

# The Challenges of the Romanian Constitutional Tradition

## II. Between Constitutional Transplant and (Failed) Cultural Engineering\*

MANUEL GUTAN

After the 1<sup>st</sup> part of this work has depicted the transplanted ideological and institutional foundations of the Romanian modern constitutionalism and the way they have been embedded in the Romanian constitutional praxis, this second part will focus on the internal morphology of the Romanian constitutional tradition. It has explanatory finalities, trying to account for the role the constitutional transplant played in the ups and downs of the Romanian constitutionalism. Contextualization through constitutional transplant will depict, in Chapter 1, the main challenges of the Romanian constitutional tradition: the urgency of the modern constitutional design and its historical impact, the role of the legal-political elite, the mechanism of the “irrational” constitutional transplantation, the place reserved for the pre-modern constitutional tradition and, last but not least, the relevance of the “theory of forms without substance” as a Romanian epistemology of the legal transplant. Some general characteristics of the Romanian constitutional

tradition will be outlined at the end. As the Romanian constitutional tradition has (or should have) a present dimension, final considerations will evaluate the relevance of the constitutional past in an ignorant contemporaneity (Chapters 2 and 3).

### 1. *Peculiarities of the Romanian Constitutional Tradition*

The ideological, institutional and political evolutions are relevant for the contextual approach of the Romanian constitutionalism in 19<sup>th</sup> and 20<sup>th</sup> centuries but are far from depicting the whole complexity of the Romanian constitutional tradition. For a better understanding, an explanatory endeavor is necessary, taking into consideration the inner relationships between the constitutional ideas, institutions and practices. All of them are united by the constitutional transplant. As Romanian modern

constitutionalism was far from being an original manifestation, at least as regards the ideas and institutions, it was the creation of the constitutional transplant. At their turn, constitutional practices were not outside the influence of the constitutional transplant. After all, peculiar constitutional ideas and institutions were applied in a specific manner in the Romanian society, more or less completely adapted, especially because they were sometime transplanted in the past. Accordingly, modernizing through transplantation is one of the most remarkable traits of the Romanian constitutional tradition. This is why, this section will try to respond to sensitive questions as regards: why the modern Romanian constitutionalism was built by massively importing constitutional ideas and institutions from abroad; what was the transplant's main causes; who were the actors of the constitutional transplant and what was the impact of the way this ideas and institutions were imported over the Romanian society; why this constitutional transplant may be correctly labeled as irrational; what was the critical reaction of the Romanian intellectuality against this irrational transplant; how this irrational transplant manifested in practice and what was its fate in the Romanian society?

Making a long story short, it can be said that: the Romanian modern constitutionalism has been built through massive constitutional transplant; due to its causes and actors, the constitutional transplant was generally irrational; this irrationality gave birth to an intense intellectual critique labeled "the theory of forms without substance"; this critique was pertinently confirmed by the failure of the constitutional transplant at the end of the 2<sup>nd</sup> World War.

### 1.1. *Incentives of Constitutional Modernization: the (I)logic of Urgency*

The constitutional development of Romania in the 19<sup>th</sup> century was marked by the wish of the Romanian nation to affirm its European political identity, as well as its state independence from the Ottoman Empire. As a consequence, the whole process of constitutional construction had been, on the one hand, the expression of the wish to assimilate the values of the modern constitutionalism and, on the other hand, the expression of the urgent need of a new political and state construction.

For a small South-Eastern European nation who was trying to build a national state at the mid-19<sup>th</sup> century, in a geopolitical context marked by the presence of three empires – a suzerain one (Turkey) and two other interested to expand their domination (Austria and Russia) – the urgency of legal and constitutional modernization does not look surprising. The chances to become a free nation had to be exploited and legal modernization seemed to be the faster and safest way to reach this goal.

The urgency to escape the Ottoman political and economic dependence focused on two main directions: on the one hand, Romania had to hastily prove to the European guaranteeing powers its capacity to internationally act as a modern state, fully endowed with brand new (legal) institutions; on the other hand, its recognition as a sovereign state depended on its capacity to function like one of this sort. These are the reasons why the urgency is both logic and illogic: the logic goes with the political context; the illogic resides in the negative effects the constitutional transplant manifested in the Romanian society. Moreover, both the log-

ic and illogic features are supported by the continuous awareness of the Romanian political elite that acting under urgency could be dangerous and dysfunctional for the Romanian society. Far from confiscating the whole picture of the constitutional transplant's causes, urgency was determining for the amount and type of the legal institutions which have been imported.

1.1.1. *The Urgency of European Legitimation: the Biased Institutional Metamorphosis*

To an outsider, the urgency of the (legal) modernization in the mid-19<sup>th</sup> century Romanian society could seem a reasonable excuse for the important legal transplant which occurred in all legal branches. The question was quite simple: why wasting time to fabricate your own way to constitutional modernity when you get over the hedge the already good looking, legitimate and functional modern constitutional institutions?! To an insider, things were not so easy to be excused. Urgency was not always an argument for giving up a Romanian way toward modernization or, at least, to some Romanian constitutional traditions. Beyond the fascination of the Western European culture, urgency has been experimented as an unbreakable incentive to bring over the foreign constitutional institutions. The Western European powers wouldn't have credited an autonomous or independent Romanian state belt outside their political and constitutional modern standards.

[...] while our experience and national history tell us we need no more than a unicameral [parliament], the foreigners come over with their experience, with the history of their feudal

states and say: redemption resides in a bicameral [parliament] ... [W]e need the Occident and the Occident tells us: I do not understand stability and order in the presence of an unicameral [parliament], because a unicameral [parliament] means revolution and disorder, and because Europe exerts today a moral pressure on us I shall vote the Senate.

[...] Let us be less persistent on our perfect ideas, let the Constitution be less perfect but let's save a country who gets out of our hands if we fail to be united [...] Accordingly, we'll vote the Senate because we desire to have a Romania<sup>1</sup>.

These dramatic words, spoken by a member of the 1866 Constitutional assembly (A. C. Golescu), are relevant for the state of mind that has accompanied the process of constitutional modernization in the mid-19<sup>th</sup> century Romania. Facing the delicate task of architecting the Romanian parliament's structure, the members of the constitutional assembly finally surrendered in front of the national urgency agenda. The eager dispute around pros and cons of bicameralism, balanced with the necessity to promote the traditional unicameral parliament, suddenly finished when it has been understood that national and political legitimation in front of Europe meant to accept the European institutional standard of bicameralism.

In this context, the incentive to constitutional modernization worked, compulsorily, as an incentive to constitutional transplant. The foreign institutions had to be transplanted not just because they were already modern but because they represented the necessary legitimation to enter the exclusivist club of civilized and independent European national states. As a consequence, the legal modernization was less a process of rationally balancing the needs of the Romanian society with its legal

traditions and the external legal markets of modern institutions, but rather a biased institutional metamorphosis. Modernization was a process of purposive national differentiation by means of legal-institutional inter-national uniformisation.

1.1.2. *The Urgency of the Nation-State's International Legitimation: the Internal Sovereignty and the Policy of "Fait Accompli"*

Art. 2 The first duty of the State's powers is to co-operate for the accomplishment, strengthening and defending the unification of the [Romanian] Principalities in one single state.

Art. 3 The most sacred duty of the Romanian is to sustain and to defend the nation's unification in one single Romanian State.

Inscribed in the constitutional project launched at 1859 by the Central Committee of Focșani (1<sup>st</sup> Title), the above listed articles are also relevant for the state of mind which dominated the process of constitutional modernization in the mid-19<sup>th</sup> century Romania. While equivalent modern constitutions in Western Europe were carefully designed in order to accomplish the demands of liberal constitutionalism i.e. limitation of power and protection of human rights, the Romanian constitutional project subsumed all this values to the most generous and urgent goal of national and political unification.

Building the Romanian modern and unitary state was at that time a continuous and fervent political project of the Romanian political elite, designed to counter-balance the external political pressures for a plurality of Romanian states (much more exposed to imperial domination). Some

European powers (especially France) were willing to support the Romanian political efforts towards political unification and there was no time to waste for academic or scientific debates about the proper ways of modernization. However, diplomacy was not only a preface for the Romanian political unification but it also was a positive witness of its accomplishment. The policy of "*fait accompli*" became not only a symbol of the Romanian willingness for political unification but, in the same time, an acknowledged burden to prove the solidity and opportunity of the Romanian political achievements. Thus, the election of prince Alexandru Ioan Cuza in both Moldavia and Wallachia (1859), despite the fact that the Paris Convention of 1858 provided for different princes (*gospodari*) in the Romanian Principalities, was a remarkable piece of "*fait accompli*". The fact happened, the European powers acknowledged. Notwithstanding, the limitation of the international recognition of the Romanian political unification just to the reign of Cuza has turned the political and legal modernization in a race against time.

The birth of the Romanian national state became a sign of international political differentiation whereas (constitutional) modernization was a path to international legitimation. The national state had to be urgently consolidated in order to amplify the independence (from the Ottoman Empire) agenda. If legitimation and independence meant internationalization, then the roots of (constitutional) modernization had to be found abroad. Particularly, the constitutional transplant developed as a Romanian "*declaration of independence*". After decades when the law had been enacted from abroad, the fact that the Ro-

manian elite could import what it wanted, from where it wanted and in the amount it wanted was a clear celebration of inner legal autonomy. Consequently, the constitutional transplant was the fastest and most symbolic way to reach the national project and the demand for a foreign dynasty on the Romanian throne was a part of this design. The “invention” of the Romanian national state was a priority *per se*, although, as the project of the Focsani Central Committee highlighted, it seemed to ask for sacrificing some of the modern constitutionalism’s values. Nation and its unitary state were cherished and prized whilst the human being occupied a humble place in the picture. Paradoxically, the emergent Romanian liberal bourgeoisie did not fight against the state in order to impose the idea of liberty, as it happened in Western Europe. In Romania the liberal bourgeoisie has fought *for* the state, as a proper means to create the nation and, implicitly, to modernize the Romanian society. As Silvia Marton correctly emphasized,

[...] [T]he Romanian nation-state... is the result of a ‘context’ – the conflict between the empires and the guaranteeing powers – which set the political construction under the exclusive imperative of the state unification and less under the citizens’ will to base their relationships with the power on the new theoretical and intellectual foundations [of liberal constitutionalism, M.G.]<sup>2</sup>.

In this context, the liberal constitutionalism, the constitutional monarchy, the foreign dynasty or the representative government were more prefabricated bricks in the hands of the hurried Romanian national builders than the well and carefully processed stones in the hands of a visionary architect<sup>3</sup>. Constitutional monarchy was (also) valued for its wide success in Western

Europe and less for its inner advantages for limiting government, the foreign prince has been demanded more for his European connections than for his eventual abilities to promote modern constitutionalism.

Politically, the legal modernization of the Romanian society in the 19<sup>th</sup> century was a process of continuous delimitation from and repudiation of the suzerain power – the Ottoman Empire. The political and legal modernization through massive legal import proved a perpetual awareness of the internal sovereignty (inside the Ottoman Empire) coming up from the medieval era, formally re-negotiated with the suzerain power and stipulated in modern legal instruments. Legal and state modernization was done despite the external political dependence, constantly tending to overcome its limits. Instead of being the outcome of the fully gained state independence, the legal modernization in Romania has rather been the cause of it.

## 1.2. *The Actors of the Constitutional Transplant*

As regards urgency, it would be easier to understand why the 19<sup>th</sup> century Romanian constitutionalism had been marked by a massive constitutional import, especially from the Belgian and French models. But the urgency of building and consolidating the young Romanian national state was just a part of the picture. It explains why the constitutional and, generally, the legal transplant were so massive but it doesn’t clarify the important role the French and Belgian constitutional systems played in the story.

Like everywhere in South-Eastern Europe, the main actor of the legal transplant in Romania was the political elite. But this idea doesn't cover all the Romanian reality. We are here in the presence of some Romanian political elite whose members massively graduated French law schools (mainly the Paris ones) and many of them even took their PhDs in law in the same places. So, we are rather in the presence of a legal-political elite. At the moment of the massive legal transplant, i.e. the reign of Prince Alexandru Ioan Cuza, the number of the Romanian politicians having a law degree in France was considerable.

This situation is crucial for grasping the whole Romanian legal transplant process. It explains why the legal transplant has been focused both on legal ideas and legal institutions, why the legal transplant was so massive and had the Belgian and French legal system as the leading models, why the legal change took place so fast and why the codification was the main law source used by the Romanian transplanting legal-political elite. It helps to understand why the other legal actors, i.e. legal scholars and judges, had such a limited influence on the process. Moreover, it could be better figured out why the expectations were so high, moving up to a harsh social engineering, and why the transplantation's effects were so irritating and, to some degree, disappointing.

The Romanian legal-political elite of the 19<sup>th</sup> century was not a mere professional group pursuing the legal transplant for the sake of socio-legal modernization and, in the same time, was not a pressure group competing with others for the favors of the political power. First of all, it did not act like a professional legal community. Its members acted rather like a political group

with legal education than like a professional legal community endowed with transient political powers. There were no professional values and traditions to be protected and sustained but rather policies to be promoted, being backed-up by foreign legal values and traditions. Secondly, in a society with a huge illiterate peasant population (80%) and a timidly developed bourgeoisie, the legal-political elite – represented by the followers of the old and powerful landowners layer – did not manifest in terms of professional pressure force but rather in terms of governmental force.

This was, perhaps, one of the most important differences between the Romanian model of undertaking legal transplant and other models in the region: the magnitude of the Romanian legal elite's capacity to use political power as a strong transmission-belt for achieving social change through legal transplant. The Romanian legal-political elite gradually acquired high political strength and this meant high transplanting strength. Its aim was not primarily the implementation of the French or Belgian legal traditions in the Romanian society but rather the modernization of the Romanian society using French and Belgian legal traditions as instruments of it. Here resides the difference between what A. Watson cornered as the law makers' tendency to "develop their own legal culture"<sup>4</sup> and the power of the same group to undertake socio-cultural engineering through law.

Nevertheless, discovering, pricing and assuming the French and Belgian legal traditions was a necessary prerequisite of the Romanian social and legal modernization. The discovery has been done in successive waves during the 19<sup>th</sup> century, accompanying the increasing number of young and

rich Romanians attending the French law schools. Pricing was inevitably (along other reasons) a consequence of the strong complex of inferiority determined by the Romanian society's backwardness. Assuming was the natural consequence of the former two aspects. As the process of pricing has implied a firm detachment from the Romanian "archaic" and feudal culture, assuming was more than just a regular applauding break or a passaging manifestation of sympathy.

The magnitude of the French and Belgian modern legal traditions' assumption could be measured through the huge impact the French culture had on the 19<sup>th</sup> century Romanian elite. Beginning with the 1820s, everything became French to the Romanian elite: clothing, cuisine, furniture, salon manners, books, theatre, the high life, education, the intellectual life and the political life. Up to the beginning of the 1<sup>st</sup> World War, the governmental meetings had been held in French, despite the fact that the monarch – Carol 1<sup>st</sup> of Hohenzollern Sigmaringen – was German<sup>5</sup>. Thus, importing the law was just a small part of the picture. The "French-isation" of the Romanian elite through transplant was a deep and widespread social movement covering a plurality of social dimensions<sup>6</sup>.

In this context, to assume the French culture meant rather a dramatic switch in Romanian legal tradition or, precisely, to give up the existing Romanian legal tradition. In Patrick Glenn's terms<sup>7</sup>, the members of the Romanian (legal) elite have become the new members of the French and Belgian epistemic (legal) communities. And, if tradition means information, this membership implied a more or less conscious discourse about it.

This is why legal ideas and legal language became, to the Romanian elite, the most important instruments to promote their new affiliation back home. Nevertheless, ideas and concepts were encapsulated in the Romanian domestic context, with unexpected more or less negative effects. This process can be interestingly pictured for the penetration into the Romanian political and juridical language of the concepts related to constitution. The two Romanian variants of the concept – *constituțiune* and *constituție* – entered the Romanian vocabulary from the French language between the '30s and '50s, along with the revolutionary French movements of ideas<sup>8</sup>. Particularly, the Romanian elites have borrowed more the idea than the ideals of the modern Constitution. Juridically, terms like *unconstitutionality*, *unconstitutional*, *un-constitutionalism* prove, at least, the postulation of the constitution's supremacy. In the same time, defining the constitution as the general regulation of the state was pretty common in the period. On the other hand, as long as the delicate years of fighting for national unity and internal sovereignty began, constitution had been understood rather as a formal-juridical prerequisite for achieving unity and sovereignty. Thus, without losing its constitutive idea of limiting power, the constitution started to become a flagship of national unity and sovereignty. Along with a specific lack of rigorous debate as regards the constitutional past, this was the cause of a pathologic lack of debate concerning the way power should be limited. This explains why, in 1866, it was more important to have a constitution instead of understanding its complex goals. This explains why the debates of the Constitutional Committee often concentrated on the existence *per se* of

the constitution and completely neglected the problem of *checks and balances*. Thus, Romanian elite was more interested in constitution and less in constitutionalism.

As a consequence, the interest for the Romanian culture or for the Romanian constitutional tradition was dramatically diminished. But this happened in the positive legal normativity rather than discursively. The past or the Romanian legal tradition played more an identitarian part in the political discourse than an effective constitutive part in the process of legal modernization. Actually, the Romanian elite became the active preacher of the French legal ideas, concepts or institutions and legal transplant became the proper instrument to seed them in the Romanian society. Illustratively, Mihail Kogălniceanu, one of the most prominent intellectual leaders of the Romanian 1848 revolution, while preaching the necessary linkage with the Romanian legal traditions in the process of legal modernization, prepared a constitutional project more than 60% faithfully transplanted from the 1848 French Constitution<sup>9</sup>. Interestingly, the same politician got the Prime Minister chair during the period of the most massive legal transplants: 1863-1865. We are here in the presence of a paradox: while the need of national identity postulated a sustained fabrication or mythisation of the past (including here the legal traditions), the current mechanism of constitutional modernization was the massive constitutional transplant. The need of a symbolic and romantic use of the history, projected to build a national identity (speculated by Kogălniceanu under the same French intellectual influences), finally surrendered in front of the stringent expectations for (constitutional) modern-

ization which could not be acquired but through foreign legal institutions.

### 1.3. *The Avatars of the Irrational Constitutional Transplant*

The indebtedness to the French-speaking Western European culture and law, especially the French and Belgian ones, has transformed prestige (along with the urgency) in the central justification background for this extremely biased legal (including constitutional) transplant<sup>10</sup>. Thus, the authoritativeness of the imported institutions turned into an efficient instrument into the hands of a Romanian political elite continuously preoccupied by its political legitimacy. Accordingly, constitutional engineering through constitutional import became a part of a change policy less understood as a blueprint for modern improvement grounded in a "culture of experience, based on economic dynamics and social prevision"<sup>11</sup> and more on a strategic political discourse focused on nation and nation-state. The "law as instrument" perspective became the basic approach of development towards modernization, in the eyes of a Romanian elite convinced that it would be able to master the social and economic change if it could properly master the law. Therefore, the top-down reform was centered on the idea that building the political nation and shaping the constitutional architecture of the nation-state will naturally attract the subsequent necessary social, cultural and economic change. In a sum, constitutional modernization primarily meant at that time an almost completely artificial constitutional con-

struction by way of massive constitutional import. The modern constitutional system has been valued as an intrinsic end of the modernization process and foreign constitutional institutions the proper bricks to build it. In that context, Romanian national identity resided in its newly fabricated constitutional system.

Being evaluated as an "irrational legal transplant", this artificial constitutional construction had many paths of evolution and quite complex ways of manifestation. The fact that the constitutional modernization has been carried out through massive legal transplant, without being in the presence of an externally imposed reception, raises questions about the inner mechanism of the constitutional change. What exactly meant the impact of urgency in this whole story and what exactly was the magnitude of the prestige factor? Some particular aspects may be envisaged:

- Irrationality seems to result from the interesting balance between the Hegelian constitutional expressivism, often invoked by the Constitutional Committee's members, and the important amount of the legal institutions imported from the Belgian Constitution of 1831. As D. Tacu stated,

[...] [A] Constitution plays in the life of one people the role that character plays in the life of a man. For this reason, having the burden to vote a Constitution, we must look at all senses and reason of the people and work as to respond to its expectation, to whole its important necessities. The law must regulate a progress, tending to the future but it should never strike that principle a people stands its existence on<sup>12</sup>.

The same linkage between national culture, constitutional culture and constitution was envisaged by the Consti-

tution's rapporteur Aristide Pascal. A successful constitution depends, from his point of view, on the intimate cohesion between one people's needs, constitutional institutions and constitutional longevity<sup>13</sup>. Unfortunately, at the end of the day, Romanian character did not always find out the path to an institutional expression in the Romanian Constitution of 1866. Or, to put it in other way, there was sometimes a manifest contradiction between the Romanian character or «soul» to be expressed in the Constitution and the Romanian need to urgently build a constitution. In this context, Romanian constitutional culture was more something which had to be engineered in order to sustain the nation-state project. Anyway, this evolution should not overshadow the historical importance of the 1866 "constitutional moment" when the nation-state has been built through voluntary and free constitutional design by the deputies of the Romanian people. If an irrational choice existed, it was, at least, a free choice.

- Generally, the period of effervescent legal transplant (1839-1866) has been dominated by an almost complete lack of parliamentary debate. Extensive debates occurred in the Constitutional Committee of 1866 but, beyond the expectations, these only concerned some particular aspects, while neglecting other important ones e.g. the division of powers and the mechanisms of *checks and balances*. The prestige and authoritativeness of the transplanted law were considerably high, aspect which made pointless the choice based on comparative analysis. Urgency played its pecu-

liar role, by overshadowing any need of deep enquiries.

- On the other hand, the nation-state building agenda had its own place in the picture. The enforcement of the young Romanian state's internal sovereignty was a sufficient argument for legislating without questioning. As regards the division of powers, for example, the obsession of having a state "in the book" drove away momentarily the need of having a living state. The constitutional postulation of three classical powers – legislative, executive and judiciary – was satisfying for the Romanian fathers of the 1866 Constitution. The particular way of interaction between powers was completely out of debate and the enquiry about the mechanisms of the parliamentary regime has been left to the mercy of the posterity.
- The argument of the Western law's authority, legitimating the recourse to legal transplant, was explicit rather than implicit. This happened because the few issues which have been debated have regularly balanced the internal sources of legal change with the external ones. Moreover, in the 1866 Constitutional Committee there almost permanently been an incentive to legal adaptation and a firm refutation of the legal imitation. Interestingly enough, there was here a fragile delineation of the blind and servile reception from the critical comparative analysis of the foreign constitutional solution. As N. Ionescu firmly stated, talking about the reception of bicameralism from England,

[...] [W]e have enough necessary reforms to introduce in our law, no need to violate our old customs just for the sake of innovation and imi-

tation... [I]f we want to imitate England, let's not humbly imitate her<sup>14</sup>.

Irrationality regularly occurred here not as an unconscious disregard of the internal legal-cultural solutions and social needs but as a conscious renunciation to them in favor of the Western legal solutions. Situated between the "moral pressure" of the Occident, the urgency of the national-state's consolidation and the undisputable authority of the Western legal tradition, the interest for national constitutional solutions had to surrender.

- Moreover, irrationality manifested as the belief that mastering the law will somehow magically produce social change. The Romanian legal-political elite did not understand the distinction between importing ideas and importing institutions. While acquiring ideas meant a normal process of mental metamorphosis of their minds, leading from ideas to institutions, importing legal institutions was thought as being a process leading from institutions to ideas. Legal norm was meant to produce mental metamorphosis in Romanian society.

Otherwise, the "law as instrument" perspective was normal for a socio-legal engineering where changes are to be produced top-to-bottom. In this context, irrationality occurred as legal-political elite's conviction that "where the laws are good, everything is going to be all right"<sup>15</sup>. The "goodness" of the law was formally evaluated, illustrating a Kelsenian way of law (re)production: a law is good, it has been said, if it complies with the constitutional principles. The Constitution, through its "good" encapsulated principles, not only produces the juridical nation but, through substantial (re)production of law,

produces “good” change in society. In other words, the Romanian society is not capable of self-reproduction but through the juridical normativity. The law is confiscating the social developments and social culture, being, at its turn, confiscated by the Romanian ruling elite. Thus, Parliament had become a huge laboratory where society was engineered through ceaseless and numerous legal productions, being expected to self-transformation after the image and likeness of its creators. In this context, the law did not necessarily need to fit the social realities, if it could and aimed to recreate the social reality. Being deeply rooted in the majority of the Romanian elite’s minds, this vision resisted to any attempt to revise the Constitution in order to fill in the gap between the imported institutions and the Romanian society.

#### 1.4. *Constitutional Transplant and Constitutional Tradition*

Despite the appearances, the legal transplant hasn’t always and unconditionally been a compulsory instrument of legal modernization in mid-19<sup>th</sup> century Romania. Surprisingly, taking into consideration the important amount of imported institutions, at least in the area of constitutional reform the possibility to appeal to the Romanian tradition has been cornered as early as the debates of the constitutional assembly got started.

[...] [I]f it exists in other countries should we also have it?<sup>16</sup>

This was the question of the day in the time of the 1866 constitutional reform and

it synthesized the dilemma of the modernizing Romanian ruling elite: to what extent the constitutional reform and, generally, the legal modernization, should be carried out by constantly underpinning the Romanian legal tradition(s) or through the import from the European market of legal models?

The panel of the disputed issues was quite brief – related to unicameral parliament, orthodox confession, naturalization, citizenship and human rights – but the intensity of the debate was relevant for the magnitude of the problems at stake. The struggle for a Romanian constitutional identity, more or less underpinned by the historicist perspective, gave expression to a Hegelian understanding about the intimate linkage between one people and its own constitution, between the national culture and constitutional values. At least in the case of human rights, the refutation of any kind of constitutional engineering was obvious<sup>17</sup>, doubled by a firm conviction on the uselessness and lack of efficacy of any sort of constitutional regulations which neglect the real needs and cultural peculiarities of some people. For G. Știrbei it was obvious that

[...] [I]t is too easy and very comfortable to talk only about the human rights and imprescriptible natural rights and other beautiful and fancy things [...] but it is more difficult for somebody to think about the nature of those liberties, to distinguish these liberties from others and see, according to one’s own culture and social development, what liberties could be prescribed [...] to see, for example, for our country, which liberties could be practically enjoyed and not just granted on paper [...]<sup>18</sup>.

This expressivism accurately manifests the tension between the desired-to-be Romanian constitutionalism and the universal constitutionalism and witnesses the

already existing consciousness about the possible negative effects of the constitutional transplant.

It is worth noticing that debates have run regularly out of a deep interest for the balance between the necessity to preserve tradition and the demands of modern constitutionalism, e.g. limiting power. The contextual analysis which occurred as regards, for example, the structure of the parliament, was interested to recover (or to build) a blueprint of social unity in the Romanian society, but no real attention was paid to the mechanisms of power. The fight for unicameralism / bicameralism was underpinned exclusively for the sake of tradition or "institutional continuity"<sup>19</sup>, without any thorough analysis<sup>20</sup> about the impact of this structure on the division and equilibrium of powers. As Silvia Marton correctly asserted, the interest for the Romanian constitutional tradition was often a chance for the Romanian "founding fathers" to run away from a "stringent intellectual and juridical reflection" on the significance of the new constitutional order to be installed<sup>21</sup>. Beyond a clear historical truth, tradition has been exploited both by the proponents and opponents of unicameralism, its logic functioning under the same mark of the authority as the foreign legal models' logic did.

#### 1.5. *Epistemology of Constitutional Modernization: the Theory of "Forms without Substance"*

The pre-communist Romanian intellectuality was dominated by a constant and strong debate about the interplay between tradition or culture, on the one hand, and

institutional import in the process of social, economic, political and legal modernization, on the other hand. Departing (also) from a critical analysis of the meeting between the constitutional import and the Romanian society, this theoretic perspective was a genuine reaction against the above mentioned irrationality of the Romanian constitutional design. Therefore, a real underpinning of the Romanian constitutional self could be realized only by recovering from the past this particular Romanian understanding of (constitutional) culture and national (constitutional) identity. Forgotten today in the juridical intellectual space, the theory of "forms without substance" could regain its place as an important epistemological dimension of the Romanian legal / constitutional identity, i.e. a peculiar way of self-understanding and understanding the other in law.

The "forms without substance" theory started after 1860 with a simple empirical analysis: the evidence of a huge discrepancy between the "legal" Romania and the "real" Romania, the important gap between the imported institutions in all dimensions of Romanian life and the socio-political and economic realities. It was launched especially when a leading Romanian philosopher and politician – Titu Maiorescu (1840-1917) – a member of a conservative political faction, harshly criticized, in the famous article published in 1868 – *In contra directiei de astazi in cultura romana [Against the contemporary direction in the Romanian culture]*, the negative effects of the (legal) institutional import in the Romanian society. Thereafter, the intellectual reactions to this situation were mainly directed toward the institutional import, in an endeavor to grasp national identity beyond its artificial

shells. The interplay between Romanian culture and society, on the one hand, and imported (legal) institutions, on the other hand, was not the exclusive analysis subject for a small group of legal professionals. On the contrary, the problem was largely analyzed by legal scholars, lawyers, historians, sociologists, philologists, philosophers, anthropologists and economists and still emulated the intellectual dialogue even in the period between the World Wars.

Accordingly, this so-called theory wasn't a systematic rational and scientific attempt to deal with the phenomenon of (legal) institutional import. It was rather a sum of genuine intellectual reactions to a delicate social, cultural and economic situation directed, from diverse ideological perspectives, to criticize, explain and reformulate the (legal) modernization process in Romania. Their common core resided in the evaluation of the institutional import's role in the process of modernization and its management in the context of a crescent Romanian identitarian crisis. Due to the significant place held by the legal engineering in this context, legal import has been an important benchmark of this debate. In the same time, due to its strong impact on the Romanian society, the constitutional transplant and the 1866 Constitution have taken the headlines of this intellectual debate.

Despite its lack of systematic approach, the theory of "forms without substance" could offer a coherent set of ideas about the interplay between law and society, about the imported law and socio-cultural background in the importing society; about necessity, sources and extent of legal import, including the role of legal elite in this process; about the balance between legal tradition and foreign law as providers of legal

solutions; the conditions of the imported institution's success in the receiving society; the necessity of the top-down legal engineering and its interplay with a bottom-up (legal) modernization.

The debate's main categories were "the form" and "the substance" used more or less explicitly in a wide range of ideological perspectives but covering, to the end, a core meaning: "the forms" usually meant the cultural institutions generally, or legal/constitutional institutions particularly, imported from Western Europe; "the substance" meant regularly the general culture of the Romanian society, its traditions, mentality and behaviors. The interplay between them, incremented in the famous formula – "forms without substance" – are concluding not just for the apparent conclusion that "forms" do not fit the "substance", but for a wide panel of problems concerning "why substance should need the forms", "what could be done so that forms fit the substance", "why substance should value more than forms". Accordingly, the theory of "forms without substance" is not just descriptive, explicative or even critical, it is also projective. It could be understood as a blueprint for successfully dealing in the future with legal and social change through constitutional import.

The emphasis on substance is not a mere preoccupation for legal efficiency as a positive coordination between Romanian culture and legal import. It is rather a conservative perspective inserted in a process of being conscious about national identity and legal identity. It is an endeavor to consciously capture the Romanian cultural and legal self's identity. Relevant in this sense is the comparative approach of the Romanian law and culture with others which,

albeit not a methodological and thorough one, frequently created the necessary context for distinctiveness.

Not accidentally, the first intellectual positions have sustained an evolutionist (presumably Spencerian) attitude, denying any endeavor to modernize the Romanian constitutional system beyond an organic development in the Romanian society. Consequently, the constitutional transplant was stigmatized, being divested by any real chance to produce some real and effective social, political or legal change. But the backwardness of the Romanian society made, finally, the orthodox proponents of the Romanian way toward constitutional modernization to acknowledge that the constitutional transplant was inevitable. Romania has been too deeply and too long enslaved in the feudal times to afford to spend time searching unconditionally for an original way toward constitutionalism. On the other side, constitutionalism was already invented and ideologically assimilated even by the Romanian political elite since the '30s. All that remained to do was to find out the proper way to manage this inevitable constitutional transplant. Accepting the inevitability, the evolutionists were eager to propose the underpinning of the imported constitutional institutions (the forms) by a step-by-step developed Romanian culture (the substance) by that saving the Romanian way of constitutional modernization.

Through this idea, the problem of fitting between the transplanted constitutional law and the Romanian culture entered the scene. The entire debate around the problem of "forms without substance" was, in fact, an attempt to solving this challenge of cultural fitting. Getting the constitutional institutions from abroad and hoping they

will be adapted and assimilated by the existing Romanian culture was a theoretical solution but it found out many opponents. The Romanian political reality during the reign of Carol 1<sup>st</sup> itself was already proving that this adaptation can be a serious distortion and compromising of the imported constitutional institutions. As the main aim of the constitutional transplant was to recreate in the Romanian society the same functionality of the modern constitutionalism like in the exporting societies, the effect of compromising was unacceptable.

The solution has come from other theoretical perspective, namely, a total cultural engineering. If the transplanted constitutional institutions would have functioned correctly only in their original cultural environment, that one should be created in Romania. Consequently, the massive constitutional transplant would be followed by important changes in mentalities and political praxis of the Romanian society. But, as it was highly demonstrated, especially by the social reality, massive constitutional transplant has produced an extreme cultural irritation in the Romanian society. Taking into consideration the huge mass of illiterate peasants the irritation produced less reactions of revolt and more a reaction of puzzlement. This "legal electroshock" or "legal electrocution" was the nocive cause of the social paralysis which followed.

The theoretical consequence of this ideological evolution was the pleading for the rational constitutional transplant. In order not to produce extreme irritation and getting a critical eye, the constitutional transplant should be done when it is necessary, by taking the correct quantity of institutions, by focusing on the pertinent constitutional institutions and on the proper

constitutional model. Moreover, it should be done after fully considering the constitutional solutions the Romanian constitutional tradition would have to offer. By doing all these, the constitutional transplant would not only avoid extreme negative cultural irritation but would favor the necessary cultural engineering. This time, the cultural engineering was supposed to produce positive irritation for societal change instead to determine negative irritation for societal petrification. This way, the constitutional transplant would be successful<sup>22</sup>.

Generally, to the Romanian intellectuality involved in the "forms without substance" debate, the successful constitutional transplant meant a totality of foreign legal institutions (the forms) rationally imported, i.e. when and from where is needed, in the necessary amount, which consequently fit the Romanian culture (the substance) not only because they respected its particularities but also because they succeeded to engineer it. The successful constitutional transplant was the one that achieved the sufficient social change (through socio-legal engineering) in order to allow the imported constitutional institutions to function at their parameters and finalities existing in the exporting society. They were purposely meant by the importing Romanian elite to achieve the same purposes. This did not mean anyway to lead the social engineering to the impossible outcome of transforming the Romanian society into the French or Belgian ones, even if some enthusiastic Romanian intellectual leaders would have desired it. For a change, the birth of a new Romanian society and a new Romanian (constitutional) culture has been envisaged – a synthesis between the old Romanian one and the Western ones –

capable to sustain the correct (in the Western mode) functioning of the imported constitutional institutions.

For example, the successful transplant of the parliamentary regime would have meant producing, through socio-legal engineering, the sufficient change in the Romanian political and legal cultures so as to determine the functioning of the Romanian parliamentary regime at the minimum of parameters accepted in Western Europe. This would have not excluded the existence of a Romanian way toward the modern parliamentary regime (as nobody could sustain the existence of a unique Western European pattern of practicing the parliamentary regime). But this Romanian peculiar parliamentary regime should have been an authentic one. This is why, the fact that the Romanian ruling elite did not afford to succeed<sup>23</sup> to implement a fair parliamentary regime but rather a sort of limited monarchy, could be called a failure of the constitutional transplant undertaken at 1866.

Generally, if a failure existed, it was a failure to change the mentalities. This happened because the elites have expected from the imported legal institutions to be the active and direct factor of the mental and social change. I did not accidentally use the ideas like "the forms must create the substance". Behind it there is no suggestion that the Romanian elite of the 19<sup>th</sup> century has done something for systematically changing mentalities in the Romanian society. The political elite truly believed, to some point, that the institutions themselves will produce the necessary mental change, disregarding their necessary contribution. The huge rate of illiteracy lasting till the beginning of the 20<sup>th</sup> century witnessed for this reality.

### 1.6. *The Failure of the Constitutional Transplant*

The evolution of the Romanian modern constitutionalism until the rise of the communism proved that the analysis of the "forms without substance" theory was both a correct radiography of the phenomenon and a true prophecy for the future.

The Romanian political elite did not succeed to fully accomplish the demands of modern constitutionalism and cope with the democratic expectations of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century. The failure of the Romanian constitutionalism (as long as it really existed) accompanied the failure of the Constitution, considering it barely succeeded to overcome the nation-state centered approach to a thorough and intellectually elaborated theory of limited government.

Symptomatically for the entire legal modernization process, the failure of the constitutional transplant didn't mean the rejection of the imported institutions by the Romanian society or their partial application. The imported legal institutions have been present in the social and state's mechanisms but without functioning at the expected Western parameters. Speaking about the Romanian parliamentary regime, Paul Negulescu, a leading Romanian specialist in public law, captured the reality in emblematic words: "the appearance of a parliamentary regime"<sup>24</sup>. Extended (with some exceptions) to the entire constitutional modernization process, one could speak, from this standpoint, about an "appearance of constitutional modernization" through legal transplant. This is why the entire history of the Romanian constitutionalism until 1938 could be summarized

in antonym terms of reality versus non-reality, truth versus false, truth versus lie, seriousness versus superficiality, the understood versus non-understood, essence versus appearance, cause versus effect, real versus ideal, illegality versus legality. Here, the reality, the truth, seriousness, the understood, the essence, the real were the Romanian society and its peculiar needs, while non-reality, false, lie, superficiality, the non-understood, the appearance, the ideal represented the transplanted constitutional institutions and the fake constitutional life they gave birth to.

Generally speaking, the true problem of the Romanian constitutionalism was not the lack of fit between the imported law and the Romanian society but, conversely, the existence of fitting through adaptation. Paradoxically, in Romania the constitutional transplant failed due to its adaptation to the Romanian cultural peculiarities. Constitutional transplant surrendered in front of the Romanian (legal) culture without succeeding to (sufficiently) engineer it.

In these conditions, the fall of the Romanian constitutionalism in 1938, during the dictatorship of King Carol 2<sup>nd</sup>, was not only the outcome of the international context, which largely encouraged the authoritarian regimes, but also the effect of the Romanian political elite's incapacity to cope with the correct parameters of the parliamentary regime<sup>25</sup>. Its ideological and discursive political endeavors were far from being sufficient to overcome the modernization of ideas, language and institutions toward a modernization of political mentalities and habits. As Hans Christian Maner puts it

Someone can speak only apparently about a modernization crisis. Properly speaking, any mod-

ernization process has occurred. Modernization appeared – in the same manner as the word ‘democracy’ – like a formal principle or ideological construction. Only concepts have been used and the modernization process has been mimed with all its afferent consequences<sup>26</sup>.

Consequently, the same author draws up the correct and implacable conclusion:

It must be underlined again that, in Romania, the process of recovering, of building and spreading ‘through institutional measures and social reforms those social, mental and political structures raised in other places, has failed<sup>27</sup>.

In this context, one could better understand the constitutional changes after 1938 and the ideology behind them. The authoritarian 1938 Constitution allegedly was a response of the truth against falsity, the need to let behind the appearance of parliamentarianism and constitutionalism and practice a functional political regime perfectly fitting the Romanian society.

The communist period left behind the debate about “the forms without substance” but, not surprisingly, the conclusions of this theory manifested as an excellent forecast for the fate of the communist constitutionalism. The Constitutions of 1948 and 1952 were samples of irrational constitutional transplant under the pressure of the Soviet imperialism. It was a massive ideological and institutional transplant, achieved in a Romanian society who did not need it and inevitably following the Soviet constitutional model. It was a complete inorganic constitutional change which determined an extreme irritation of the Romanian culture. It was built by ideologically denying all that represented the modern Romanian constitutionalism with its ups and downs. This is why during the communist decades

there was no thorough debate on the goods and evils of the constitutional past, about the Romanian constitutional tradition. In a society learning a complete new ideology, the linkage to the past was normally absent.

Maybe the most efficient thing done by the communists, taking into consideration the success of the constitutional transplant, was the cultural engineering. By mass indoctrination, ideological terror and political pressures, they created the cultural climate necessary to the functioning of the political and constitutional institutions. But a real (as opposed to false) constitutional order was far to be installed. The 1965 Constitution has brought a Romanian way towards communism and, in a totalitarian climate, the gap between constitutional text and official ideology, on the one hand, and the effective political and constitutional life, on the other hand, recreated the old dichotomy between true and false. The appearance of a constitutional life, even a socialist one, was the effect of the same adaptation of the communist constitutional import to the cultural data of the Romanian society, never been enough reeducated so to perfectly cope with the imported institutions. Being sustained by force, fear and terror, this false constitutional life was inherently condemned to extinction.

#### 1.7. *Remains of the Constitutional Past*

Drawing a line, we can summarize the main features of the Romanian constitutional tradition coming from the past and worthy to be observed for contemporary and future developments of the Romanian constitutionalism:

- The importing mentality and its main consequences: the need to almost always reform the constitutional system through constitutional transplant and the lack of a consistent constitutional tradition;
- The obsession for the institutions and the belief that by simply changing the institutions, the legislator could change also practices and mentalities (legal-cultural engineering);
- The obsession for legal formalism and the lack of interest for legal effectiveness in legal practice (the forms without substance);
- The obsession for the state as the main political identitarian expression of the Romanian nation. National state encapsulates the Romanian's struggle for differentness and liberty;
- The central role of the Romanian juridical-political elite in creating, from top to bottom, the Romanian modern constitutionalism;
- The Romanian ethnocentric constitutionalism;
- The authoritarianism of the Romanian head of state (no matter monarch or president); the extreme personalization of the political power which lead frequently to dictatorship and totalitarianism;
- The appetite for authoritarian regimes. Basically, the Romanians didn't succeed to practice a real democracy and they developed only partially the mechanisms of the modern (liberal) constitutionalism.

2. *Epilogue: the Revolution of 1989 and the Contemporary Romanian Constitutional Culture: a Present (formally) Looking for a Past*

The year 1989 has brought the fall of the Romanian communism, after the bloody Revolution of December. Over one thousand dead and the Ceaușescu's execution have brought to an end the harshest communist dictatorship in Eastern Europe. The fight for freedom and dignity opened the door for the social and constitutional change.

The first constitutional acts have been adopted by the newly constituted National Salvation Front and its Council, both in order to avoid anarchy after the abrupt breakdown of the communist regime and to consecrate the democratic values of the future constitutional reform. Its basics mainly envisaged "the giving up to the leading role of one single party and the settlement of a pluralistic democratic system of government; the organization of free elections; the separation of the legislative, executive and judicial powers and the election of the political leaders jus for one or two mandates". The decree-law no. 2/1989 from 27 December, by regulating the structure of the new political power, was not in such a hurry to apply these values, at least the separation of powers. The National Salvation Front's Council was extremely powerful and any balance between legislative and executive was still inexistent. But there were hard times and the young Romanian democracy had many enemies. The building of the Romanian democratic constitutionalism was put on the shoulders of a future "constitutional commission". Anticipating the will of the Romanian people (never di-

rectly consulted) the decree-law no. 2/1989 was proclaiming the Republic, thus giving expression to the strong anxiety against the monarchy, developed after decades of communist propaganda.

The road to democratic normality was long and full of perils. Two decrees-law – no. 81 and no. 82/1990 – transferred the political power from the National Salvation Front's Council to the Provisional Council of National Unity (CPUN), after the National Salvation Front (FSN) has declared its intentions to participate to the first democratic elections as a political party. The new organ was composed of the deputies of all the political parties existent at the date of its establishment. The decree-law no. 92/1990 has regulated the main organs of the state, partially to be elected after the first democratic elections of 20 May 1990. The bicameral Parliament, the President of the Republic – to be directly elected – and the Government were introduced in a political equation which was anticipating the semi-presidential regime endowed with a weak President preferred by the Constitution of 1991. The elections were massively gained by FSN (67%) and have brought the very popular Ion Iliescu – a former communist dissident and one of the central leading figures of the Revolution – to the presidency (85% of the valid votes).

Since July 1990, the new Parliament acted as a Constituent Assembly, having the task to prepare and vote the post-revolutionary democratic constitution. After a relatively long period of time, the Assembly voted by two-thirds the final version of the Constitution on 21 November 1991. The Constitution has gained the popular approval at the referendum of 8 December 1991 and entered into force at the same date.

The Constituent Assembly and its Constitutional Commission had not a very easy mission. Its task seemed to be relatively simple, as everybody was thinking that the normal way for post-communist Romania was toward the Western values of contemporary constitutionalism. These ones were already accepted by the revolutionaries and were inscribed in the decree-law no. 92/1990. The most delicate problem was the necessity to put somehow together these universal values with the values of the Romanian original constitutionalism. The identitarian constitutional crisis has inevitably explored the constitutional past of the Romanians in order to respond to the present and future necessities.

One of the biggest problems of the contemporary post-communist Romanian democracy was the lack of a democratic (constitutional) tradition or, even if it would have been existed in the past and somehow actually perpetuated in the present, there was no real consciousness of it. Under communism, there was no serious analysis of the Romanian parliamentary tradition during the monarchy and good constitutional ideas or practices have been erased from the collective conscience by the communist propaganda.

This doesn't mean the appeal to some Romanian constitutional tradition is completely inexistent in the contemporary Romanian public discourse. It has been remarkably used at the "constitutional moment" of 1991. That time, the recovery of the ideological and praxiological dimensions of the Romanian democratic constitutional tradition was essential for a society in transition from dictatorship to democracy. More than any contemporary constitutional models and values of the contemporary

constitutionalism, getting back the democratic past, as long it has existed, offered a plus of legitimacy to the founding moment, by retrieving the Romanian constitutional identity. A constitution designed from this perspective anticipates the political future of the Romanian nation by linking it to the past and legitimates any political dynamic keeping this limits.

From this perspective, the „constitutional moment” of 1991 was also a chance to evaluate the negative aspects and failures of the Romanian democratic constitutional tradition. In a political context when the quest for political and constitutional legitimacy was charging the Romanian interwar period with positive aspects it never had, the interest for a critical analysis was a proof of maturity. Thus, the acknowledgment of the more or less nefarious constitutional tradition of the head of state’s authoritarianism determined the fathers of the Constitution, by manifesting an aversive constitutionalism<sup>28</sup>, to design the division of powers in relation to a complex mechanism of *checks and balances* meant to perpetually prevent in the future the negative experience of the extreme personalization of political power in the hands of an authoritarian or dictatorial head of state.

On the other hand, it should be remarked that turning back toward the pre-communist constitutional tradition and its recovery in a post-communist society is not as easy as it looks at a first glance. If recovering ideas and institutions is quite simple, recovering mentalities and democratic praxis is very difficult if not impossible. Changes in mentality occurred after the communist era could compromise, on a more or less long term, the efforts to recover the lost constitutional identity. In

the same time, the excessive valorization of the past could create a mythical perspective over the constitutional tradition which could compromise the real chances of the future generations to create a real and stable democracy. This endeavor could really inhibit the democracy, as the obsessive identitarian regain of the past could block the political dialog future oriented of the contemporary generation. This is why constitutional tradition should be constantly under a process of critical evaluation in the community which sustains it.

Paradoxically, in contemporary Romania, after the constitutional moment, the identitarian recovery of the constitutional past represents more a formal frequentation of the constitutional tradition. Until the constitutional revision of 2003, the Romanian constitutional tradition was absent from the scientific and public discourse, being just sporadically touched by the Constitutional Court. The constitutional revision of 2003 added an important idea:

Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people... [Art.1, paragraph 3].

Thus, the central values of the Romanian constitutionalism, actually the whole Constitution, are expected to be compulsorily understood from now on through the glasses of the democratic/constitutional traditions. The revised Constitution of 2003 has succeeded the performance to textually bind the will of the present and future generation with a democratic/constitutional tradition which almost nobody is currently interested of, which almost

nobody critically analyses, which is purely formally present in the public discourse. This is why, not only the contemporary Romanian constitutionalism is formally looking for a past but also the Romanian constitutional tradition is looking for a present in a society who would be interested to really criticized or sustain it. After all, the present Romanian constitutionalism – whether ideas, institutions or praxis – is completely marked by the Romanian constitutional tradition, bad or good as it was. All that remains is to critically discover its advantages and limits. Until then, it will be impossible to get a real constitutional identity.

### *Conclusions*

From all I remarked until now, some final conclusions could be depicted:

- In contemporary Romania the Constitution does not realize its integrative mission because we don't have a true constitutional identity;
- We don't have a true constitutional identity because we are lacking a constitutional culture of our own. We are regularly obsessed by the constitutional text and we are confusing the constitutional success with the correct and coherent of a formal constitutional normativity. This aspect only makes way to a constitutional engineering undertaken in laboratory, assuming the risk of having a chief engineer to impose and conduct constitutional experiments on his own taste;
- We don't have a constitutional culture because, between other things, we do not have a democratic (constitutional)

tradition. Generally, there is a small interest for discovering what would represent the past ideas, ideals, values, hopes, anxieties and constitutional democratic (or undemocratic) practices;

- The lack of a democratic (constitutional) tradition could endanger the contemporary Romanian democracy. As long as we are not clear about what we are, we have and we do in the field of constitutionalism we could be anytime the victims of some constitutional experiments developed in laboratory. For example, the tendency to ignore, in the context of the current debates about the constitutional revision, the anxiety of the head of state's authoritarianism – as an essential benchmark for detecting and firm rejection of an unhealthy constitutional tradition at the moment of designing the 1991 Constitution – could have disastrous consequences for the contemporary Romanian democracy.
- The same lack of what we have, we are and we are doing in the matter of constitutionalism could create a fertile context for the manipulation of the popular constitutional emotions. As long as we do not get generally assumed and understood democratic values, as long as we do not get popular democratic practices generally assumed and well understood, this aspect could capture the popular will toward predetermined political and constitutional ends. The moment of the 2009 referendum, putting to the popular choice the unicameral Parliament and the reduction of the parliamentarians' number was emblematic for this kind of manipulation.

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- <sup>2</sup> S. Marton, *La construction politique de la nation. La nation dans les débats du Parlement de la Roumanie*, București, Nemira, 2009, p. 97.
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- <sup>5</sup> I. Bulei, *România în secolele XIX-XX. Europeanizarea*, București, Littera, 2011, pp. 31 ss.
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- <sup>10</sup> Guțan, *Building the Romanian Modern Law* cit., pp. 130 ss.
- <sup>11</sup> D. Barbu, *Bizanț contra Bizanț*, București, Nemira, 2001, p. 264.
- <sup>12</sup> Pencovici, *Desbaterile Adunarii Constituante* cit., p. 115.
- <sup>13</sup> Ivi, pp. 23-24.
- <sup>14</sup> Ivi, pp. 192-193. For the same idea see also pp. 252 and 264.
- <sup>15</sup> Marton, *La construction politique de la nation* cit., p. 341.
- <sup>16</sup> Pencovici, *Desbaterile Adunarii Constituante* cit., p. 50.
- <sup>17</sup> Ivi, pp. 89-90.
- <sup>18</sup> Ivi, p. 89.
- <sup>19</sup> S. Marton, *Les libéraux, l'Etat et la nation: le débat parlementaire de 1866 sur le bicaméralisme*, in «N.E.C. Yearbook», 2003-2004, p. 129.
- <sup>20</sup> Pencovici, *Desbaterile Adunarii Constituante* cit., pp. 185-185.
- <sup>21</sup> Marton, *La construction politique de la nation* cit., p. 96.
- <sup>22</sup> M. Guțan, *Comparative Law in Romania: History, Present and Perspectives*, in «Romanian Journal of Comparative Law», n. 1, 2010, pp. 53-68.
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