Some Notes for a History of Reversed law-making. Decree-Laws in Interwar Romania

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Introduction

Let us imagine that, 50-100 years from now, the political and legal history of today's Romania would ignore – or would just passingly mention – the practice of law-making through ordinary and emergency ordinances! The outlook would obviously be incomplete and misleading.

Beyond the strictly historical interest, it is worth dealing with what we generically name *decree-laws* also because we can connect them to the current situation. Decree-laws are somehow the ancestors of today's ordinances. Since, starting 2003, the Constitution refers to the "spirit of the democratic traditions of the Romanian people" and seeing the "motivations" provided by the Romanian Constitutional Court in the last years, historical "arguments" could always be expected. We should be prepared to question the validity of such arguments. The attempt of "clarification" is useful, as a Romanian scholar wrote in the 1930s, «not only for a profane citizen, more or less ignorant of public law theory, but even for an informed jurist, whose sufficiency is likely to be overwhelmed by such a complex issue»[1].

In this paper, we shall review the practice of law-making by the executive power in pre-communist Romania, but we shall focus on the periods 1918-1920 and 1934-1938, when (1) law-making by the executive power had an official character; (2) parliamentary government was officially maintained.

As for the terms, simplifying, we may say that *decree* is the name established in French public law, in the second half of the 19th century, for the acts of the executive power, while *ordinance* was used in German public law. Both terms were used in Pre-fascist Italy, which had a very rich doctrine on the matter and where it was difficult to make a distinction between the various acts of the government[2].

Beyond this, the issue is complicated. In the words of the author we have already

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quoted, «the theory of decree-laws calls for the contribution of not necessarily all public law theories, but at least a significant part of them, in order to be understandable»[3]. It is not our intention to summarize here the doctrine of those times[4] and actually we do not think it would be really useful, except perhaps for showing the interest of many jurists in this issue. We choose to follow the ideas of another interwar specialist in public law, that «legal principles do not have their own absolute value, by themselves and independently from the requirements of social life"[5] and that "most times, public law principles are only political necessities and trends turned into legal doctrine fundamentals»[6]. We prefer to keep close to the historical facts and positive law and only briefly resort to doctrine and case law interpretations.

A compound word, *decree-laws* (classified as oxymoronic by some supporters of strict separation of powers) has been used in politics, in law and in the media – and is used in historiography – to refer to different normative acts, all issued by the executive power, but somehow related to the attributions of the legislative power. Some Italian and French scholars distinguished between *decree-laws*, that the governments simply used to issue legally binding norms instead of the Parliament during "abnormal periods" and without the support of any superior rule, and *legislative decrees* or *decrees on legislative matters*, adopted based on a delegation from the Parliament, i.e. a *habilitation law* in today's terms[7]. Although we recognize the accuracy of C.G. Rarincescu's opinion, that «this distinction [...] is not based on formally [...] or materially specific features», the different approach resulted in a different treatment in case law and in doctrine, as the quoted author mentions. Furthermore, the distinction is useful in order to see how the executive power got involved in law-making in the modern and contemporary history of Romanians. We shall use the term *decree-laws* since this is how they were usually named, outlining those instances when they were actually *legislative decrees*[8].

Beyond these attempts to conceptually systematize the issue, the legislative practice was very diverse and complicated, in all European countries which were more or less familiar with the parliamentary regime.

1. *A historical outline on law-making by the executive power in Romania*

19th and 20th centuries Romania (until the establishment of the communist regime), the government acted through *decree-laws* (whether officially named like this or not) for several periods and in several ways, which we shall try, for the time being, to summarize as follows:

(1) First, during 1858-1862, A.I. Cuza tried to avoid the formal difficulties of the unification imposed through the Paris Convention (1858) and adopted, by means of decrees, a range of administrative regulations on legislative matters, that, according to the Convention, should have fallen under the scope of laws common to both Principalities, drawn up by the Central Commission and voted by Assemblies. The "unconstitutionality" was obvious, but the body that should have ascertained it, the same Central Commission, failed to do it. Moreover, since the Convention stipulated

that the ruler «drew up the regulations for the execution of laws», the question arises whether a regulation could be adopted in the absence of a supporting law. The wording, which quite clearly indicated a negative answer, remained unaltered in the 1866 Constitution as well. Several jurists considered that the regulations should meet both the "negative condition", i.e. not to infringe, amend or suspend any laws, and the "positive condition", i.e. to be adopted «based on and to the extent of a text of law»[9]. However, in Romania, as in France, the theory of the regulatory autonomy of executive power seems to have been dominant[10]. But in Romania this domination was tacit, as there were no discussions on anything similar[11] to "public administration regulations" (based on legislative delegation) or "decrees in the form of public administration regulations" (without delegation)[12]. Until 1938, regulations were adopted on legislative matters with no law that could be executed. The regulation simply replaced the law or, more seriously, it amended a law – which could be equated to partial suspension, explicitly forbidden by the Constitution and unaccepted in any theory. Let us just think about the organisation of ministries! The 1866 and 1923 Constitutions stipulated that the monarch «cannot create a new function, without a special law» and «has no other powers except those assigned to him by the Constitution». This shows that the organisation of ministries could only be performed by legislative means. Nevertheless, the ministries operated for a lot of time based on mere administrative regulations (which were indeed upheld by budgetary laws, as implicit ratification). Even after a framework law of ministries was adopted in 1929, decrees were issued amending their explicitly established structure. We shall not insist on this type of decrees. We would just like to point out that the decrees to delegate the monarch's prerogatives to the Council of Ministers during his absence from the country are worth a specific discussion. They filled a constitutional gap and were generally classified as unconstitutional by many scholars. However, the "constitutional use" was frequent, initiated by Cuza in 1860 and continued by Carol I, Ferdinand and Carol II[13].

(2) During November 1918 – June 1920, when the Chambers were dissolved and the elections could not be organized within the two-month term, the executive issued a considerable number of decree-laws, pending subsequent ratification by the Parliament. While, in the beginning, they were somewhat justified by a "right of necessity", their adoption became more and more arbitrary and authoritarian afterwards, especially in 1920.

(3) During July 1934 – February 1938, based on specific laws and subject to ratification by the Parliament, the executive again issued decrees, also referred to as *decree-laws*, but they were quite different from those of the previous period and would mostly qualify as *legislative decrees*, which we described above.

(4) In July 1864 and February 1938, through their statutes, Cuza and Carol II reserved the right to issue legally binding decrees until the Parliament would convene – which more or less depended on themselves. Under the influence of Napoleon III, Cuza stipulated in the Statute of 3/15 July 1864 that legally binding decrees could be adopted «until the new assembly was convened» (December 1864, according to the Paris Convention) and only «upon pro-

posal of the Council of Ministers and of the heard Council of State» (which makes one think of the "public administration regulations" of the French Constitution and the Senatus Consultum of 1852), with no need for ratification[14]. The formal name of the acts was not *decree-laws*, but *decrees*. In practice, in 1864, the terms *law* and *decree* were alternatively used (sometimes even in the same text)[15]. Under art. 46 of the 1938 Constitution, Carol II stipulated that he could issue legally binding decrees with no requirement, whenever the Parliament was dissolved or was not in session. So far, this was an extension and a constitutional establishment of the practice deployed in the years preceding the authoritarian regime. However, under art. 98 it was mentioned that «until the Legislative Assemblies are convened, all decrees are legally binding with no need for ratification»[16]. Nevertheless, the situation was very complicated: until the Parliament convened (June 1939), the acts were named either *laws* or *decree-laws*, and the basis was either art. 46 or art. 98 or even both at the same time[17]. Perhaps a detailed study on Carol II's legislation will be able to explain why the authoritarian monarch acted like this, whether it was intention or negligence.

(5) From 7 September 1940 until 23 August 1944, I. Antonescu, «President of the Council of Ministers, with full attributions to lead the Romanian State» (who had taken the official title of «State Leader»)[18], according to the Decree-Law no. 3072 of 7 September 1940, exercised "all the other powers of the state". He issued thousands of decree-laws, based not only on the already mentioned decree-law, but also on the Decree-Law no. 3052 of 5 September 1940, which suspended the 1938 Constitution and dissolved the Parliament[19]. As of May 1941, the *decree-laws* were (also) referred to as *laws* and were numbered as such[20].

(6) After Antonescu was overthrown, Decree no. 1626 of 31 August 1944 «on the establishment of the rights of Romanians in the 1866 Constitutions and with the amendments to the Constitution of 29 March 1923», repealing the decrees of 5-7 September 1940, stipulated that: «a decree issued based on the decision of the Council of Ministers will organize the national representation». However, by then, «the legislative power will be exercised by the King, upon proposal of the Council of Ministers»[21]. The decree on the exercise of legislative power and Law no. 560 / The decree-law on elections for the Assembly of Deputies were only issued in July 1846, the elections took place on 19 November and the Assembly convened on 1 December. Until then, the law-making process was the same as during Antonescu's rule, i.e. by means of *decree-laws*, which were named and numbered as *laws*, only that the King was now the one who issued them[22].

In the following, we shall exclusively focus on the 2nd and the 3rd categories.

2. *The decree-laws of 1918-1920*

On 5 November 1918, the King dissolved the Parliament elected in May, during A. Marghiloman's government. Nothing special! This had been done for more than five decades and would still be done in the following two. The reasons mentioned in the Report of the President of the Council of Ministers, C. Coandă, asking for the dissolution, referred to the fact that the

elections had taken place «by infringing specific texts of the Constitution». What was and still is extremely special is that «all the works undertaken by the dissolved Assemblies during their operation» were declared «inexistent and completely unenforceable»[23]. We cannot help but notice that they aimed at overthrowing an alleged unconstitutionality through another one. We cannot help but notice that the King declared the "inexistence" of his own acts, the decrees by which he had sanctioned the laws. He practically recognized that he had acted unconstitutionally, but, anyway, his person was inviolable and only the ministers could be held liable. We cannot help but notice the contradiction: the report stated that the Assemblies «are merely inexistent», but it called for their dissolution and for their acts to be declared as inexistent, which was eventually done by means of two decrees. Any perorations of a legal nature would be pointless, as everything lies in the political circumstances of those times. Many *whys* have remained unsolved. For instance, why choose this odd option, and not do what had been simpler and closer to the text of the Constitution, i.e. dissolve the Parliament, organize new elections and have the "works" be declared inexistent by the new Parliament? Or, as Take Ionescu would reproach, why, once the Parliament elected in 1918 was declared "inexistent", didn't they restore the previous one, extend its mandate and, possibly, add representatives of the reunited provinces?[24] Many things were said and written at that time, as it usually happens in politics… After all, it was as N. Iorga put it: «The Conservatives and Averescu's partisans announce a fierce battle against the "Decree-laws" which are, in their opinion, backed by the Liberals, who, according to today's release, approve these measures»[25]. We shall only focus on two relevant testimonies.

First, the "victim" A. Marghiloman, who, although he had felt wronged, had accepted the habit of resignation upon request, considered – maybe too harshly, but not without reason – that «Coanda's report was a model of nonsense and hypocrisy». The decree seemed to him a «coup, in all its brutality, but a coup with a sole effect: to cancel the lawsuit against the Brătianu government. The laws we have voted will be established by means of a decree: they say it themselves!»[26].

I. G. Duca responded, admitting that Coandă's appointment had been proposed (not imposed, as the opponents said) to the King by I.I.C. Brătianu, since the general was «willing to play this part», i.e. to «cancel the entire activity of the Marghiloman Parliament», «promote popular vote by means of a decree-law» and «decide the mobilization and re-engagement in the war alongside the Allies». However, he denied that «denouncing the activity of the Marghiloman Parliament» aimed at relieving the Liberals from a lawsuit, which was «merely a coincidence». He explained everything by the promise that had been made to the "allied ministers", that «when we shall again be free in our movements, we shall immediately cancel everything that has been done under the bayonets of the enemy occupation»[27]. Hence, it would have been just a symbolic gesture, aimed at regaining the allies' benevolence. But a symbolic gesture that generated a weird situation.

As Marghiloman wrote, a significant part of the legislation declared "inexistent" would be recreated. According to the

decree of 5 November 1918, «subsequent decree-laws would determine those measures that, for business purposes, would be legally enforced». The act added that «the provisions of this decree are legally binding and will be ratified by the new legislative bodies».

This act may be considered the basis of the entire system of decree-laws during 1918-1920. We can even say that it played a constitutional role for a certain period. In fact, the opposition and the hostile press condemned the suspension of the Constitution. C.G. Dissescu wondered whether «do we still have a constitution»[28]. This decree is somewhat similar – notwithstanding the failure to use the plebiscite procedure and the inclusion of the ratification clause – to the constitutional provisions by means of which Cuza and Carol II reserved the right to regulate until the Parliament would convene. In other terms, it could be considered an empowerment guideline that the executive awarded to itself. However, another issue arises. The 5 November decree exclusively refers to subsequent decrees that would «legally establish» the measures that had been declared "inexistent". Was it allowed to introduce completely new measures by means of decree-laws? The practice reveals an affirmative answer.

All decree-laws until June 1920 were subjected to the ratification clause. Usually, art. 1 began with the formula «is hereby approved, subject to subsequent ratification by the Legislative Bodies». Few of the decrees – one of which was the parent decree – stipulated, under the second to last article, that they «will be subject to ratification [...]». We cannot realize whether the difference was intentional or was just a textual incongruity. The parent decree, unlike all others, should have been subject to ratification by «the new Legislative Bodies» which should have convened in February 1919. After many postponements of the elections, these bodies barely began to operate in December. But the parent decree was not ratified then either, not even submitted. It was ratified, together with all the others, only in March 1924.

If the government was honest in its claims, «the regime of decree-laws» shouldn't have lasted long, three months, until the "new legislative bodies" convened. Without questioning the fact that "urgent needs" had to be "met", it should be noticed that another reason for which the Liberal government chose to regulate by means of a decree was the electoral campaign, so that they could assume the achievement of the great reforms[29]. The period was primarily extended because the elections took place with delay. Nevertheless, the practice was also deployed after the first elections of the Greater Romania. Only one decree-law was issued during the government of Vaida-Voevod (December 1919-March 1920), but 28 were issued under the government of Averescu, (March-June 1920).

Already in January 1919, the hostile press referred to the government as «our factory of decrees». The Liberal Party, which, in 1866, «had overthrown a democratic ruler only because he had despised the laws of the country» was now accused of «having overthrown the entire Constitution and having established a fully-fledged government, based on the absolutism of decree-laws»[30]. As many as 464 decree-laws were ratified on 26 March 1924, of which 158 ratified and repealed and only 16 ratified with amendments[31]. This practice of law-making by the executive was criticized

on many occasions and for various reasons. Below we provide a summary of the comments of C.G. Rarincescu, who was of the opinion that the 1918-1920 regime was a «complete dictatorship, which included all the areas of public and social life without distinction, with no limits or conditions»: (1) the number of decree-laws was considerable they were issued on both public law and private law matters, both in urgent situations and when they could have waited; (2) many times, they were issued to the benefit of certain persons or groups; (3) the control was an illusion, the Parliament once more proved to be a «mere tool of the government» – the ratification, which was anyway late, took place «almost with no discussions»[32].

Beyond the criticisms, this practice could not be specific to Romania, as the opponents claimed. It was a political and journalistic exaggeration to say that «of all the peoples around us and of the rest of Europe, only the Romanian people, instead of gaining more freedoms, lost even the previously existing ones»[33]. No matter how much the Romanians deplored «the ruin of constitutionalism», their situation would not cause «laughter in all civilised countries», as the Transylvanian leader M. Popovici forecasted[34]. It is not our intention to draw a comparison here, but we should mention that, during the First World War, given the obvious special circumstances, the practice of law-making by the executive became widespread, and scholars even considered that «it was during this period that exceptional legislation by executive [*governativo*] decree (which is now perfectly familiar to us) became a regular practice in the European Democracies»[35]. Indeed, this was done in many cases according to specific delegation laws, which granted "full powers"[36]. From this point of view, the Romanian case is somewhat an exception. It is most similar to the Swiss situation, where, although a delegation law had been passed in 1914, it was unconstitutional in the opinion of many scholars. However, the Federal Court stated that it was unable to assess the validity of the legislative decrees issued by the Federal Council based on the right of necessity, considering that they could only be subjected to political control[37]. Similarly, in Romania, several decisions of the Court of Cassation from 1919 and 1921, criticized by many doctrinarians, stipulated that the government was authorized to regulate due to the «imperious necessities of the greater good» and decree-laws were «decidedly political» and, hence, could only be subjected to parliamentary control. C.G. Dissescu considered that the Supreme Court began to «sanctify» decree-laws instead of repealing them as unconstitutional[38].

Of the hundreds of decree-laws issued from November 1918 to June 1920, we shall deal in the following with three particular cases, which show the fragility of the constitutional regime at that time and the arbitrary nature of the government's actions.

(1) From December 1918 to August 1919, six decree-laws were issued regarding the granting of citizen rights to Jews in the Old Kingdom. We shall not focus on their content here; what is relevant is that they did not amend a law, but the very famous art. 7 of the 1866 Constitution, which was still in force, and such an approach was forbidden even in the systems that explicitly granted additional powers to the executive in exceptional situations. Accurately criticized in the doctrine – P. Negulescu considered that it was «a proof of political immaturi-

ty»[39] – the measure was transferred to the Parliament's control by the Court of Cassation (15 February 1919). We could wonder why did Bratianu act in such a hurry, why did he choose to play such a dangerous game when at least the provisions of decree of 30 December 1918 were unsatisfactory to everyone, to anti-Semites and Jews alike. The only possible answer could be his wish to claim, in the Paris Conference, that the Jewish problem had been completely solved in Romania. Since they impacted the Constitution, these decrees were ratified through art. 133 of the 1923 Constitution.

(2) We have already said that, in terms of ministry organization, royal decrees (administrative regulations) were quite frequent, so it came to no surprise that A. Averescu established, by means of decree-laws, three new ministries (of labour and social protection[40], of cults and arts and of communications[41]). The case of the ministry of labour, established by means of the decree-law in 29 March 1920, is worth mentioning. The decree-law did not include an explicit ratification clause, but it stipulated that «this department will operate based on a law for its organization, which will be adopted in the future and will show its scope of action, departments and services»[42]. A minister (G. Trancu-Iaşi) was appointed on the publication date, but a law would be adopted only two years later[43]. In the following months, the minister provided the King with reports on the issue of other decree-laws (which were actually issued), which included, on 26 April, the *Decree-law on the organization of the ministry of labour and social protection*[44]. For these reasons, the opposition began to talk about «a department that does not exist, but still has a general secretary and a head of cabinet that are paid by the state, as well as a car for electoral propaganda, which is included in the country's budget»[45].

(3) A case worth a separate discussion is that of the Ruling Council (*Consiliul Dirigent*) of Transylvania. This body issued legally binding decrees (with limited material and territorial competence)[46]. It was not a creation of the Bucharest government, but of a local representative body. Taking note of the decision of Alba-Iulia, the King issued a *decree*, not a *decree-law*, with no ratification clause. It is true that there was a *Decree-law no. 3632 of 11 December 1918 regarding the establishment of the management of public services in Transylvania*, stipulating that «on a provisional basis and until the final organization of the Greater Romania, the Ruling Council of the National Assembly of Alba-Iulia is hereby charged with the management of the public services stipulated in Decree no. 3631…»[47], but this can – or even must – be seen as a ratification, as a transposition of the decisions made in Transylvania into the Romanian legislation. For this reason, the dissolution of the Ruling Council by means of the decree-law of 2 May 1920 can be seen as an act of force, a "ukase", especially since the Transylvanian leaders, headed by I. Maniu, agreed to the dissolution, but by legislative means and on a gradual basis[48]. Anyway, only the dissolution decree was submitted for ratification in 1924, while those of December 1918 were not. In 1920, the Greater Romania was not finally organized so that the Council could be dissolved, but rather the dissolution of the Council was used for the final organization[49]. The dissatisfactions persisted. This is one of the founding ambiguities of the Greater Romania.

In the spring-summer of 1920, when the Averescu government resumed the practice of law-making by decrees, the criticism became more and more fierce. The Romanian National Party, feeling that its control over Transylvania was threatened, issued a press release saying that «the current leaders of the country have waived the constitutionalism of a genuine democracy and introduce an untimely battle between brothers» and that, «as a sincere supporter of genuine constitutionalism», this party argued «fervently against governing by means of decree-laws»[50]. For Maniu, «the system of decree-laws» was «something unheard of in political life»[51].

Since Averescu's party managed to get parliament majority in June 1920 and, thereafter, all the governments won the elections they had organized, the practice of having legally binding norms issued by the executive was abandoned, and would be resumed after almost 15 years.

3. *The decree-laws of 1934-1938*

Things were completely different at the middle of the 1930s. The issue at stake was no longer the poor organization of a state going through an exceptional domestic and international situation, but a drift to authoritarianism. Carol II already had attempted at installing governments "above parties", but he had not succeeded. Now he was trying to marginalize them, by extending the role of the executive power. It was not a singular case. Let us put aside the state where authoritarian regimes had already been established and take a look at those who at least maintained the appearance of democracy. In France, in 1924, 1926 and 1934, laws had been passed that entitled the government to adopt decrees on legislative matters, confirming the idea that, in the last decade, the decrees had prevailed against the laws[52]. Closer to use, in Czechoslovakia, the Hrad had a "semi-constitutional" mechanism of issuing decrees when the Parliament did not convene. A. Rădulescu outlined that the «use of decree-laws which are presented as a necessity stemming from the need to protect the country or take other urgent action», represented «a serious infringement of the Constitution», following the European «fashion» of «granting full powers to the governments», justified through the «extension of regulatory power»[53].

Legislative delegation did not exist in Romania, neither stipulated in the Constitution, nor imposed by the legislative process or by case law, as in Germany, France and Italy. Attempts were made at passing delegation laws in 1917 and 1918, and even at including the delegation in the 1923 Constitution, but they failed[54]. But there is a first time for everything.

At the beginning of July 1934, a few days before the end of an extraordinary session, the Tătărescu government submitted to the approval of the chambers a *Law for the simplification of public services and for urgent economic or financial measures*. The draft generated a lot of turmoil in the press, among the opposition and even among some deputies of the majority[55]. However, as many other times, the turmoil did not lead to anything. The law was published on 9 July. It authorized the government to issue decrees for the «simplification and rationalization of public services and institutions…», the review of the budgets of central adminis-

tration and the performance of treasury operations, during the parliamentary holiday (but no later than 15 November). The following provision generated major controversies: the decrees amending laws in force or creating «a new legal state» had to be subjected to ratification by 15 December. The failure to timely submit a decree or its rejection by the chambers entailed the unenforceability of the act[56]. Hence, the Parliament allowed the government to issue acts on legislative matters. Was this possible in the Romanian constitutional system? Major voices said it wasn't. A. Teodorescu, for instance, considered that this was «merely» «an unconstitutional law, as it authorized the executive to amend the existing laws by means of decrees, as well as adopt legally binding decrees on matters exclusively reserved to the Parliament»[57]. This was in accordance with a significant part of the French doctrine and with the prevalent Belgian trend[58], which claimed that delegation was not possible in systems with a rigid constitution, unless explicitly provided[59]. Besides, this was the position of the Legislative Council as well: whatever the Parliament voted, the government could not regulate since «there were no provisions in the Romanian Constitution that would allow the transfer of attributions from the legislative to another power…»[60]. Obviously, the opinion that prevailed was the one of supporters. Both the Minister of Justice, V. Antonescu, and the under-secretary of state, A. Bentoiu, showed that similar laws had existed and still existed in other countries – which was true – and that they were not *decree-laws*, but rather *mere regulations* or *regulatory decrees*, as those which had to be passed by the King, in general, for the enforcement of laws, according to the Constitution. Seen from this perspective, the decrees based on the 1934 law could have been similar to the "public administration regulations: of the French system. An interesting approach was the one provided by T. Onişor who, after performing a thorough description of decree-laws and strongly criticizing the practice, ended by defending the Romanian law. In his opinion, decree-laws were «crimes against the principle of separation of powers», «guilty [sic!] crimes in a democratic regime»[61]. He considered that legislative delegation was incompatible with democracy: «the regime of decree-laws is an anomaly in the rule of law; it implies the sacrifice of constitutional legality»[62]. He agreed with the Legislative Council: a law of full powers was impossible in Romania since it was not provided by the Constitution. Besides, such a law always had to be «drawn up by the constituting assemblies», whether dealing with rigid or simple constitutionalism[63]. However, he also agreed with the government: the decrees issued based on the law of 9 July 1934 were not decree-laws, but «simple regulations, perfectly valid, as long as they remained within the framework of the law…»[64]. The Parliament wouldn't have authorized the government to regulate, but it would have "invited" it to «execute the provisions of the law». Well then, what about the possibility to amend laws by means of a decree? Onisor's answer was surprising: «the truth is that it is not the decree that amends […] a legal provision. The law has done this», establishing principles and providing for «a tacit and global repeal of all the provisions contrary to the consequences implied by the principles of law». Nevertheless, he recognized that the principles were "only suggested" and they had to be «extended

and detailed to the last consequence, by the government»[65].

First, it is difficult to see which are the principles, when the law basically stipulates some directions of action with a view to simplifying services and reducing expenses. Then, even if principles were involved, this would entail another comprehensive discussion on the possibility to supplement a law by means of a regulation. Even if we agree with a significant part of the doctrine and admit that this is possible, we could reach a vicious circle in this case if we were to consider, like P. Negulescu, for instance, that no regulation-based supplementation had to affect any legislative provision or fall within the scope of the legislative power[66]. According to Onişor's logic and to Negulescu's terminology, the regulations issued based on the 1934 law were both *complementary* to the latter and *autonomous*, as they created new legal states. We must notice that the government would have also been granted the power to control the legislation, being able to establish whether the various laws infringed some alleged principles, most of which had also been introduced by it.

Beyond the discussions, actually, based on this law, the Tătărescu government took very significant liberties – an action that was ardently criticized, but, after all, tolerated. Based on such liberties, it adopted many and various normative acts, both decree-laws and regulatory decrees. Some were adopted in August. Thereafter, in autumn, their number kept increasing, reaching an incredible frequency in November, when the "authorization" got closer to the deadline. 13 decree-laws were issued from 9 to 15 November. Another one was issued on 30 November 1934, after the deadline. 21 decrees were submitted to the Parliament in December 1934 and ratified as a whole on 3 and 7 April 1935. The opposition protested against voting, but what was the point? An issue stands out: only the decrees amending laws or creating «new legal states» were subjected to the ratification clause. But who decided what had to be submitted or not? The government, of course. For instance, the *Decree on the concentration of the services of the Ministry of Industries* clearly affected the 1929 Law on the organization of ministries, but was not sent for ratification.

Immediately after the ratification as a whole, a law was voted (18 April 1935) that authorized the government to take the «required economic and fiscal administrative actions for the capitalization of wheat», by means of a decree based on a journal of the Council of Ministers, also setting out infringements and sanctions. At a first glance, this does not seem a problem: a law authorized the government to take "administrative actions", hence there was no need to fulfil the requirement of submission for ratification. On 29 June 1935, based on the mentioned law, a *Decree establishing the minimum price of wheat* was issued, which stipulated that «all the provisions of laws and regulations contrary to the provisions of the hereby decree are and shall remain repealed»[67]. Thus, this was a case of amendment of laws by means of a decree without stipulating parliament ratification. This was granted, but only in January 1937, together with other decrees, issued on the basis of other laws[68].

The 1935 law was pursued on 7 April 1936, when a *Law for assuring and maintaining budget balance during the 1936-1937 exercise* was passed, a law on "full financial and

economic powers", that authorized the government to adopt decrees, based on a journal of the Council of Ministers, during the parliamentary holiday (with no deadline), in order to take «any required actions to maintain and assure budget balance and to meet unpredictable financial or economic needs imposed by the requirements of National Defence and by the Country's general interest»[69]. This time, all the decrees, whether they had legislative content or not, had to be subjected to ratification in the first ordinary session. Several other decrees were issued based on this law. 43 were ratified on 26 January 1937, and other 2 were ratified on 1 April.

In 1937, things seem to have gone completely astray. During their last days of operation (13 and 18 March), the Chambers adopted a *Law to unify and streamline exceptional financial measures* (published on 1 April)[70], which, under art. 14, fully reproduced the provisions regarding the government's authorization. On 20 March, the parliamentary holiday began; on 8 October, the commencement of parliamentary activities was postponed by a month, and the Chambers were dissolved on 19 November. The Parliament resulting from the elections of December 1937 was dissolved on 18 January 1938 without having ever convened. Against this background, the government issued decree-laws on basis of art. 14 of the law of 1 April 1937 until the new Constitution came into force, on 27 February 1938. The fact that, on 23 June 1937, art. 13 of the law was amended by means of a decree, based on art. 14, seems to us a genuine peak of decree-based law-making, at a time when the appearances of the parliamentary regime were somewhat maintained[71]. The regulated matters were most diverse, many times going beyond the (comprehensive) framework of the supporting law. We shall delve on the months of January and February 1938, which illustrate the fluid limit between the interwar "parliamentary democracy" and the "royal dictatorship"[72]. The King's authoritarian tendencies were stronger and more obvious that in the previous years, showing that the change he desired was getting closer, but, formally, the country was still subjected to the 1923 Constitution. In the first two weeks of 1938, the situation was somewhat special, as no party had gained a majority, but it was not entirely exceptional. The *Hung Parliament* was waiting to be convened, and O. Goga's minority cabinet expected the dissolution of the Parliament and the organization of new elections, that they would win. This kept with the tradition of the last seven decades. From the beginning, the executive used art. 14 of the Law of 1 April 1937 in order to issue decree-laws on economic and financial matters. Moreover, they used it as a pretext to issue decree-laws completely unrelated to maintaining and assuring «budget balance» or to meeting «unpredictable financial or economic needs imposed by the requirements of National Defence and by the Country's general interest», as were those on the «assimilation of the prefect of the Capital Police to under-secretaries of state» or on «removing simple assault from the Law on the state of siege»[73]. On 18 January, the King exercised his prerogative of dissolving the Parliament and convened new elections for the beginning of March. Nothing unexpected so far. However, on the same day, by means of a decree-law that failed to mention any legal basis – actually, there was none – he amended the electoral law, as he replaced

the geometric signs of political parties with dots[74]. We are not interested in the purpose of the measure; we just want to outline the amendment of a law – and what a law! – by means of a decree, without even using the pretext of a "full power" law. On the following days, the Chambers of Agriculture, Commerce and Industry were dissolved by means of decrees[75]. On 22 January, again with no basis, the famous *Decree-law on the review of Romanian citizenship* was passed, which represented the beginning of state-based antisemitism. On the same day, invoking art. 14 of the Law of 1 April 1937 and also introducing the ratification clause, the Criminal Code was amended[76]. The transition to a new phase took place on 11 February, with the decree-law that, «considering the best interest of ensuring public order in the state», introduced the state of siege in the entire country, for an unlimited period[77]. On 12 February, «considering the spiritual state generated by the fact that political fights were getting worse», the elections were called off and the country found itself again in the situation of November 1918 – November 1919. Thus, until 27 February 1938, the King took the liberty to issue, besides the decrees stemming from the 1937 law, other decrees, with no basis, that reinforced his power; for instance, he appointed (by derogation from the Law on judicial organization) magistrates as mayors and prefects and vested them with «full powers»[78]. According to the Constitution subjected to the plebiscite, which came into force on 27 February, he reserved the right «to issue legally binding decrees on any matters», whenever the legislative bodies did not convene, and he only had to submit them to ratification «in their closest session» (art. 46). Until the first assembly, that would take place in June 1939, a derogation from the latter rule (art. 98) operated. A climax of decree-based law-making in interwar Romania – again showing the continuity of the two regimes – occurred on 26 January 1939, with the *Law on the ratification of decree-laws intervening until 27 February*, which ratified no less than 211 decree-laws/laws issued from 1 April 1937 to 27 February 1938. However, since the Parliament had not been elected yet, this law actually was a «legally binding decree» that needed no ratification[79].

Conclusions

Although the 1866 and 1923 Constitutions stipulated that the legislative power was exercised jointly by the King and the two Chambers, and the King was the last one to be involved, things did not occur like this in reality. First, law-making in disguise was widely deployed, and decrees were used in order to regulate on matters that should have been under the scope of laws. This practice excluded the Parliament from certain legislative actions and can be seen across the entire period of 1859-1938. Then, a major part of the legislation was adopted backwards, with no constitutional basis. All the three "branches of the legislative power" were involved, but the constitutional order was disturbed and the role of the Parliament was significantly diminished. Practically, the King made the law and the Parliament only approved it. Indeed, the King could not amend what the Parliament had voted, while the Parliament could amend what the King had decreed. However, while the Parliament's deci-

sions could not be enforced without being sanctioned by the King, his decrees were enforceable prior to parliamentary ratification. Two periods when this happened can be outlined in the history of "parliamentary democracy": 1918-1920 and 1934-1938. The contexts were different. At the end of the First World War, in the absence of a Parliament and by virtue of a "right of necessity", the government took the liberty of issuing "decree-laws" under reserve of subsequent ratification. This occurred late, after four years, and without a serious review, which would have been impossible anyway, given the extremely high backlog of decrees. In the 1930s, the government obtained, based on "full power" laws, the right to issue decrees that could amend laws in force or could create «new legal states» – indeed, provided that they were submitted for parliament ratification. It abused of this right, not only with the high number of decree-laws that were adopted, but also by going beyond the material limits – which were anyway loose – stipulated in the supporting laws. Although the latter were "special full power" laws (on economic, financial, administrative matters), the government assumed "general full powers"[80]. The acts were ratified as a whole and, though with much controversy, practically with no opposition.

Law-making by the executive should not be seen in isolation; it is just a part of a set of political practices[81] which, at least in the 1930s, illustrated the hypertrophy of the authoritarian component of Romanian "parliamentary democracy"[82]; eventually, the former suppressed the latter.

[1] T. Onișor, *Adevărate și pretinse decrete-legi*, in «Revista de drept public», n. 5-8, 1934, p. 218.

[2] A. Morrone, *Le ordinanze di necessità e urgenza, tra storia e diritto*, p. 4, <https://core.ac.uk/download/pdf/111780135.pdf>, April 2020. M. Benvenuti, *Alle origini dei decreti-legge. Saggio sulla decretazione governativa di urgenza e sulla sua genealogia nell'ordinamento giuridico dell'Italia prefascista*, in *Studi in onore de Claudio Rossano*, Napoli, Jovene, 2013 vol. I, p. 21.

[3] Onișor, *Adevărate și pretinse decrete-legi* cit., p. 218.

[4] For an overview, see D. Apostol Tofan, *Originea delegării legislative (1). Doctrina clasică românească*, in «Studii și cercetări juridice», LX, 2015, n. 3, pp. 305-358; *Originea delegării legislative (2). Doctrina clasică occidentală* (II)", in «Studii și cercetări juridice», LX, 2015, n. 4, pp. 447-472.

[5] C.G. Rarincescu, *Decretele-legi și dreptul de necesitate. Studiu de drept public comparat*, Bucharest, Tipografiile României Unite S.A., 1924, p. 76.

[6] Ivi, p. 42.

[7] Ivi, pp. 26-27, n. 15. A. Pichat, *Les décrets en matière législative. Décrets-loi*, Paris, Dalloz, 1935, pp. 148-149. Regarding this matter too, the situation in Italy was more complicated, as the scholars exhaustively detailed this distinction, which is still seen nowadays (see R.F. Zumbini, *Il decreto legislativo e il decreto legge agli essordi dello Statuto albertino*, in «Quaderni costituzionali. Rivista Italiana di Diritto Costituzionale», XXXI, 2011, n. 2, pp. 306-311).

[8] Another distinction, postulated in France by É. Laferrière and adopted in Romania by C.G. Rarincescu, is the one between *decree-laws* and *law-decrees*. While the former were legislative acts of the executive power, the latter were administrative acts of the legislative power, laws by means of which the Parliament performed management acts or exercised its control on local acts/bodies, according to the legislation in force (É. Laferrière, *Traité de la juridiction administrative*, Paris, Berger-Lévrault et C^ie^, 1896, vol. II, pp. 16-17). Rarincescu also classified budgetary laws *as law-decrees* (Rarincescu, *Decretele-legi* cit., p. 24).

[9] Ivi, p. 53.

[10] Pichat, *Les décrets* cit., p. 5.

[11] P. Negulescu, *Tratat de drept administrativ român*, Bucharest,

«Gutenberg» Joseph Göbl, 1906, vol. I, p. 218.

[12] Laferrière, *Traité* cit., p. 10.

[13] P. Stroiescu, *O cestiune constituțională. Decretele pentru plecarea din țară a M.S. Regelui*, Bucharest, F. Göbl & Fii, 1898, pp. 4-6; D.A. Sturdza, *Puterea executivă în Constituțiune României*, Bucharest, Carol Göbl, 1906, pp. 16-17; P. Negulescu, *Curs de politică administrativă*, Bucharest, 1939, vol. II, p. 108.

[14] The fact that, during the first three years of his reign, A. I. Cuza regulated by means of decrees, with no legal-constitutional basis, and he formalized this prerogative during the last two years supports the idea that the his Statute of 1864 did not result in «a change in the nature of the political regime, but in its level» (M. Guțan, *Șeful statului la români: între deziderat constituțional și realitate politică*, in M. Guțan, O. Rizescu, B. Iancu, C. Cercel, B. Dima, *Șefii de stat. Dinamica autoritară a puterii politice în istoria constituțională românească*, Bucharest, Universul Juridic, 2020, p. 37), showing that «the transition from a functional parliamentary regime […] to an authoritarian regime was not abrupt» (M. Guțan, *Avatarurile autoritarismului domnesc la mijlocul secolului al XIX-lea*, in *Șefii de stat* cit., p. 219).

[15] For instance, the act resulting in Cuza's famous agricultural reform was titled *Law on the regulation of rural property*, but the words «this decree» and «the hereby decree» appeared several times in its text (C. Hamangiu, *Codul General al Românei. Legi uzuale 1860-1900*, Bucharest, Leon Alcalay, 1903, vol. II, p. 1396).

[16] Considering the obvious similarity to the 1864 provision, it was concluded that «the sources of article 46 paragraph 7 are, hence, Cuza's Statute and the 1852 French Constitution (of Napoleon III)» (A. Tilman-Timon, *Les actes constitutionnels en Roumanie de 1938 à 1944*, Bucharest, «Cugetarea» S.A., 1947, p. 42).

[17] See C. Hamagiu, *Codul* cit., vol. XXVI.

[18] D. Honciuc Beldiman, *Statul național legionar. Septembrie 1940 – Ianuarile 1941. Cadrul legislativ*, Bucharest, INST, 2005, pp. 93-94.

[19] Ivi, p. 83.

[20] The first title was «Law no. …», but «Decree-law on/regarding…» also appeared between the introductory section and the operative one. The first *law* we were able to identify dates from 13 May 1941 («Monitorul Oficial», I, n. 116, 19 May 1941, p. 2717).

[21] Ivi, n. 262, 2 September 1944, p. 6232.

[22] The period of the so-called "royal strike" (August 1945 – January 1946), when the King refused to issue decrees upon the government's proposal, is an exception. Formally, law-making became impossible, but, in practice, it took place by means of journals of the Council of Ministers.

[23] Ivi, I, n. 183, 6 (19) November 1918, pp. 3201-3202.

[24] «Adevărul», 30 July 1919, p. 1.

[25] N. Iorga, *Memorii*, Bucharest, «Națională» Ciornei, n.d., vol, II, p. 116.

[26] A. Marghiloman, *Note politice*, Bucharest, «Eminescu» Institute of Graphic Arts, 1927, vol. IV, p. 145.

[27] I.G. Duca, *Amintiri politice*, Munchen, Jon Dumitru – Verlag, 1982, vol. III, p. 141.

[28] C.G. Dissescu, *Puterea și responsabilitatea guvernamentală*, in *Noua Constituție a României*, Bucharest, Cultura Națională, 1922, pp. 42-43.

[29] On the Christmas day of 1918, a news service of the National Liberal Party, after explaining what decree-laws meant, concluded as follows: «The Liberal Party asks for your vote so that they can establish, within the assembly, the laws adopted by means of a decree, which grant land and the right to vote. This is why the countrymen have the duty to vote for the candidates of the Liberal Party. Not voting for them means that the countrymen want neither land, nor the right to vote» («Mișcarea. Ziar național-liberal», 25 December 1918, p. 1).

[30] C. Bacalbașa, *Decretele-legi*, in «Adevărul», 13 January 1919, p. 1.

[31] «Monitorul Oficial», I, n. 68, 27 March 1924.

[32] Rarincescu, *Decretele-legi* cit., pp. 159-160.

[33] Bacalbașa, *Decretele-legi* cit., p. 1.

[34] «Gazeta Transilvaniei», 7 April 1920, p. 1.

[35] G. Agamben, *Stato di eccezione*, Roma, Bollati, Boringhieri, 2003; En. Tr. *State of Exception*, Chicago and London, University of Chicago Press, 2005, p. 13.

[36] France, the United Kingdom, Italy, Belgium, Switzerland, etc. (G. Jèze, *L'exécutif en temps de guerre. Les pleins pouvoirs (Angleterre, Italie, Suisse)*, Paris, M. Giard & E. Brière, 1917; Herbert Tingstén, *Regeringsmaktens expansion under och efter världskriget: studier över konstitutionell fullmaktslagstiftning*, Lund, Gleerup, 1930; Fr. Tr. *Les pleins pouvoirs. L'expansion des pouvoirs gouvernementaux pendant et après la guerre mondiale*, Paris, Stock, 1934).

[37] Jèze, *L'exécutif* cit., pp. 48-49; Tingstén, *Les pleins puvoirs* cit., p. 59.

[38] Dissescu, *Puterea* cit., pp. 42-43.

[39] P. Negulescu, *Constituția României*, in *Enciclopedia României*, Bucharest, 1938, vol. I, pp. 189-190.

[40] «Monitorul Oficial», I, n. 272, 30 March 1920.

[41] Ivi, n. 57, 15 June 1920.

[42] Instead, the decree-law on the ministries of cults and arts and communications had a ratification clause and stipulated that «the attributions of the new ministries will be established by means of a regulation and the expenditure required for the operation of each will be stipulated in the relevant budgets».

[43] A law extending the department and turning it into the Ministry of public health, labour and social

protection was adopted in April 1922 (D. Constantinescu, *Istoricul organizării Ministerului muncii*, in *Zece ani de politică socială în România [1920-1930]*, Bucharest, 1930, p. 16).

44 «Monitorul Oficial», I, n. 21, 30 April 1920.

45 «Țara nouă. Ziar al Partidului Țărănesc», 4 May 1920, p. 1.

46 From December 1918 until March 1920, the Ruling Council adopted 24 decrees (T. Onișor, *Opera legislativă a Consiliului Dirigent*, Bucharest, Marvan 1937, pp. 16-17). In terms of executive acts, the Ruling Council issued *ordinances* and each of its departments issued *circular orders*. Although the Council's activity has been extensively researched, an analysis of the material differences between these kinds of norms has not been undertaken so far.

47 «Monitorul Oficial», I, n. 212, 13 December 1918. Article 2 of the decree established the material competence of the Ruling Council, listing the matters that remained within «the administration of the royal government»: foreign affairs, army, railways, postal services, telegraph and telephone services etc.

48 Gheorghe Iancu, *Contribuția Consiliului Dirigent la consolidarea statului național român (1918-1919)*, Cluj-Napoca, Dacia, 1985, pp. 296-299.

49 It should be mentioned that, before dissolving it on a formal basis, the Bucharest government amended the electoral legislation of Transylvania, by means of a decree-law. This was obviously a manoeuvre of Averescu, who wanted to extend his political influence by reducing the representation ratio of the territories across the mountains. Most Transylvanian politicians protested, invoking the "democratic" way of adoption of the "electoral law". «I cannot conceive that the electoral law can be amended by means of a decree-law», M. Popovici said. «Our electoral law […] is a law made with the will of the people, voted by the Great Assembly and no one, besides the Parliament, is entitled to amend it» («Gazeta Transilvaniei», 7 April 1920, p. 1). Politically, the argument should have stood. In July 1919, Maniu had convened the Great National Assembly (which was formally inexistent) in order to be able to withstand I.I.C. Bratianu's intrusion. This did not matter for Averescu, who was determined to take strong action. Legally, the argument did not stand, because even though it had been drawn up by the Ruling Council and had been debated by the Great Assembly, "the electoral law" was not a decree of the Council, but a decree-law of the central authority. Fulfilling the mission, it had been assigned through the Decree-law no. 3632 of 11 December 1918, the Ruling Council had submitted the «electoral reform draft based on universal vote» to the King – not directly, but by means of the Council of Ministers in Bucharest («Monitorul Oficial», I, n. 103, 26 August 1919).

50 «Românul», 29 April 1920, p. 1.

51 I. Maniu, *Discursul-expozeu în Congresul Partidului Național*, Orăștie, Libertatea, 1920, p. 28.

52 Pichat, *Les décrets* cit.

53 A. Rădulescu, *Constituția cehoslovacă*, in «*Academia Română. Memoriile secțiunii istorice*», Bucharest, Imprimeria Națională, 1936/1937, vol. XVIII, p. 27.

54 arincescu, *Decretele-legi* cit., pp. 131-132; Apostol Tofan, *Originea delegării legislative (I)* cit., p. 319.

55 H.C. Maner, *Parlamentarismul în România (1930-1940)*, Bucharest, Editura Enciclopedică, 2004, p. 372.

56 Hamangiu, *Codul* cit., vol. XXII, pp. 497-498.

57 Apostol Tofan, *Originea delegării legislative (I)* cit., p. 319.

58 Tingstén, *Les pleins pouvoirs* cit., pp. 134-135.

59 The situation in Romania was similar to the one in France, where only an alleged "right of necessity" could be claimed to support "full power" laws. In other cases, it was considered that adopting such a law implied an amendment of the Constitution: in Italy, because the 1848 Albertine Statute was flexible and could be reviewed similarly to an ordinary law (G. Jèze, *L'exécutif* cit., p. 46); in Germany, because they were adopted based on the procedure required for the review of the 1919 Constitution (H. Tingstén, *Les pleins pouvoirs* cit., pp. 240, 290).

60 Manner, *Parlamentarismul* cit., p. 373.

61 Onișor, *Adevărate și pretinse decrete-legi* cit., p. 220.

62 Ivi, p. 224.

63 Ivi, p. 226.

64 Ivi, p. 230.

65 Ivi, pp. 228-229.

66 Apostol Tofan, *Originea delegării legislative (I)* cit., p. 343.

67 Hamangiu, *Codul* cit., vol. XXIII, p. 663.

68 Ivi, vol. XXV, pp. 33-37.

69 Ivi, vol. XXIV, p. 531.

70 Hamangiu, *Codul* cit., vol, XXV, p. 899.

71 Ivi, vol. XXV, p. 904.

72 For more details on the «many uncomfortable continuities» between "democracy" and "dictature", see B. Iancu, *Separația puterilor în Consituțiile de la 1866 și 1923*, in *Șefii de stat* cit., pp. 300-309.

73 Hamangiu, *Codul* cit., vol. XXV, pp. 3-4.

74 Ivi, pp. 27-29.

75 Ivi, pp. 30-33.

76 Ivi, pp. 39-44.

77 This decree-law was practically a restoration of the 1864 situation, when, following the model of Napoleon III, Cuza had reserved the right to proclaim the state of siege, with no control. Although the 1864 law was not formally repealed, its validity was extensively debated, since the 1866 and 1923 Constitutions stipulated that they could not be suspended «neither in full, nor in part». Until 1938, the state of siege was always declared by means of de-

crees but based on laws referring to the original law. Generally, the state of siege is seen in relation to law-making by the executive. However, in interwar Romania, these issues remained formally distinct, although they were connected in practice. For a synthetic presentation, see C.S. Cercel, *The "Right" Side of the Law. State of Siege and the Rise of Fascism in Interwar Romania*, in «Fascism. Journal of Comparative Fascist Studies», no. 2, 2013, pp. 205-233.

[78] Hamangiu, *Codul* cit., vol. XXV, pp. 141-142.

[79] The decree did not invoke a constitutional basis, only the report of the Prime Minister (M. Cristea) and of the Minister of Justice (V. Iamandi) and a Journal of the Council of Ministers. However, the report stipulated the supporting "logic": the decree-laws to be ratified had been issued based on art. 14 of the law of 1 April 1937 and, provided that they amended laws or created «new legal states», had to be submitted for ratification. A sophism ensued: «the Legislative Bodies are dissolved and, until they convene, based on art. 98 of the Constitution, the entire law-making action is exercised by means of decree-laws» («Monitorul Oficial», I, 1939, n. 21,). First, paragraph 7 of art. 98 only stipulated that «until the Legislative Assemblies convene, all decrees are legally binding with no need for ratification». Then, no provision stipulated that the ratification had to be done "until the Parliament convened". A question remains: why didn't Carol II wait a few more months?

[80] See Tingstén, *Les pleins pouvoirs* cit., p. 221.

[81] Together with the state of siege, that has already been mentioned, as well as the fact that most laws adopted according to the Constitution were government initiatives and the Parliament had no significant intervention on them (see M. Dogan, *Analiză statistică a „democrației parlamentare" din România*, Bucharest, Publishing House of the Social Democratic Party, 1946, pp. 64-86).

[82] Some scholars even mention a «structural authoritarianism» of the Romanian political system (Iancu, *Separația* cit., p. 250).