# New Europe College Yearbook 2005-2006



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# ROMANIAN CONSTITUTIONALISM AND THE STATE OF THE EUROPEAN UNION

« 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

Given the challenges posed by the breadth and depth of the topic and due to the space limitations imposed by editorial constraints, a few caveats and preliminary clarifications are necessary from the onset. The European Union accession can be seen, from a theoretical legal standpoint, as a meeting of two legal worlds. More importantly, from a socio-legal viewpoint, this process of acculturation and transfer of legal norms, attitudes, values, is a feat of unprecedented dimensions. Even for a national jurisdiction such as ours, well accustomed to processes of modernization by way of Western legal transfers (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.), adoption of the approximately 80.000 pages of the acquis communautaire (acquis de l'Union) is a task of momentous proportions. 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.<sup>1</sup> Yet, this 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 survey 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. Although practical changes will be inevitably mentioned, their purview will be merely exemplary of the broader argument. The scope of this paper is more limited and yet more 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, 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 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" (neutral social and economic regulation) and a form of "government" (a state-like structure of political union).

These ambiguities are further complicated or compounded in the newer member states and accession countries. Clashes of paradigm are aggravated in legal systems where the paradigms themselves are largely 'inherited,' without sufficient prior internalization, by means of forced and fast cultural and legal translations. The overnight modernization brought about by means of the political conditionality *acquis* adoption, although beneficial overall, is not an unqualified good.

Furthermore and related, 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.

As a last caveat, complementary to the previous remarks, it should be restated that the accession process has by now already had many beneficial effects on the Romanian legal, social, and political system.<sup>2</sup> Yet, the benefits 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 that confounding contraption, the Draft Constitution Treaty, whether it had been wise to proceed with such fanfare to the adoption of a "European Constitution." Might it not, perhaps, would have been better, prudentially speaking, to let the changes occur slowly and organically? Thus, this new empire would have surreptitiously just 'happened' upon

its subjects somehow more naturally, perhaps even "in a fit of absence of the mind," as the historian Seeley once claimed the British Empire 'just happened' upon the world. Others have wondered (and justly so) why the document was 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 (the current writer will happily bring testimony to this effect). Yet, in spite of the punctual correctness of all these observations, the most bewildering occurrence of all 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 and the package ("constitution", "constitutionalism") as such.

This state of affairs is not accidental but rather the crowning of a long process of taking liberties with terms and concepts. As John Gillingham, a particularly astute 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."

#### 2.2. Governance and Government

While there are many factors which influenced this exact configuration of events in the adoption and ratification process of the Constitutional Treaty, on a more fundamental level the change was an inevitable consequence of EU evolution. It can be neatly categorized as yet another wavering of the European project between governance and government.<sup>4</sup>

What follows is anything but 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 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.<sup>5</sup>

In English language, 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 (many powers). 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 quest, after the advent of Reformation and the 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 6

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 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 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 20<sup>th</sup> 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 used to depict regulatory structures, such as the American independent agencies, the British *quangos* or the French *authorités administratives indépendantes*. <sup>7</sup>

## 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 marks an ambivalent standpoint on the divide between public and private, an uncertainty regarding the role of the politics, and a consequently politically agnostic 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, in terms of market failure.

Policy-wise and institutionally, 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.<sup>8</sup> 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. 9 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 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 independent 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 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 thesis at this point is that this transition was from the onset inevitably inscribed in the project, since most regulatory issues are inherently political, in the classical sense of the word.

I will exemplify my 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, the idea of economic regulation through independent bodies is, so to speak, an American patent. Secondly and related, 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 in favor of 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).<sup>10</sup>

Moreover, American independent agencies are the paradigmatic example of governance within government. A 1935 US Supreme Court decision, *Humphrey's Executor v. United States*<sup>11</sup> 'constitutionalized' their politically neutral, 'fourth branch of government status.' 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. Il 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 Commission was performing an expert, non-political function, the commissioners could and properly should have been insulated from *direct* political control.

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." <sup>12</sup> 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 two functions, locomotive inspection and train safety standards and maximum rate regulation. The two attributions were perceived as similar in nature. 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 objectivity, would be perceived as "standardized responses to risk based on professional conventions based on cost risk trade-offs<sup>13</sup> At the beginning of economic regulation, even the administrative setting of "reasonable" railroad rates by independent state and federal commissions had been seen as an instantiation of exact science. Perceived 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, to paraphrase another sedulous student of American regulation, Martin Shapiro, as "beyond human manipulation...as the astronomer charted Venus's sidereal movement."14

Nonetheless, 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 relation between a man and a thing. To wit, within the Lockean conceptual framework, the classical philosophical articulation

of the practices of classical constitutionalism, the state cannot legitimately interfere with my property by definition, since the state is my creation for limited and specified purposes, based on consent. We all (theoretically and counterfactually or pre-politically speaking) only gave it limited powers, for reasons of convenience and uniformity, as our common agent, to interpret the laws of nature, solve undisputedly disputes as to their meaning, and punish transgressions. 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." <sup>15</sup> This concrete (physical) and personal notion of property had come under various attacks already by the end of the 19th and beginning of the 20<sup>th</sup>. 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."<sup>16</sup> 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.

Belief in the capacity of experts to solve objectively, i.e., un-politically, economic and social problems persisted for a few decades after the collapse of the nineteenth-century faith in 'natural,' principled, limits between the individual and the state. 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.<sup>17</sup>

Nonetheless, it did not take long for congratulation to turn into unease and then vociferous complaint, as it grew more and more evident that bureaucracies, when they are not 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 "tunnel effect", 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 this deleterious tendency. Also, 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 referred to as "agency capture"). 18

The next step was to legitimate the political independence of the administration through procedure. That is to say, the new argument for insulating regulatory administration from politics would not be that the administrator's task is non-discretionary and thus politically neutral as an exercise of scientific rigor. Conversely, the neutrality-objectivity 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,"19 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<sup>20</sup> The provision of the broadest possible 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."<sup>21</sup> The problem with the interest representation model is its incapacity to generate limits and standards; without an external yardstick, it is impossible to tell what weigh should be given to the various competing interests. Besides, in the abstract, the epistemological burden placed on the administrator (and consequently on the court which supervises the administrative process) is impossible to meet, as it tends towards 'synopticism.'22 This common problem with procedural 'solutions' is beautifully shorthanded by Jeremy Bentham's characterization of procedure as mere "adjective law": in any field of human decision-making, an increased level of procedure cannot as such provide an answer to the problem at hand. The level of due process is, conversely, a direct function of the importance of the issue to be decided.<sup>23</sup>

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-legitimating 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 Defence Council, Inc.*,<sup>24</sup> holding that deference is due to reasonable agency interpretation of the scope of its statutory authority, provided Congress has not precisely spoken to the question forming the object of litigation, and *Lujan v. Defenders of Wildlife*,<sup>25</sup> 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 ensures both public accountability and, just as importantly, democratic legitimacy. These decisions 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. Constitution, Constitutionalism, Governance and Government Revisited-the Reasons for and the Impossibility of a Failed Attempt at Metamorphosis

"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 the American developments, *mutatis mutandis* of course, led to the constitutionalizing rhetoric implied in the passing references in ECJ decisions to a European constitutionalism and finally to the European Convention and its 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. First of all, it developed by regulation breeding more regulation -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.<sup>26</sup> 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." 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. As the growth of the project had reached a point when the aloofness from the public began to pose the question of legitimacy in imperative and undelayable terms, the answer which the European political and bureaucratic establishment sought to provide was the artifice of a treaty called a constitution.

A constitution is of course a mechanism for dividing and concentrating power, a "genealogy of power written at its birth" determining (put it 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. Phe 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. Perhaps the European Union would even be able, in time, to acquire a *sui-generis* legitimacy, based on a non-majoritarian (or majoritarian but non-substantive, purely procedural), Habermasian deliberative democratic model (presumably suitable in equal measure to faculty meetings, roundtable talks, and modern, pluralist, complex societies).

Nonetheless, besides the neutral-negative element, a constitution, as it is also commonly understood, must of necessity rest on a positive, political component. That is, a constitution needs to be underpinned by a legitimation mechanism. At this level, the question is and will likely remain unanswered in the near future. The argument, expounded in its clearest form by Dieter Grimm, <sup>31</sup> is straightforward and as yet unanswerable. Namely, given the fact that there are neither a European people (substantive democracy) nor the minimal preconditions for a public sphere, such as pan-European parties, a common language, pan-European television networks, etc. (formal democracy), there is no true legitimating mechanism, thus no political element and therefore there can be as yet no European government.

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 a constitutional 'bootstrapping' by Valéry Giscard d'Estaing, the President of the Convention on the Future of Europe,<sup>32</sup> the legitimacy-democracy deficit and sovereignty aspects seem to have been acutely apparent in the process of the adoption of this injudicious venture. The rejection of the enterprise in the Dutch and French referenda will probably quell this sort of design, if only for a while.

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

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

In this vein, 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 have an opaque, perhaps even quasi-mythical quality.<sup>33</sup> 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 has to strain imagination and reason 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 and all range within the bounds of reasonable difference. 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, acceptance and 'appropriation' by the Commission of the given proposals for reform advanced by the local partners in the process (the case of the Romanian National Integrity Agency will certainly spring to mind), perhaps the politically correct conformities embraced by Brussels in line with whatever happen to be the ideologically orthodox preferences of the day. For if one does not have guidance by means of standards or clear guiding principles, such are the courses of actions one would be compelled to follow.

In the following, I will elaborate on two detrimental and perhaps even dysfunctional effects of the accession, regarding the structural constitution (legislative process and separation of powers) and rights protection.

## 3.1. The Matter of Processes-Structural Constitutionalism and the Antinomies of Accesssion

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 neutralization of political decision-making, which may at any rate result in the impoverishment of the public sphere (it is, after all, in the nature of bureaucratization to hinder, restrict or undermine the possibility of "meaningful social action").<sup>34</sup> In Romania, this situation might add to a preexisting sense of irrelevance regarding political participation.<sup>35</sup>

As a perverse 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 correct and anticipate in the new Candidate States. In this respect, the accession process worsened a local systemic flaw. 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.<sup>36</sup>

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 ordinances<sup>37</sup> has been a constant reality, flying in the face of the provision in Art. 58 (now 61) (1) that "Parliament is...the sole legislative authority of the country."<sup>38</sup> 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 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."<sup>39</sup> 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, 40 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 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.

The un-negotiable manner in which the adoption of the *acquis* proceeded has aggravated the practice of executive legislation. The emergency ordinance OUG 31/2002<sup>41</sup> regarding the prohibition of organizations and symbols with a fascist, racist 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 regulation (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 (though an important one, as different jurisdictions, among established EU Member State democracies, take different positions in this respect, along reasonable divergences of outlook regarding the place and limits of speech in a Rule of Law state).

Perhaps in Romania this particular EU-related requirement could yet have been justified on principled local justifications, as it could be regarded from the standpoint of 'militant democracy' requirements, <sup>42</sup> especially 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 but rather helps perpetuate the tongue-in-cheek preexisting instrumental attitude towards the rule of law. Forced through the backdoor of 'motorized' governmental legislation, justified cavalierly on instrumental consideration, such measures are usually regarded by the public, at 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 emergency constitutional requirement (which triggers recourse to an emergency ordinance), during a decision on an exception of unconstitutionality raised by a party convicted under the fascist propaganda provision, 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 20<sup>th</sup> of June 1995, published in the Official Journal, Part. I, nr. 129 of 29<sup>th</sup> 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."43

To be sure, cutting through the verbal niceties, and summing the logic up 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. It is neither a very principled advice nor a constitutionally valid consideration.

### 3.2. The Problem of Conflicting Values-Imposed Conformities vs. Classical Constitutionalism

Indeed, agreement on the exact configuration of rights and the weight to be given 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.<sup>44</sup> This is why the catalogue of 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. 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 natural 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.

For these reasons, it is crucial that 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 the country. 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 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 become 'European.'

One of the enduring legacies left by former Prime-Minister Adrian Năstase is the National Council for Combating Discrimination (CNCD).<sup>45</sup> 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.<sup>46</sup>

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 *Metuselah Voting*, the latter had derided the statistical propensity of the elderly electorate to vote *en masse* for the left-wing Social Democratic Party. Mihăieș was initially fined 40.000.000 ROL<sup>47</sup> 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.

The Council seems to be fated by design to vacillate in this manner, rather pathologically, sometimes between irreconcilable standpoints. To wit, during the 'caricature crisis,' it issued a press release making an appeal to the Romanian press, to the effect that the caricatures ought not to have been published, as freedom of speech, a "fundamental freedom on whose existence all democratic societies depend," should be exercised "responsibly" and without discriminations based on various criteria, religion included. More recently, the Council changed course and expressed concern regarding Article 13 in the Draft Religion Law pending (in committee stage) before the Chamber of Deputies. This ill-omened provision reads as follows: "In Romania, all forms, means, acts or actions of religious defamation and enmity, as well as publicly offending religious symbols are forbidden." The Council recommended that it be dropped from the final text yet, always timorous and unsettled, it opined that perhaps the provision could just be modified, so that it would not be interpreted "as restrictive of the rights to free speech, opinion, and information."48 One is hard-pressed to imagine how such a conformant modification could be termed.

A problematic recent action of the Council, which bears on the issue of religious speech, is a 2005 decision to fine an Orthodox priest for discrimination based on sexual orientation.<sup>49</sup> 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 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. 50 To wit, other things being equal,<sup>51</sup> 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, and sentenced to one month imprisonment. 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 guotes, he qualified homosexuality as a sinful "sickness" which, like all "abnormalities," constituted no less than "a deep cancerous tumor in the entire society." 52 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." To be sure, the secular rationalistic cast of mind presupposed by these statements clashes quite obviously with the claims of ultimate truth entailed by notions such as 'sin', 'redemption', and 'damnation' or with an 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 (that is, unless its frightful existential claims were to be transposed and transformed into a harmless decorative display of diversity). Leaving aside the problematic moral condemnations derived by the Swedish pastor from his reading of the Bible, one can easily notice the deleterious consequences (for both speech and religion) that emerge when his opinion (and our assessment of it) are moved from the level of social judgment unto the ground of legal sanction. 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.<sup>53</sup>

What the conflicting trends in recent Romanian legal and social developments bring to the table of observation is an environment where the 'warring gods' of tradition, modernity and post-modernity confront each other in a perhaps distorted (but for that very reason more instructive) battleground. As the contradictions are starker, the problems to come are more easily discernable. Legislative initiatives which shelter collective sensitivities and susceptibilities from public discourse<sup>54</sup> are bound to violently wrench the paradigm on which our type of civilization is built. In the latter case (blasphemy laws and group defamation), the proponents of such laws argue that they seek to protect individuals from violence. Such arguments are misleading, as individuals are secured always legal protection in libel and slander criminal law, as well civil redress by way of tort liability. More often, the argument is made that civil dialogue and public peace are thus safeguarded. Nonetheless, it ought to be remembered that the modern state arose as a distinctive form of the political which constitutively presupposes some form of normative delineation between the public domain and religion, as a basic rule of the game. Its evasion makes out of 'dialogue' an embarrassing compromise and secures only the public peace that follows, usually for a short while, any act of cowardice. In the changing context, holding fast to old principles would perhaps be the wiser course of action. Resisting this manner of innovations is what and nothing less than constitutionalism requires.

#### **NOTES**

- See Miriam Aziz, "Constitutional Tolerance and EU Enlargement: The Politics of 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 (2006).
- See, for a comparative analysis, an excellent study and unalloyed defense of the positive effects of "political conditionality" by Wojciech Sadurski, "Accession's Democracy Divident: 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).
- John Gillingham, European Integration, 1950-2003: Superstate or New Market Economy? (Cambridge: Cambridge University Press, 2003), -Preface, at xvi.
- 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.
- 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).
- 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."
- 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).
- 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).

- 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).
- See Majone, Regulating Europe, supra note 5.
- <sup>11</sup> 295 U.S. 602 (1935).
- <sup>12</sup> Richard B. Stewart, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1667 (1974-1975), at 1678.
- Both locomotive inspection and rate setting were perceived as one and the same issue essentially, i.e., "objective, scientific assessements based on exact, nondiscretionary standards." Martin Shapiro, <u>The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science-Based Decision-Making</u>, EUI Working Papers, European University Institute RSC No. 96/11 (1996).
- 14 Martin Shapiro, supra note 9. 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."
- Blackstone's Commentaries, supra 2 (Ch. 1-Of Property, in General). Of course, in both Locke and Blackstone, the final assumption is natural law, i.e., Divine ordinance. In Blackstone the distinction and relation between actual practices (positive law) and their foundation in natural law or, as he puts is law as rational science is made very explicit. While "[i]t is well if the mass of mankind will obey the laws when made, without scrutinizing the reasons of making them," if we go to the roots of things, we see that the final authority is Divine command, so that the foundation of property is, positively speaking, Genesis 1:28: "In the beginning of he world, we are informed by holy writ, the all-bountiful creator gave to man 'dominion over all the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject."

- "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." Cited by Morton J. Horwitz, *The Transformation of American Law 1870-1960 -The Crisis of Legal Orthodoxy* (New York, London: Oxford University Press, c1992), at p. 163.
- 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://sdrc.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.
- 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).
- Supra note 12.
- 20 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 have been made to the contrary 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).
- 21 Stewart, supra note 12, at pp. 1759-1760.

- <sup>22</sup> Martin Shapiro, Who Guards the Guardians-Judicial Control of Administration (Athens and London: Georgia University Press, c1988).
- 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, the titles cited in note 20, supra, and Francesca Bignami, "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. See, thus, on a 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).
- <sup>24</sup> 467 U.S. 837 (1984).
- <sup>25</sup> 504 U.S. 555 (1992).
- Consolidated text available online, http://europa.eu.int/eur-lex/en/consleg/pdf/1994/en\_1994R2257\_do\_001.pdf.
- 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).
- András Sajó Limiting Government: An Introduction to Constitutionalism (Budapest: CEU Press, 1999 (2003)).
- <sup>29</sup> Laurence Tribe, *American Constitutional Law*, 2<sup>nd</sup> ed. (Mineola, NewYork: The Foundation Press, 1988)
- "[I]t is clear that the Union has at least the potential of a new form of governance where the political element of government is replaced with alternative forms of interest-group policies that are developed within policies." András Sajó, Becoming "Europeans": The Impact of EU 'Constitutionalism' on Post-Communist Pre-Modernity, 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 175 (2006).
- See Dieter Grimm, "Does Europe Need a Constitution?" 1(3) European Law Journal 282 (1995) and 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).
- See the articles and interviews in "Symposium on the proposed European Constitution," in 3 (2-3) *International Journal of Constitutional Law* (June 2005).

- 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 24, at 313.
- Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich eds. (Berkeley: University of California Press, 1978).
- 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 the referendum satisfied the validation requirement by an extremely narrow margin, just slightly over the constitutionally requisite 50%.
- http://www.infoeuropa.ro/ieweb/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).
- Sometimes more than a hundred 'emergencies' per year were found the respective government in power to exist.
- 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 rthe constitution. The literature on the topic is abundant. See, for instance, loan 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).
- 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.
- 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.
- 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. htp\_act\_text?idt=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).

- Karl Lowenstein, "Militant Democracy and Fundamental Rights," I and II; American Political Science Review 31 (June 1937) and (August 1937).
- 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).
- See András Sajó, "Constitutional Sentiments," http://www.law.berkeley.edu/institutes/csls/Sajo%20paper.pdf.
- The following section has been submitted in similar form for publication as part of an article which is forthcoming in the contributions volume of the 14<sup>th</sup> 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.
- 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.
- <sup>47</sup> Approximately 1100 EUR.
- Hotărâre din 18.01.2005, Available online at http://www.cncd.org.ro/.
- http://www.cncd.org.ro/CNCD\_Culegere\_de\_Jurisprudenta\_a\_Colegiului\_ Director 2005.pdf.
- 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).
- 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.
- An English translation of the sermon is available online at: http://www.cbn.com/CBNNews/News/040907aa.aspx.

- The authorized English translation of the judgment is available online, on the website of the Supreme Court of Sweden, at: http://www.hogstadomstolen.se/2005/Dom%20pa%20engelska%20B%201050-05.pdf.
- One could perhaps make amends in this context for the criminalization of Holocaust denial, as in this case it is a matter of fact and not susceptibility and due to the need of taking into account the legacy of the past (Romanian interbellum fascism).

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