping’ by Valéry Giscard

³² Alec Stone Sweet, *Governing with Judges-Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), The classical account of these transformations is provided by Joseph Weiler’s article, “The Transformation of Europe”, 100 *Yale L. J.* 2403 (1990-1991).

d'Estaing, the President of the Convention on the Future of Europe,³³ the legitimacy-democracy deficit seems to have been acutely apparent throughout the process of the adoption and ratification.

A constitution is of course a mechanism for dividing and concentrating power, a “genealogy of power written at its birth”³⁴ determining (in blunt vernacular) “who gets what, when, and how”. A constitution also constitutes power, meaning, according to the Latin roots of the word, it causes things to come together and stand up.³⁵ The proposed European constitution and the sheer existence of the European Union serve very well the negative function of constitutionalism, in the sense of avoidance of concentration-aggregation of power in one single institution or branch of power and incidental avoidance of the tyranny of the majority.³⁶ Perhaps the European Union would even be able, in time, to acquire a *sui-generis* legitimacy, based on a non-majoritarian, ‘Habermasian’ deliberative democratic model (presumably suitable in equal measure to faculty meetings, roundtable talks, and ‘modern, pluralist, complex societies’). The distant future is, by definition, as rich in imaginable possibilities as it is unfathomable.

Nonetheless, besides the neutral-negative element, a constitution, as it is also commonly understood, must of

³³ See the articles and interviews in “Symposium on the proposed European Constitution”, in 3 (2-3) *International Journal of Constitutional Law* (June 2005).

³⁴ András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: CEU Press, 1999 (2003)).

³⁵ Laurence Tribe, *American Constitutional Law*, 2nd ed. (Mineola, New York: The Foundation Press, 1988).

³⁶ See András Sajó, *Becoming “Europeans”: The Impact of EU ‘Constitutionalism’ on Post-Communist Pre-Modernity*, in Sadurski *et al.*, *supra* note 2, p. 175 *et sequitur*.

necessity rest on a positive, political component. That is, the constitution-formal document which sets forth in codified form the accomplishment of a number of identifiable tasks and limitations needs to be underpinned by a legitimation mechanism. At this most crucial level, the question remains open. The reason why was formulated in its clearest form by Dieter Grimm, in the course of a debate with Jürgen Habermas on the future fate of European constitutionalism. Grimm's argument is trenchant in its academic common sense.³⁷ Namely, given the fact that not even the minimal preconditions for a European public sphere exist (such as pan-European parties, a common language, pan-European television networks, etc.), there is no true legitimating mechanism, and, consequently, no autonomous political element. Therefore, there can be, in the foreseeable future, no European government or genuine European constitutionalism.

3. Romanian Constitutionalism between Post-Communist Pre-Modernity and Overnight Post-Modernization-A Few Remarks on Possible Future Tensions

All the implications of the meandering EU quests in search of legitimacy and political form are most visible in the confusing signals sent by the Commission (standards proposed, measures promoted, institutions advocated or supported) under the political conditionality accession requirements.

³⁷ See Dieter Grimm, "Does Europe Need a Constitution?", 1(3) *European Law Journal* 282 (1995) and 3 (2 and 3) *International Journal of Constitutional Law* 193 (June 2005). See also Jürgen Habermas, "Remarks on Dieter Grimm's 'Does Europe need a Constitution?'", 1(3) *European Law Journal* 303 (1995) and "Why Europe Needs a Constitution", 11 *New Left Review* 5 (2001).

To wit, a Bulgarian researcher with the Sofia Centre for Liberal Strategies, Daniel Smilov, noted, in an insightful comparative article focused on EU-related judiciary reform in his country, that the requirements of the Commission in this area have had an opaque, perhaps even quasi-mythical quality.³⁸ In his reading of the developments, as the same institution, legislative measure or constitutional arrangement is, across accession states, here simply noted without ado in the respective Country Report, there praised and elsewhere chastised harshly, one would have to strain imagination and reason to their limits in order to divine a unifying model, a yardstick, behind the criticism and praise. Perhaps the analysis-assessment made by the Commission follows a complicated and contextualized chart which includes all relevant systemic differences, so that the above-mentioned disparities of treatment could be integrated in a broader encompassing framework. Yet, as Smilov pointed out, neither a specific and itemized laundry list of criteria, nor a complex combinatory model of analysis, context- and system-savvy, are to be found. A model is not provided since a model does not exist, be it only due to the fact the disparities of constitutional system design among the Member States are significant, all ranging within the bounds of reasonable differences. By the same token, admitting that it does not know precisely what it wants would, nonetheless, weaken the bargaining position of the Commission.

Therefore, the negotiations and follow-up assessments via country reports proceed erratically, by dint of ad-hoc choices,

³⁸ See, for an insightful discussion of the 'mythical' character of the Commission's 'political conditionality' requirements, in the context of the Bulgarian judicial independence reforms, D. Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, in Sadurski *et al.* (Eds.), *supra* note 2, p. 313.

acceptance and ‘appropriation’ by the Commission of the given proposals for reform advanced by the local partners in the process (in the case of Romania, the Romanian National Integrity Agency will certainly spring to mind). This is unsurprising, as, if one does not have guidance by means of standards or clear guiding principles, such are the courses of actions one is compelled to follow. In the following, I will elaborate on two detrimental and perhaps even dysfunctional effects of the Romanian accession process, regarding the structural constitution (legislative process and separation of powers) and matters of rights protection.

3.1. Democratic Process-Constitutionalism and the Antinomies of Accession

The technical and unconditional nature of implementing the *acquis* and (upon accession) the very structure of decision-making in the Union have already contributed (and will very likely continue to do so) to the further demise of public debate. This danger is aggravated by the bureaucratic neutralization of political decision-making, which may at any rate result in the impoverishment of the public sphere.³⁹

In Romania, this situation might add to a preexisting sense of irrelevance regarding political participation.⁴⁰ As a perverse

³⁹ It is, after all, in the nature of bureaucratization to hinder, restrict or undermine the possibility of “meaningful social action”. See Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich eds. (Berkeley: University of California Press, 1978).

⁴⁰ It is interesting, in this respect, to compare the 2004 Eurobarometer polls measuring the popular perception of EU accession (still regarded by a high percentage of the Romanian public as a net public good) with the polls showing a very low electoral turn-out during the referendum on the 2003 ‘Euro-amendments’ to the Constitution. After some protracting and last-ditch government efforts, participation in

long-term effect, the process may also contribute to the reinforcement of the executive at the expense of the national legislature, and, perhaps, breed precisely the sort of nationalistic-emotionalist identity politics which the political conditionality measures seek to remedy in the new Candidate States.

In this respect, the Romanian accession process worsened a local systemic flaw. Art. 114 (now 115) emergency ordinances, although in principle an exceptional law-making procedure, set the practical norm of Romanian post-communist legislative practice. The regulation of virtually everything by means of emergency ordinances⁴¹ has been a constant reality, flying in the face of the provision in Art. 58 (now 61) (1), which reads: "Parliament is...the sole legislative authority of the country".⁴² In 2003, the Constitution was amended and the changes made to Art. 115 – "Legislative Delegation" sought to remedy certain of the particularly problematic aspects of the previous constitutional regulation of the matter. The limits on the adoption of 'emergency' (or 'constitutional' ordinances) are both substantive and procedural. Substantively, emergency ordinances cannot encroach on "the field of constitutional

the referendum satisfied the validation requirement by an extremely narrow margin, just slightly over the constitutionally requisite 50%.

⁴¹ Sometimes more than a hundred 'emergencies' per year were found to exist by the respective government in power.

⁴² *Formally*, the principle is respected, to the extent that 'ordinary' ordinances are adopted pursuant to an enabling act, whereas 'emergency' (or 'constitutional') ordinances are authorized directly by the constitution. The literature on the topic is abundant. See, for instance, Ioan Muraru and Mihai Constantinescu, *Ordonanța guvernamentală-doctrină și jurisprudență* (*The Governmental Ordinance-Doctrine and Jurisprudence*) (București: Lumina Lex, 2000) and Antonie Iorgovan, *Tratat de drept administrativ* (București: All Beck, 2001).

laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly".⁴³ Procedurally, under the amended Constitution, emergency ordinances enter into force only after having been laid before Parliament for adoption and after having been published in the Official Journal. If Parliament is not in session, it is convened within 5 days. An ordinance on which a House fails to pronounce within 30 days is considered adopted and is automatically forwarded to the other House, which takes a decision under emergency legislative procedure.

While the new form of the delegation provision was seen as an improvement on the original 1991 constitutional treatment of delegation,⁴⁴ the prediction can be safely made that emergency ordinances will continue to dominate governmental practice, just as before. This is essentially due to the fact that the main vantage point of the government (and the unfortunate choice of the Constitutional Committee) is this normalization and routinization -as a matter of governmental practice- of the emergency. It is inevitable that the Executive would prefer to choose a less cumbersome and more

⁴³ Art. 115 (6). The pre-2003 uncertainty regarding whether the Government could adopt emergency ordinances within the field of organic laws (laws are materially classified in the Romanian Constitution as ordinary, organic, and constitutional) was solved by forbidding a parliamentary (ordinary) delegation under enabling acts within the constitutionally-reserved field of organic law.

⁴⁴ For instance, the new provisions specify the exact entry into force of ordinances, a matter which had been previously left unclear. On the other hand, given the parliamentary nature of the political system, the new (expedited) procedure and the short deadline might turn into additional possibilities for the majority in government of circumventing the rights of the parliamentary opposition.

expeditious procedure under a pretense of necessity. Moreover, while the executive is now under the obligation of motivating the emergency situation in the text of the 'constitutional ordinance', in practice, controlling the constitutionality of the essential element (the existence or non-existence of an 'exceptional' or 'urgent' situation) is, for obvious practical and epistemological reasons, very difficult. Both the Parliament and the Constitutional Court are not, either legally or institutionally, capable of grappling with the systemic *fait accompli* of 'motorized legislation'.

The un-negotiable manner in which the adoption of the *acquis* proceeded has aggravated the practice of executive legislation. It is ironical that the nature and process of EU accession aggravates a phenomenon which is regarded as very problematic and harshly criticized by every single European Commission Country Report on Romania, the use of emergency ordinances to by-pass the legislative process.⁴⁵

The emergency ordinance OUG 31/2002⁴⁶ regarding the prohibition of organizations and symbols with a fascist, racist

⁴⁵ http://www.infoeuropa.ro/iweb/imgupload/RR_RO_2004_EN_00001.pdf. See pp. 15-16. I reiterate here some arguments which were developed in my doctoral dissertation, "Legislative Delegation-A Comparative Analysis" (copy on file with the Central European University Library).

⁴⁶ Ordonanță de urgență nr. 31 din 13 martie 2002 privind interzicerea organizațiilor și simbolurilor cu caracter fascist, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni contra păcii și omenirii, textul actului publicat în Monitorul Oficial Nr. 214 din 28 martie 2002, available online at http://www.cdep.ro/pls/legis/legis_pck.http_act_text?id=34086 (Emergency Governmental Ordinance No. 31 of March 13, 2002, regarding the ban on fascist, xenophobic, and racist organizations and symbols, and the prohibition of promoting the cult of persons guilty of war crimes and crimes against humanity, published in the Official Journal No. 214 of March 28, 2002).

and xenophobic character and forbidding the promotion of the cult of persons guilty of crimes against peace and humanity offers a very good example. This is not a part of a technical bulk of legislation (e.g., in the field of competition policy) regarding which, perhaps, an expedited procedure would be cautioned or at least could be justified. As it deals with restrictions on rights and promotion of values, the ordinance is precisely the sort of legislation that should have been subject to public debate in parliament. Whether one approves, based on liberal-constitutionalist arguments, of such limitations on speech is a different issue. Perhaps in Romania this particular EU-related requirement could have been justified on principled justifications, from the standpoint of 'militant democracy' requirements,⁴⁷ given the legacy of Romanian interbellum fascism. Nonetheless, Holocaust denial and bans on fascist-xenophobic propaganda were in Romania not an issue of confronting past but yet another piece of governmental 'Euro-legislation'. Criminalization proceeded hastily through an Emergency Governmental Ordinance of 2002, hence with no prior parliamentary or public debate.

The purpose of civility in social debates will not be attained by such means. The effect may actually be an obverse one. In such ways, one does not even create *Zwangsdemokraten* ("forced democrats")⁴⁸ but rather helps perpetuate the tongue-in-cheek preexisting cavalier attitude towards the rule of law. Forced through the backdoor of emergency governmental legislation, justified primarily on instrumental considerations, such measures are perceived by the public, at

⁴⁷ Karl Lowenstein, "Militant Democracy and Fundamental Rights," I and II; 31 *American Political Science Review* (June 1937) and (August 1937).

⁴⁸ Cf. see Sajó, "Becoming 'Europeans,'" in Sadurski et al., *supra* note 2.

best, as an alien imposition which does not concern them. It is emblematic in this respect (lack of commitment to constitutionalism and the rule of law) that the Constitutional Court itself, when called to decide on the constitutionality of this ordinance, pointed out primarily the needs of EU integration. The ordinance was declared in conformity with the Constitution in a brief Solomonic judgment, out of which a passage is worth quoting at the closing of this section, to illuminate the problems which are posed when poor constitutional drafting is coupled with poor constitutional reasoning and instrumental treatment of rights and legality:

The Court appreciates that, in the absence of a constitutional definition of 'exceptional situation', as was decided by Dec. nr. 65 from the 20th of June 1995, published in the Official Journal, Part. I, nr. 129 of 29th of June 1995, this needs to be related to 'the necessity and urgency of regulating a situation which, due to its exceptional circumstances, requires the adoption of an immediate solution, in view of avoiding a grave detriment to public interest'. Thus, in the present case, the existence of an exceptional situation was determined by the urgency of stricter regulation of the domain, due to the necessity of promoting the principles of the rule of law state, democratic and social, where the dignity of men, justice, political pluralism, equality of mankind represent supreme values. Whereas, the prohibition of extremist manifestations of the fascist, racist, or xenophobic type constituted and constitutes a constant preoccupation of the international community, at the level of the European and international organisms as well as at the level of national legislation. The prevention and combating of incitement to national, racial, and religious hatred correspond to the requirements of the European Union in the field, constituting, at the same time, a positive signal

given by the Romanian state in the field of combating racism, anti-Semitism, and xenophobia. The efficiency of this signal depends in no small measure on the urgency with which the Romanian state adopts the necessary legislative measures to sanction this sort of acts.⁴⁹

To be sure, cutting through the verbal niceties, and summing up this convoluted logic in more pedestrian language, the Court is in essence making the argument that we have to suffer EU proclivities in order to gain access to long-awaited EU status and largesse. This is an instrumentally savvy rationalization for an institutional rubber-stamp, not a principled argument or (more importantly) a constitutionally valid consideration.

3.2. Values-Imposed Conformities vs. Liberal Constitutionalism

While the theory and practice liberal constitutionalism revolves around rights, agreement on the exact configuration of fundamental rights and the weight to be given each of them within a given polity is not a self-evident or even easy venture, as the French revolutions were among the first to discover, during debates on the Declaration of the Rights of Man and of the Citizen.⁵⁰ For this reason, it is all the more essential that

⁴⁹ Decizia Curții Constituționale Nr. 67 din 3 februarie 2005, publicată în Monitorul Oficial Nr. 146 din 18 februarie 2005 (Decision of the Constitutional Court, No. 67 of February 3, 2005, published in the Official Journal No. 146 of February 18, 2005).

⁵⁰ See Andrés Sajó, "Constitutional Sentiments", <http://www.law.berkeley.edu/institutes/csls/Sajo%20paper.pdf>. This is why the catalogue of fundamental rights identified by classical constitutionalism is short and precise, comprising strictly what are today called, perhaps by a partial misnomer, "negative" rights (civil and political rights and liberties). The qualifications "natural," "human", and "unalienable" are of little epistemological help in and of themselves.

matters of rights are settled within each polity through open and public debate, by legislative rules, enforceable in courts of law.

I will in the following provide one very edifying example of how and why ideological fads and fashions implemented under the political *acquis* may in the future have rather importunate consequences on the culture of rights and the rule of law in Romania. This example is edifying with respect to the way in which institutions and legislation which do not necessarily correspond to a proper understanding of liberal democracy have happened upon a hapless public, with the mantra of democracy and rule of law conditionality serving as an-all purpose justification. Such a situation is partially the result of various governments in power having sought to export issues of justification and legitimacy by presenting to the electorate the accolades from Brussels, while at the same time downplaying or deferring to take into account the actual effects of the changes. As communism and transition have used both politicians and the public to consider law a realm about and within which negotiation is always possible and end-results are fairly open-ended throughout the process, the changes were undoubtedly regarded as inevitable superfluities one has to put up with in order to “finally join Europe”.

One of the enduring legacies left by former Prime-Minister Adrian Năstase is the National Council for Combating

This is not to aver the Benthamite quip regarding legal rights vs. “nonsense upon stilts” or to mount an ultraconservative attack on the idea of human rights but only to modestly observe that we can all be sure to agree willingly on noble wording pitched at a high enough level of idealistic abstraction. The problems arise once we descend to the contentious and pragmatic specifics.

Discrimination (CNCD).⁵¹ It was established as an autonomous government institution by a 2001 Government Decision based on a 2000 Government Ordinance. The creation of the Council passed rather unobserved, except for the cursory and standard justification of its establishment as a necessary legal step on the political conditionality road to EU accession.⁵²

The Council drifted for a long while in the comfortable torpor provided by lack of either public and political support or political responsibility. It awakened with a jolt and rose to meteoric national awareness a few years later, once it became afflicted with tunnel vision. This was to be expected, as the controlling provisions of its enabling legislation are framed in terms so generous that it is possible for the enforcement agency to see the world at large as a playground for malicious discrimination or downright hateful discriminatory incitement. In 2005, CNCD reprimanded, on age-based discrimination grounds, Mircea Mihăieș, a noted local columnist and public intellectual. In an article entitled *Metuseleh Voting*, the latter had derided the statistical propensity of the elderly electorate to vote *en masse* for the left-wing Social Democratic Party.

⁵¹ A part of the argument in this section has been submitted in similar form for publication as part of an article which is forthcoming in the contributions volume of the 14th Annual Conference “The Individual vs. the State-Free Speech and Religion: the Eternal Conflict in the Age of Selective Modernization”, held at the Central European University, Budapest, May 12-13 (András Sajó, Ed.).

⁵² In the Romanian context, it is revealing to note, as an interesting and pertinent antinomy of the accession, that, while virtually every single Country Report criticizes, under the ‘Democracy and Rule of Law’ chapter, the practice of by-passing the Parliament through ordinary and emergency ordinances (delegated legislation), the non-negotiable and top-down nature of the adoption of the *acquis* renders the use of this type of ‘motorized legislation’ endemic.

Mihăieș was initially fined 40.000.000 ROL⁵³ but afterwards, on administrative appeal, following an open letter in his support signed by a sizeable number of public figures, the fine was reduced to 5.000.000.

A very problematic recent action of the Council is a 2005 decision to fine an Orthodox priest for discrimination based on sexual orientation.⁵⁴ The priest, having found the mobile phone number of the church cantor listed in the classifieds section of a local newspaper, in an advertisement posted by someone looking for gay sex partners, had expressed during and after the Sunday sermon the opinion that the cantor be fired, as homosexuality was a sin the Church could not abide. The priest was promptly fined 10.000.000 ROL.

This anomaly is not idiosyncratic. Romanian legislation reproduces *tale quale* trends that are becoming quite common in recent times.⁵⁵ To wit, other things being equal⁵⁶, the CNCD decision is the domestic counterpart of a recent Swedish case, in which a Pentecostal pastor, Åke Green, was convicted, based on Swedish hate law, of the crime of agitation against a group,

⁵³ Approximately 1100 EUR.

⁵⁴ http://www.cncd.org.ro/CNCD_Culegere_de_Jurisprudenta_a_Colegiului_Director_2005.pdf.

⁵⁵ See, for a comparative review of recent developments and criticism of Canadian practice, H. C. Clausen, Note: "The 'Privilege of Speech' in a 'Pleasantly Authoritarian Country': How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty," 38 *Vanderbilt Journal of Transnational Law* 443 (2005).

⁵⁶ Unlike the Swedish situation, where criminal law sanctioned an expression of general opinions directed at an identifiable group, in the Romanian case an administrative tribunal imposed an administrative fine for a misdemeanor directed against an individual. Nonetheless, considering the way in which the Romanian administrative decision is motivated and the attributions of the Council, an analogy is possible.

and sentenced to one month imprisonment.⁵⁷ Result-wise, the problems were postponed through a judicial dilatory compromise, rather than addressed. On appeal, the Supreme Court vacated the lower court conviction, in a rather strange decision. Namely, the Swedish Supreme Court did away with the domestic legal provisions under which the incriminated conduct clearly fell, and acquitted Green based on their own understanding of what the European Convention of Human Rights required and, consequently, on an unseemly prediction of what the European Court would have done, given the particular context, had the case reached it.⁵⁸

To be sure, a secular rationalistic cast of mind clashes quite obviously with the claims of ultimate truth entailed by notions such as 'sin', 'redemption', and 'damnation' or with an

⁵⁷ He had delivered a sermon, subsequently printed in a local newspaper ("Is Homosexuality Genetic or An Evil Force that Plays Mind Games with People"), in which, based on a collection of Bible quotes, he qualified homosexuality as a sinful "sickness" which, like all "abnormalities", constituted no less than "a deep cancerous tumor in the entire society".⁵⁸ Chapter 16, Section 8 of the Swedish Criminal Code incriminates "making a statement or otherwise spreading a message that threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual orientation". The *travaux préparatoires* of the 2003 amendment which included sexual orientation in the list expressed the desire of the Government (the initiator of the Bill) not to incriminate "objective and responsible debate". Rather, the expressed intention was to legislatively foster such discussions in which it would be "possible for homosexuals and others to reply to and correct erroneous positions in free and open discourse, and thus counteract prejudices that otherwise might well be preserved and continued in secret".

⁵⁸ The authorized English translation of the judgment is available online, on the website of the Supreme Court of Sweden, at: <http://www.hogstادمstolen.se/2005/Dom%20pa%20engelska%20B%201050-05.pdf>.

interpretation of sacred texts based on received authority. A secularized sensitivity is 'by nature' predisposed to read religious beliefs through anachronistic lenses or regard religion itself as a prejudice. One can easily notice the deleterious consequences (for both the right to free speech and freedom of religion) that emerge when religiously-grounded opinions (and our assessments of them) are moved from the level of social judgment and religious discourse unto the ground of legal sanction.

The meanderings of the European 'statehood' have determined legal and institutional transformations in the constitutional systems of the new Members States which, from the standpoint of constitutionalism, do not warrant unalloyed enthusiasm. A measure of sober skepticism seems to be, at least for the time being, justified.

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O EUROPĂ CAM SLABĂ DE CONSTITUȚIE

Bogdan IANCU

Constituționalismul european-între concepte, fenomene și jocuri de cuvinte

„Istoria e o galerie de tablouri, cu multe copii și puține originale.”

Alexis de Tocqueville, *Vechiul Regim și Revoluția*

„Tema integrării are conotații vădit postmoderne; de-a lungul celor cincizeci de ani, argumentul că doar cuvintele au un înțeles este adesea convingător. Capturarea limbajului a fost și este o parte importantă a poveștii europene... Eurocuvintele pot să însemne mai mult sau mai puțin decât este evident, pot semnifica lucruri diferite pentru auditorii diferite, sau pur și simplu pot să nu însemne nimic.”

John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?*

Despre Tratatul instituind o Constituție pentru Europa (sau, după cum este adeseori numit, „Constituția Europeană”) s-a discutat deja îndeajuns.¹ Mulți comentatori politici s-au

¹ Acest text, care reia într-o formă mai succintă argumentul textului în engleză, a apărut într-o primă versiune în revista *Ideii în dialog*, Anul IV, Numărul 1 (28) (ianuarie 2007), pp. 32-34.

întrebat, mai cu seamă după voturile negative în referendumurile din Franța și Olanda, dacă era într-adevăr nevoie să se treacă, cu atât de multă ceremonie, la adoptarea unui act constituțional european (Convenție Europeană, comparată adesea cu cea de la Filadelfia, declarații sforăitoare, ceremonii etc.). Nu ar fi fost oare mai potrivit ca schimbările să se fi petrecut mai organic și evolutiv, după cum Seeley descria apariția Imperiului Britanic, „ca într-un moment de neatentție”? Alții au întrebat (în mod cu totul judicios) de ce documentul este atât de voluminos, întins pe sute de pagini, mai mare chiar decât Constituția Indiei. În sfârșit, mulți au făcut observația corectă că o constituție trebuie să poată fi înțeleasă cu ușurință de subiecții săi. De pildă, spre deosebire de claritatea, precizia și concizia legii fundamentale americane, care a rămas, în prevederile sale esențiale, nealterată din 1787, documentul european ridică probleme de înțelegere chiar și pentru un cititor avizat.

În pofida corectitudinii punctuale a tuturor acestor remarci, lucrul cel mai uimitor este tocmai faptul că discuții informate asupra actului în cauză au putut porni, în mod inconștient, fără discriminările de rigoare, de la asumții legate de constituționalismul statal. Cu alte cuvinte, e surprinzător faptul că percepțiile și cadrul conceptual comun au putut fi într-atât de mult distorsionate încât etichetele ca atare („constituție”, „constituționalism”) să nu fie îndeajuns (sau să fie mult prea puțin) chestionate.

Nici lumea academică juridică nu pare să fi scăpat de confuziile categoriale amintite. Mai mult chiar, citirea unor articole din doctrina de drept public european dă lectorului un sentiment de ușoară irealitate. Scriitorii textelor par a îmbina în chip cu totul nefericit teza lui Humpty Dumpty, personajul din „Alice în Țara Minunilor” potrivit căruia cuvintele pot să însemne exact ce dorește cel ce le folosește,

„nici mai mult, nici mai puțin”, cu noua limbă de lemn a eurocrației bruxeleze. Găsim astfel o pleoră de referiri la noul constituționalismul „societal”, „policentric”, „în rețea”, „deliberativ” etc., de care constituționalismul „majoritarian”, „hegemonic” și cu totul învechit al statului națiune ar urma să fie în chip fericit înlocuit.

Multe din confuzii sunt determinate de nediferențierea corectă între variile sensuri pe care le poate îmbrăca termenul de constituție. Această noțiune, ca de altfel majoritatea conceptelor esențiale ale teoriei statului și dreptului (reprezentare, separația puterilor, Statul de Drept etc.), e un termen general, susceptibil de accepțiuni diferite, a căror neidentificare prealabilă duce în chip inevitabil la neclaritate conceptuală.² Cauza mai adâncă a echivocului se regăsește însă în oscilarea proiectului european între un instrument neutru de guvernare supra-statală și un mod de guvernământ, cu toate consecințele ce decurg, sub raportul legitimității, din această ambivalență identitară a Uniunii.

Uniunea Europeană-între un instrument de guvernare și un mod de guvernământ

„Să privim Bursa Regală din Londra, un loc mai venerabil decât multe curți de justiție, unde reprezentanții tuturor națiilor se întâlnesc pentru binele omenirii. Acolo, evreul, mahomedanul și creștinul fac împreună negoț, ca și cum ar împărtăși aceeași religie și dau numele de necredincios doar celui falit.”

Voltaire, *Scrisori despre englezi*, Scrisoarea VI („Despre presbiterieni”)

² V. Carl Schmitt, *Verfassungslehre* (Achte Auflage), Berlin, Duncker&Humblot, 1993.

„Despotul nu este un om. Este... planul corect, realist, exact... care va da soluția câtă vreme problema a fost corect pusă... Este Planul... alcătuit departe de agitația din Primărie, de țipetele electoratului și de lamentațiile victimelor societății. El a fost întocmit de minți serene și lucide. Nu a avut nimic în vedere decât adevărurile umane general valabile.”

Le Corbusier, *The Radiant City: Elements of a Doctrine of Urbanism to be Used as the Basis of Our Machine-Age Civilization* (1967 (1935))

„În privința aceasta o pagină de istorie valorează cât un volum de logică.”

Judecătorul Oliver Wendell Holmes, în *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921)

Comunitățile Europene au fost create inițial ca agenții administrative autonome politic, pentru reglementarea la nivel supra-național a unor mecanisme de piață comună. Desigur că proiectul mai larg a urmărit dintru început și un scop politic, anume pacificarea postbelică a Europei. Acest al doilea aspect a fost însă înțeles ca decurgând în mod natural din integrarea economică. Planurile de natură utopică care vizau scopul unificării politice în chip direct, nemijlocit, au eșuat repede și lamentabil (exemplul cel mai relevant este cel al Tratatului care urma să instituie o apărare comună pe principii federale, *European Defense Community*). Jean Monnet și ceilalți arhitecți ai Comunităților au tras repede consecințele necesare.³ De altminteri, ideea că pacea poate fi obținută indirect prin deschiderea către liberul schimb nu a fost

³ V. Valentin Constantin, „Ce a abandonat Uniunea prin Tratatul Constituțional?” (în volumul de față).

novatoare; ea face parte din bagajul de idei ale Iluminismului, după cum o arată și citatul din Voltaire care deschide această parte a argumentului.

Nici ideea de reglementare administrativă prin instituții autonome politic nu este una cu totul nouă. Modelul de „agenție independentă” care a stat la baza mecanismelor cheie ale Comunităților/Uniunii a fost preluat, împreună cu logica sa de funcționare și rațiunile sale justificative, din practica de reglementare economică și socială americană.⁴ Ideea de bază ce stă în spatele mecanismelor legislative și instituționale de acest tip este că, datorită problemelor de coordonare și consistență decizională ridicate de procesul politic, anumite domenii de acțiune statală pot fi scoase de sub influența procesului politic obișnuit, delegând prin lege (sau, în cazul CE/UE, prin tratat) atribuții administrative de natură discreționară către instituții neutre din punct de vedere politic.⁵ Ca și în cazul independenței instanțelor judecătorești sau în cel al autonomiei unei bănci naționale, reversul necesar al medaliei rezidă în convingerea că atribuțiile delegate pot fi exercitate în mod nediscreționar. În măsura în care și datorită faptului că natura și modul lor de îndeplinire prezintă garanții de raționalitate (expertiză și imparțialitate), aceste funcții pot, deci, să fie scoase în afara fluctuațiilor „iraționale” ale agregării preferințelor electorale. Dacă delegăm o anumită măsură de discreție unui expert, delegarea este neproblematică, deoarece

⁴ V., astfel, Giandomenico Majone, *Regulating Europe* (London and New York: Routledge, 1996) și „Temporal Consistency and Policy Credibility – Why Democracies Need Non-Majoritarian Institutions”, Working Paper, *EUI Working Papers of Robert Schuman Centre* 96/57 (Florence: European University Institute, 1996).

⁵ V. Juan J. Linz, „Democracy’s Time Constraints”, 19 (1) *International Political Science Review* 19 (1998).

exercițiul ei nu poate fi arbitrar. Decizia expertului este în mod necesar obiectivă. În termenii unui eminent profesor american de drept administrativ:

În această situație, puterea discreționară de care se bucură expertul este mai degrabă aparentă decât reală. Soluția care trebuie găsită este pur și simplu o funcție a scopului de atins și a unei stări de fapt. Se poate să existe un proces de încercare și eroare în stabilirea celui mai bun mijloc de a atinge scopul definit dar cei ce fac obiectul controlului administratorului nu sunt supuși voinței sale arbitrare mai mult decât pacienții aflați în grija unui doctor priceput.⁶

Problema fundamentală este însă a stabili dacă și în ce măsură anumite atribuții pot fi exercitate în mod obiectiv. Întrebarea esențială e pusă chiar de Aristotel, atunci când vorbește, în cartea a treia a *Politicii*, despre faptul că produsele multor „arte” sunt judecate nu doar sau nu cel mai bine de către cel ce stăpânește meșteșugul lor; în exemplul său, stăpânul casei e un mai bun judecător asupra rezultatului decât cel ce o construiește.⁷

În practica americană, prima agenție de acest tip a fost Comisia Federală de Comerț (*Interstate Commerce Commission*), însărcinată, în 1887, cu stabilirea standardelor de siguranță pentru locomotive și cu fixarea tarifelor maxime pentru transportul interstat al mărfurilor. Ambele atribuții erau văzute ca identice, obiective în natura lor, prima făcând obiectul ingineriei, a doua reprezentând agregarea unui calcul economic (rata rezonabilă de câștig pe piață) și contabil

⁶ Richard B. Stewart, „The Reformation of American Administrative Law,” 88 *Harv. L. Rev.* 1667 (1974-1975), p. 1678. Traducerea mea.

⁷ *Politica*, III, 11, 1282a.

(aplicarea ratei respective la valoarea pe piață a companiei feroviare și la valoarea tipului respectiv de marfă în trafic). Genul acesta de gândire corespundea logicii clasicismului economic și juridic, care privea piața și drepturile de proprietate ca realități „naturale”, în afara manipulării politice și juridice. Însă, chiar și după erodarea parțială a acestui cadru conceptual, ideea că reglementarea economică și socială poate fi exercitată în mod expert și deci autonom s-a păstrat, chiar dacă în forme și din rațiuni diferite. Pentru o vreme, argumentul expertizei a câștigat chiar mai mult teren ca urmare a variilor idei melioriste și „progresiste” de „inginerie socială” care au bântuit veacul trecut. O multitudine de agenții independente au apărut în prima parte a secolului al XX-lea, cu atribuții de reglementare în domeniul monopolului și al practicilor neloiale de comerț (Comisia Federală de Comerț), al reglementării audio-vizualului (Comisia Federală pentru Comunicații), al reglementării pieței de capital (Comisia pentru Operațiuni Bursiere) etc. În a doua parte a secolului, modelul s-a extins și la reglementarea socială, în sfera gestiunii variilor tipuri de risc. Toate aceste practici instituționale au, de bună seamă, un echivalent juridic. Astfel, în 1935, Curtea Supremă a declarat neconstituțională demiterea de către Franklin Delano Roosevelt a Președintelui Comisiei Federale de Comerț. La baza deciziei a stat și motivarea că, deoarece atribuțiile Comisiei presupuneau imparțialitate și expertiză administrativă, controlul executiv (politic) era nejustificat. În planul contenciosului administrativ, considerațiile acestea au determinat interferența minimală a judecătorilor cu exercitarea atribuțiilor administratorilor independenți.

Poate nu în mod cu totul surprinzător, doctrina și practica americană de dată mai recentă merg într-o direcție diametral opusă. Încă din anii 50, o serie de critici au început să observe

că, lăsate în voia lor, toate birocrațiile tind să dezvolte comportamente organizaționale patologice. În primul rând, ele dezvoltă un comportament auto-logic, ca urmare a efectului așa-numitei „viziuni gen tunel” (*tunnel vision*) și își traduc mandatul în imperative absolute de reglementare. Dacă am avea o agenție independentă a constructorilor de autostrăzi, lumea s-ar umple probabil de șosele inutile. De asemenea, birocrațiile fac excel de zel în direcția mandatului respectiv; după cum știe oricine a avut de a face cu o birocrație, un birocraț „ideal-tipic” (în sensul weberian) privește lumea din perspectiva exact opusă celei ce animă ideea de Stat de Drept. Tot ce nu se încadrează într-o autorizație expresă este considerat de principiu interzis și totul pare să trebuiască a fi prezăvut în cât mai multe detalii și codicile. Pentru un exemplu european epitomatic și destul de amuzant, recomand cu multă căldură cititorului lecturarea Reglementării Comisiei 2257/94 („Banana Regulation”), care prevede, cu minuțiozitate ușor ridicolă, standardele pentru bananele apte a fi importate în piața comună (bananele nu pot avea, spre exemplu, o „curbură anormală”).⁸ Agențiile administrative, în absența controlului politic, par de asemenea adeseori predispușe la a fi „capture” de cele mai puternice interese private sau ideologice care fac obiectul reglementării lor. Spre exemplu, în practica americană, datorită reglementării tarifelor minime și maxime de transport aerian federal printr-o asemenea agenție independentă, tarifele ajunseseră să coste în trafic interstatat de trei ori mai mult decât cele pentru transportul intrastatal pe o distanță similară. După desființarea agenției și de-reglementare, ele au căzut simultan la un preț mult mai mic. În sfera riscurilor, ca de altfel în toate domeniile la interfața

⁸ Textul consolidat este accesibil on-line, http://europa.eu.int/eur-lex/en/consleg/pdf/1994/en_1994R2257_do_001.pdf.

între drept, politici publice și tehnologie, a devenit din ce în ce mai problematică afirmarea posibilității unui rezultat obiectiv. Multe „riscuri” sunt, în primul rând, foarte dificil de calculat, datorită dificultății agregării datelor și a extrapolării lor (de la studii pe cobai, spre exemplu, la oameni). Alte riscuri, chiar dacă pot fi calculate, se întrepătrund și necesită alegeri finale de ordin prudential. De pildă, unii conservanți alimentari sunt cancerigeni dar folosirea lor previne apariția botulismului. Stabilirea precisă a unei concentrații de benzen, sub condiții de incertitudine, înseamnă în ultimă instanță a pune un preț pe o viață statistică salvată (un preț prea mare poate falimenta industria, poate distruge locuri de muncă etc.).⁹ Toate deficiențele menționate s-au tradus în practici instituționale și juridice în mod corespunzător modificate. Astfel, o decizie revoluționară de control administrativ, din 1984, *Chevron USA v. Natural Resources Defense Defense Council, Inc.*, declară că, atunci când mandatul legislativ al unei agenții este vag (discreționar), deferența judecătorului cu privire la soluția administratorului se justifică prin legitimitatea democratică a controlului exercitat de către președinte.

Nu astfel au decurs lucrurile la nivelul Uniunii, unde, în loc să se restabilească ordinea priorităților de reglementare, revizuind spre exemplu procedura și competențele Comisiei și să se întărească controlul politic acolo unde legitimitatea politică-democratică există (la nivelul Statelor Membre), s-a

⁹ V. Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University press, c1993) sau Christian Joerges, „Law, Science and the Management of Risks to Health at the National European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef”, 7 *Colum. J. Eur. L.* 1 (Winter, 2001).

purces cu entuziasm păgubos la crearea unei democrații imaginare, pe de o parte prin întărirea rolului și atribuțiilor Parlamentului European, pe de alta, printr-un simulacru de „constituționalizare”. Puțini au fost autorii care au sesizat nefirescul situației. Astfel, în chip cu atât mai lăudabil cu cât poziția sa a fost aproape singulară, profesorul german Dieter Grimm, fost judecător al Curții Federale Constituționale, a enunțat un contra-argument, pe cât de clar și lucid, pe atât de valid în bunul său simț academic, la observația lui Jürgen Habermas că Uniunea ar deschide drumul unui nou tip de democrație, una de tip discursiv-deliberativ (presupusă probabil de Habermas a se potrivi în egală măsură ședințelor de catedră, meselor rotunde televizate și societăților „moderne, pluraliste și complexe”). În argumentul profesorului Grimm, o constituție are nevoie de o unitate politică preexistentă pe care să o poată integra. Atâta vreme cât un popor european sau măcar precondițiile minime ale unei sfere publice (o limbă comună, rețele paneuropene de televiziune, sisteme partinice paneuropene) nu există sau nu s-au consolidat, un act juridic este „constituțional” doar cu numele, rămânând în mod necesar o formă fără fond.¹⁰ Neexistând un mecanism de legitimare, nu poate exista nici un guvernământ european.

¹⁰ V., astfel, Dieter Grimm, „Does Europe Need a Constitution?” 1(3) *European Law Journal* 282 (1995) și „Integration by constitution” (June 2005). *International Journal of Constitutional Law*, Vol. 3, Issue 2 and 3, pp. 193-208. V., de asemenea, Jürgen Habermas, „Remarks on Dieter Grimm’s ‘Does Europe need a Constitution?’” 1(3) *European Law Journal* 303 (1995) și „Why Europe Needs a Constitution”, 11 *New Left Review* 5 (2001).

Constituționalismul românesc-între premodernitate postcomunistă și postmodernizare forțată

Din acest motiv, pozițiile cu încărcătură politică ale Uniunii sunt, mai cu seamă în privința *acquis*-ului politic (adică a setului de criterii impuse Statelor Candidate cu privire la asigurarea stabilității instituțiilor care garantează „democrația, statul de drept, respectarea drepturilor omului, precum și protecția minorităților”) sunt, adesea, destul de problematice. Desigur, influența aderării asupra cadrului politic-constituțional al României a fost, de foarte multe ori, una pozitivă. Panegiricele nu lipsesc însă. În aceste rânduri, în virtutea scepticismului funciar pragmatic și sănătos pe care îl impune tradiția constituționalismului liberal-democratic, vom urmări, în limitele impuse de spațiul editorial, doar (câteva din) tensiunile existente și pericolele posibile.

Un jurist bulgar afiliat Centrului pentru Strategii Liberale de la Sofia, a observat că, în țara sa și în alte țări recent candidate, pozițiile Comisiei cu privire la reforma justiției par să aibă un caracter opac, „aproape mitic”. Un aspect laudat într-un raport de țară (să zicem, gradul de dependență față de Ministerul Justiției al respectivului Consiliu Superior al Magistraturii) e criticat în alt context statal, fără a se oferi în prealabil un model, o bază a criticii (fie o listă de standard de criterii de atins, fie un model contextual complex care să integreze diferențele existente). Comisia dă impresia mai degrabă, în viziunea autorului, că basculează ad-hoc între varii poziții ireconciliabile, încorporând de multe ori preferințele legislativ-instituționale ale partenerilor locali agreeați.¹¹

¹¹ D. Smilov, „EU Enlargement and the Constitutional Principle of Judicial Independence” în W. Sadurski, A. Czarnota și M. Krygier (Coordonatori), *Spreading Democracy and the Rule of Law: The Impact*

În România, natura necondiționată a adoptării (impunerii) *acquis*-ului a validat practica caracteristică constituționalismului românesc post-decembrist de a scurtcircuita Parlamentul prin ordonanțe de urgență. Astfel, a fost confirmată și agravată o problemă locală de reglementare constituțională care era din start nefericită. Anume, proasta idee de a da Executivului, prin constituționalizarea și deci rutinizarea „urgenței”, un beneficiu permanent de legiferare prealabilă, pune Parlamentul și Curtea Constituțională într-o situație de perpetuu *fait accompli*. Ca un ironie paradoxală inconștientă, toate rapoartele de țară ale Comisiei critică însă exact practica pe care natura aderării o încurajează.

Ordonanța de urgență nr. 31 din 13 martie 2002, „privind interzicerea organizațiilor și simbolurilor cu caracter fascist, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni contra păcii și omenirii” oferă, din mai multe privințe, un exemplu grăitor. Această măsură (euro-)legislativă, prin care este restrâns dreptul constituțional la liberă expresie, ar fi trebuit (prudențial vorbind) să fie supusă dezbaterii parlamentare și să facă obiectul unei discuții publice. Nu intru aici în chestiunea mai complexă a justetei incriminării negării Holocaustului. Poate că măsura incriminării ar fi fost justificată la noi, ca un element de „democrație militantă” și de reconciliere cu tarele trecutului nostru interbelic. Dar această reconciliere presupunea asumarea ei în și prin dezbaterea publică. Așa cum lucrurile s-au petrecut în fapt, ordonanța a trecut repede prin mașinăria legiferării guvernamentale „motorizate”, probabil sub convingerea că,

of EU Enlargement on the Rule of Law, Democracy, and Constitutionalism in Post-communist Legal Orders (2006). De asemenea, în același volum, András Sajó, *Becoming 'Europeans': The Impact of EU 'Constitutionalism' on Post-Communist Pre-Modernity.*

la urma urmelor, deși, instrumental vorbind, asemenea măsuri ne sunt impuse și deci trebuie adoptate (ca să „intrăm odată în Europa”), nu o fi chiar musai să le și aplicăm. Genul acesta de logică instrumental-legislativă se transpune în plan social prin indiferența (în cel mai bun caz) sau ostilitatea publicului și prin întărirea unei predispoziții locale bine împământenite de a considera dreptul și drepturile drept spații de continuă negociere. Nici scopul civilității în sfera publică, nici Statul de Drept, nu pot fi atinse astfel. În cel mai bun caz, se creează „democrați de nevoie” (*Zwangsdemokraten*), care își vor da probabil, la cea mai mică ocazie, arama pe față.

Și Consiliul Național pentru Combaterea Discriminării, o euroinstituție moștenită de la Guvernul Năstase, a fost înființat în baza unei Hotărâri de Guvern din 2001, luată în baza unei Ordonanțe de Urgență din 2000. Mandatul său legal este formulat în termeni atât de largi încât îi permite a vedea lumea întregă ca o mare voință de discriminare (firește, în sensul cel mai general, lumea așa și este, plină de distincții). De ce era nevoie de o asemenea instituție, nu este deloc evident, în măsura în care democrații liberale-etalon (Germania, bunăoară) nu cunosc atare practici. Până acum, în orice caz, Colegiul Consiliului pare a se fi ferit el însuși de discriminare, chiar și în sensul propriu etimologic al termenului (diferențe mentale raționale).

Pentru o bună bucată de vreme, instituția a plutit într-un fel de torpoare automulțumită, până când, în 2005, și-a făcut un nefericit debut public, amendându-l pe profesorul Mircea Mihăieș pentru delict de opinie cu 40.000.000 de lei vechi. Mai apoi, amenda a fost redusă la 5.000.000, ca urmare a scrisorii deschise de sprijin a mai multor intelectuali publici (probabil în ideea că, oameni suntem, dar principiile sunt principii). Voi da exemplul unei decizii recente de o natură

încă și mai problematică. Printr-o hotărâre din 18 ianuarie 2005, Colegiul a dispus sancționarea un preot ortodox (I.S.) cu amendă contravențională în valoare de 10.000.000 lei, pentru săvârșirea unui act de discriminare pe criteriul orientării sexuale.¹² Preotul respectiv pretinsese a fi găsit numărul telefonului mobil al dascălului-cantorului bisericesc (P.M.G.) trecut într-un talon, scris de acesta din urmă, ce urma a fi trimis la un ziar local, spre publicare în secția de anunțuri-mică publicitate, pentru căutarea unor parteneri „gay” pentru sex. Așa încât, la finalul liturghiei, în cadrul predicii, preotul le-a prezentat enoriașilor talonul, spunând că P.M.G., deși „băiat bun, sufletist”, era „lupul între oi” și trebuia numaidecât dat afară. Absurditatea și pericolele hotărârii (trecând peste anecdoticul „culorii locale”) îi sunt probabil deja evidente cititorului. Credința nu are cum urma logica sensibilităților ideologice ale momentului și nu le poate asimila pe acestea din urmă fără a-și distruge propriile fundamente. De altfel, anomalia administrativă locală face ecoul unor idiosincrazii legislative recente destul de comune. Un pastor suedez pentecostal a fost condamnat la un an de închisoare anul trecut, în baza unei legi similare de natură penală, pentru o predică cu titlul „Este homosexualitatea determinată genetic sau e o forță malefică care se joacă cu mințile oamenilor?”. Curtea Supremă a Suediei a casat în cele din urmă sentința, printr-o decizie a cărei logică constituie mai degrabă un compromis dilatoriu decât o soluționare a problemei.¹³ Indiferent ce

¹² Hotărârea poate fi accesată online, la adresa: http://www.cncd.org.ro/documente/carti/Culegere_de_Jurisprudenta_a_Colegiului_Director_2005.pdf (pp. 69-74).

¹³ Predica poate fi găsită la <http://www.cbn.com/CBNNews/News/040907aa.aspx> iar decizia Curții este tradusă în engleză pe situsul oficial al acesteia, <http://www.hogstادمstolen.se/2005/Dom%20pa%20engelska%20B%201050-05.pdf>.

credem fiecare despre aceste chestiuni, este extrem de problematic, pentru exercitarea atât a dreptului la liberă expresie cât și a celui la libertatea credinței, atunci când genul acesta de judecăți (și opinia noastră asupra lor) sunt trecute din sfera sancțiunii religioase și a opiniei sociale în cea a sancțiunii publice.

Suntem cu toții îndreptățiți, după un drum lung, mai ales acum, la speranțe în privința beneficiilor ce derivă din aderarea la Uniunea Europeană. O oarece măsură de scepticism și poate chiar mefiență pare totuși să se impună.