ROMANIA'S CONSTITUTIONAL EDIFICE 1866-2016. BENCHMARKS FOR THE REVISION OF THE CONSTITUTION

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I. Introduction

The Romanian constitutionalism celebrates in 2016 two major events: 150 years since the entry into force of the Constitution of 1866 and 25 years since the date of entry into force of the Constitution of 1991. During this time interval, there have been particularly important constitutional changes, caused by the political and social transformations.

The essence of this sometimes discontinuous evolution of the Romanian constitutionalism consisted in the development of fundamental laws, which were the basis for the organisation of the State, in exceptional historical circumstances, able to offer a constitutional framework for the governance of the country and for guaranteeing the exercise of fundamental rights and freedoms, outlining a Romanian constitutional identity. Thus, in Romania there were several fundamental laws: The 1866 Constitution, the 1923 Constitution, the 1938 Constitution, the constitutions of the communist regime (the 1948 Constitution, the 1952 Constitution and the 1965 Constitution) and the 1991 Constitution, currently in force, as revised in 2003, which has restored the principles of democracy and the values of the rule of law. The mutations arising in the field of constitutional life took place against the background of historical events such as: the 1877 Independence War, the First World War, the realisation of the Greater Romania, the Second World War, the rise of communism and its removal by the Romanian Revolution of December 1989.

This study, highlighting benchmarks of past developments, reveals also a series of coordinates for future developments, particularly in light of the concerns for revision of the current basic law.

II. Romanian Constitutions of up to 1991

1. The Constitution of 1866

The 1866 Constitution has not arisen from scratch, but was preceded by a series of documents with an important role in the evolution of constitutionalism in Romania. From

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amongst such documents,[2] we mention, in particular, the Organic Regulations in force in Moldova and Wallachia, as well as the Statute expanding the Paris Convention[3], pre-constitutional documents, whose merit lies in the fact that they have opened up the establishment of democracy in Romania, whereas by their structure and content they were basic acts underlying the organisation and governance of the Romanian Principalities. They reflect the state of some "major upheavals and movements, an expression of the fight for the achievement of State unity of the Romanian people and for removal of the feudal order as to respond to claims of a democratic nature"[4], as well as of the influence of west European liberalism. Without meeting the drafting requirements of a Basic Law, in the modern meaning of this concept, the documents referred to were considered as a Romanian option that has allowed the development and adoption of the first Constitution of Romania by the Constituent Assembly[5] on 29 June 1866.

A significant fact about this Constitution, which appeared in a complicated political context and was promulgated without the consent of the Great Powers, is that it was an act of manifestation of independence (whereas the country was still under the suzerainty of the Ottoman Empire), thus configuring the necessary framework for the evolution of the Romanian State on modern and democratic basis. Its adoption followed the path of formal and material rules for the adoption of a Basic Law, being debated and amended during eleven meetings and then promulgated by Prince Carol I on 30 June 1866, and published in the Official Gazette on 1 July 1866. As noted, "the urgency with which it was debated was intended to force the Guarantor Powers to accepted it as an already accomplished fact"[6].

According to Article 1 of the Constitution of 1866, "*The United Romanian Principalities were an **indivisible** State under the name of **Romania***". This constitutional text has profound meanings, being a historical answer of the Romanian patriots to the numerous external oppositions that wanted to maintain the status quo in order to promote their own interests.

[2] Thus, we can mention the "Constitution" of Prince Mavrocordat (7 February 1741), the Supplex Libellus Valachorum of 1792; the "Cărvunarilor" Constitution of 1822; the Organic Regulations of Wallachia of 1831; the Organic Regulations of Moldova of 1832; the Draft Constitution drawn up by Ion Câmpineanu in 1838; the Draft Constitution for Moldova drawn up by Mihail Kogălniceanu in 1848.

[3] "Statutu Dezvoltătoriu Convenţiunei din 7/19 august 1858"; through Decree no. 517 of 2 May 1864, Alexandru Ioan Cuza submitted to the people's approval the Statute expanding the Convention of 7/19 August 1858; the Statute thus adopted provided, in its general part, that the basic law of Romania is and shall continue to be "Convenţiunea încheiată la Paris în 7/19 august 1858, între Curtea Suzerană şi între Puterile garante autonomiei Principatelor-Unite" [the Convention signed in Paris on 7/19 August 1958 by the Suzerain Court and the Powers that guarantee the autonomy of the United Principalities]. The Statute was an addendum to the Convention, which was necessary having regard to the "disputed election on 5 and 24 January 1859, the realization of the Union and the abolition of the Central Committee" that had rendered "not applicable several essential articles of the Convention both for their fulfilment, and for restoring the balance between the powers of the State".

[4] I. Muraru, M. Constantinescu, Studii constituţionale [Constitutional Studies], Actami Publishing House, Bucharest, 1998, p. 8.

[5] See the Official Journal no. 95 of 1/13 May 1866; we refer to the Elective Assembly which became the Constituent Assembly and which, at the meeting of 1 May 1866, proclaimed Prince Karl Ludwig of Hohenzollern-Sigmaringen as hereditary prince of Romania, under the name Carol I.

[6] E. Focşăneanu, "Istoria constituţională a României" [Constitutional History of Romania], 1859-1991, Humanitas Publishing House, Bucharest, 1998, p. 28.

Both the "indivisible nature" of the Romanian State and the name of the country "Romania" represented a political stand with regard to the provisions of the Paris Convention[7] of the Guarantor Powers, in the sense of fulfilling the goals expressed at its adoption by the Ad-Hoc Assembly[8] of Moldova of 7 October 1857 and by the Ad-Hoc Assembly of the Principality of Wallachia of 8 October 1857 (the unification of the Principalities in one State, already achieved in 1895, whereas the will of the Romanian people was that this union would last forever).

Concerning the form of government, the Constitution had proclaimed the regime of the hereditary monarchy in Romania, as an expression of the same goals expressed in the Ad-Hoc Assemblies (a ruler of foreign origin with a hereditary monarchy, elected from one of the dynasties of Western Europe, whose successors will be raised according to the country's Orthodox religion).

The content of the Basic Law was inspired by the Constitution of Belgium, which, at that time, was considered one of the most democratic Constitutions of its time. The Constitution of 1866 incorporated elements specific to a Basic Law, defining the State territory, the rights of the Romanian people, the powers of the State, the powers of the king and the statute of the ministers, the judiciary, the finances, the military forces, all of which were accompanied by a series of general, transitional and additional provisions. We underline the detailed regulation of fundamental rights in Title II – "*About the Rights of the Romanian People*", for instance, the abolition of the death penalty, the freedom of the individual, the inviolability of a person and his residence, which were guaranteed, the liberty of conscience, media, education and assemblies, the secrecy of correspondence, the abolition of the privileges and foreign titles of nobility, the "sacred" and "inviolable" nature of the property "of any kind". It is also worth highlighting its provisions regarding the revision procedure[9], introduced as another attempt to acquire some distance from the rules imposed by the Guarantor Powers through the provisions of the Paris Convention, an instrument which did not contain any provisions laying down the procedure for its amendment. The Constitution of 1866 can be characterised, from this perspective, as a true act of emancipation, meaning that the nation had the exclusive right to revise the Basic Law it had developed.

In that period, and under the provisions of this Constitution, the constitutionality review has emerged in Romania. Without an express regulation of their competence to carry out such review, the courts have established, by means of case-law, their right to rule on the constitutionality of ordinary laws, basing their legal reasoning on the principle of separation of powers. Thus, if each of the powers had to act within the limits of their competences, and the jurisdiction of the courts covered the application of both the constitutional and the ordinary law, it is natural that, in the event of inconsistency between the laws, the courts would

[7] Convenţiunea pentru organizarea definitivă a Principatelor Dunărene ale Moldovei şi Valahiei din 7/19 august 1858 [The Convention for the final organisation of the Danube Principalities of Wallachia and of Moldova of 7/19 August 1858], see E. Focşăneanu, *cited paper,* p. 20.

[8] Their papers were published in the Official Gazettes of the Ad-Hoc Assembly, in issue no. 1 of 30 September 1857 up to issue no. 23 of 4 January 1858).

[9] We would point out that this Constitution *(i.e.* of 1866) was revised on 12 October 1879, on 8 June 1884 and on 19 July 1917.

determine which one has priority and the consequences resulting from this prioritisation. Relevant as to the crystallisation of this type of reasoning and to the establishing in this way the constitutional review is the trial of the Tramway Society of Bucharest (1912)[10], when the Ilfov County Court, followed by the Court of Cassation and Justice, have affirmed their competence to carry out also the constitutional review of laws in the cases submitted to them for resolution.

2. The Constitution of 1923

The 1918 Union required the adoption of a constitution attuned to the new political, economic, social, ethnic and institutional realities. A neo-liberal characterisation of the 1923 Constitution is made by Ştefan Zeletin which distinguishes the three essential features on which it is underlined: The Constitution is the result of the struggle between the social forces; the Constitution enshrines the supremacy of the bourgeois force over the other social strata; The constitutional mutations must vary according to the interests of the bourgeoisie[11].

We must remember, as a reference document for the new constitutional establishment, the Alba-Iulia Declaration[12], which established new provisions for the organisation of the national State, namely universal vote, freedom of the press, agrarian reform, national freedom of all minorities and the democratization of the entire political sphere.

A distinct problem concerning this Constitution, which was also the object of debate at that time, concerns its character: is it a new Constitution or a revision of the original one of 1866? From the standpoint of the normative content, it is in essence a revision of the previous Constitution[13], an extension of its provisions to the new political and social realities generated by the completion of the Romanian territory, many of them being the result of the union of Transylvania, Bessarabia and Bukovina with the Country. In order to explain this position, it is necessary to specify that, for the most part, the Constitution of 1923 copied the provisions and structure of the Constitution of 1866, having 10 articles in addition to the Constitution of 1866 (138, plus the transitional and additional provisions contained in 5 other articles). 20 articles of the old Constitution have been amended, and only 7 have been given a new content.

We note, from amongst the provisions of this Constitution, those of Article 1, according to which "*The Kingdom of Romania is a* ***national, unitary*** *and indivisible State*". If in 1866 the

[10] Gerard Conac – *O anterioritate română: Controlul constituționalității legilor în România de la începutul secolului XX până în 1938 [A Romanian precedent: The review of the constitutionality of laws in Romania since the beginning of the twentieth century up to 1938]*in the report *A VI-a Ediție a Zilelor Constituționale Româno-Franceze. Tema: Efectele deciziilor, [The VIth Edition of the Constitutional Romanian-French Days. Theme: Effets of decisions.], Bucharest, 3-4 October 2000,* Constitutional Court of Romania, Bucharest, mp. 79-113.

[11] See A. Banciu*, Istoria vieții constituționale în România (1866-1991) [History of the constitutional life in Romania],* "Şansa" Publishing and Press House/ SRL, Bucharest, 1996, p. 59 *et seq.*

[12] By which it was decided, on 1 December 1918, the unification of Transylvania, Banat, Crişana and Maramureş with the Romanian Kingdom.

[13] In the same vein, E. Focşăneanu, *cited paper,* p. 60: "basically, the accepted option was that of revision of the old Constitution, but officially it was claimed to be a new Constitution, thus taking into account the objection that the new Constitution in its entirety must represent the will of all the citizens of the country, including those in the new provinces". Therefore, when voting on articles, not only the revised articles, but also those that remained unchanged were submitted to vote so that, at least formally, an acceptable solution was given to those wanted a new Basic Law. Formally it was a new Constitution; in essence, it was the old, vastly revised Constitution.

emphasis has been on the indivisible character of the State, supporting and strengthening the Unification of Principalities of 1859, now the emphasis was on the national and unitary character of the State, as the basis for the Great Union of 1918, specifying thus the limits in guaranteeing the rights of national minorities, a novelty element that emerged as a result of the unification with Transylvania. That is why also a new Article 126 is introduced, according to which "*the Romanian language is the official language of the Romanian State*". Also an element of novelty is the express enshrining of the review of constitutionality of laws, established in the jurisdiction of the United Sections of the Court of Cassation.

The Constitution of 1923 was "repealed" by the Constitution of 1938 and was partially reinstated in 1944. Together with the Constitution of 1866, it enshrined modern forms of the European parliamentarism based on the principle of the separation of powers, on the democratic guarantee of the exercise of State authority, on the review of constitutionality, and on the proclamation of the citizen's fundamental rights and freedoms. The period that followed, starting with a conceded authoritarian Constitution, and continuing with the stage of the Communist Constitutions, marked the decline of democracy and the abandonment of the principles that characterise the rule of law.

3. The Constitution of 1938

The Carlist Constitution of 1938 was created by the famous jurist Istrate Micescu and led to the establishment of an authoritarian regime in Romania. The rules laid down in the Constitution of 1866 and the Constitution of 1923 have been revised in the light of the new political requirements, by exacerbating the attributions of the executive power and by restricting the fundamental rights and freedoms. On 20 February 1938, the King addressed a proclamation to the people by which he introduced a new Constitution, and set 24 February as the date of organizing the plebiscite for the new Constitution. Voting was mandatory. The Constitution entered into force on 27 February 1938[14].

In terms of organisation of each State power, the new Constitution ignored the regime of separation thereof, the King being the "Head of the State" and, as such, exercising the entire power of the State. The King exercised the legislative power through the National Representation (the Senate and the Assembly of Deputies), the executive power through the Government; the court rulings were executed in his name. Title II of the Constitution of 1938, which had traditionally governed human rights, was divided into two chapters: "*About the obligations of the Romanian citizens*" and *"About the rights of the Romanian citizens".* The emphasis on "obligations" to the detriment of the rights shows the spirit of the Constitution, which departed from the democratic principles enshrined in the previous Constitutions. Political parties were disbanded in March 1938, and in December of the same year, "The Front of National Revival"[15] was formed, "the only political organisation of the State".

International events and the new political regime have led to significant territorial losses and to the entry of Romania into World War II. In those historical circumstances, the

[14] Published in Official Gazette of Romania, Part I, no. 48 of 27 February 1938.

[15] Law no. 4.321 of 15 December 1938 for the establishment of the political organisation of "The Front of National Revival", published in the Official Gazette no. 293 of 16 December 1938, http://legislatie.just.ro/Public/DetaliiDocument/30588.

Constitution of 1938 was suspended, the legislative bodies were disbanded, and the Legionary Movement began to affirm itself in the Romanian political space. The end of World War II, especially Romania leaving the alliance with Germany and continuing the war alongside the Allies, on 23 August 1944, created the premises of the partial reinstatement of the Constitution of 1923, on 31 August 1944. The events of 1944-1947 followed and the same led to the abdication of King Michael I and to the establishment of the communist regime in Romania.

4. The Constitutions of the Communist Regime

The Romanian constitutional arch was continued by the communist Constitutions of 1948, 1952 and 1965, which established constitutional provisions specific to the "dictatorship of the proletariat" and to the renunciation to the principle of separation of powers.

Thus, after the World War II, Romania entered under the sphere of influence of the Soviet Union, which had the effect of establishing the communist regime in our country. This political system acquired legitimacy with the drafting of a new constitution, based on the sole power and on the formal proclamation of human rights, the role of single party being present in all the structures of the State, in the affirmation of the totalitarian ideology.

In Romania, the first communist Constitution (*i.e.* that of 1948) abolished the monarchy and proclaimed the People's Republic of Romania, which led to the creation of the one-party and authoritarian State, as well as to a centralized and politically driven economy[16].

The 1952 Constitution was adopted by the National Assembly on 24 September. The text of the new Constitution stated that it was adopted as a result "of the historic victory of the Soviet Union over the German fascism and the liberation of Romania by the glorious Soviet Army"[17]. The nationalization of the main industrial, mining, transport and telecommunications enterprises was regulated. The elements of the bourgeois capital were abolished and the State socialist sector was created based on the common property of the entire people and on the collectivization of the agriculture.

In 1965, the Constitution of 1952 was replaced by a new Constitution, which conferred a superior position to the Communist Party, and by its modification in 1974, regulated the office of President of the State. The Constitution of 1965 had a certain formal opening towards citizens' rights and freedoms, including the right to personal property and the possibility for members of agricultural production cooperatives to own personal plots of land but such was size-limited. The same Constitution established a new administrative-territorial division, replacing the regions and districts with counties.

During the totalitarian regime, there was review of constitutionality of the laws in Romania. Thus, the Constitution of 1948 contains no provision indicating the existence of the constitutional review, and the Constitution of 1952, while enshrining the obligation to respect the laws and the Constitution, does not establish forms of review of the constitutionality of laws. The Constitution of 1965, which stipulated that "*the Great National Assembly exercises general control over the application of the Constitution and only it can decide on the*

[16] See G. Mihai*, Constituțiile României din anii 1948 şi 1952 – Legile fundamentale ale instaurării regimului comunist [The Constitutions of Romania of 1948 and 1952 - Basic Laws of the establishment of the communist regime]*, SSM info Press Publishing House, Bucharest, 2008, p. 206.

[17] *Ibid.,* p. 306.

constitutionality of the laws", did not establish however a system of genuine exercise of such review. Subsequently, by Law no. 1 of 1969, amendments were brought to Article 53 of the Constitution, stipulating that the Grand National Assembly elects during its legislature a constitutional committee which will submit reports or opinions on the constitutionality of the laws, having, at the same time, the competence to examine the constitutionality of decrees comprising provisions having the force of law and resolutions of the Council of Ministers. In reality, those provisions were aimed at create a positive image of the regime by simulating the constitutional democracy standards.

In fact, as some authors[18] have pointed out, the adoption of constitutions during the communist era occurred only to mark "a new stage in the construction of socialism. Constitutions of the communist era have been characterised as representing "the will of a single political formation, manifested by the monopolization of power and proliferation of abuse. [...] Actually, they were not adopted to be applied, but to create a certain favourable image for the Communist State."[19] Of course, these constitutional mutations did not contribute to the improvement of the economic and social situation of the Romanian people, and the increase in the number of grievances has led to the Revolution of December 1989.

III. The Constitution of 1991, revised in 2003

1. The historical background characterising the adoption of the current Constitution

The revolution of December 1989 started in Timişoara on 16 December, and then spread into the rest of the country. The climax of the revolution was the rally on 22 December 1989, after which the communist leaders, Nicolae Ceauşescu and Elena Ceauşescu, left the Central Committee headquarters. Following a short trial, the two were executed in a military base in Târgovişte.

From the very first days of the Revolution, the Communiqué of the National Salvation Front issued on 22 December 1991 dissolved all communist power structures in Romania, with the exception of the military, - *i.e.* the Presidency of the Republic, the Government, the State Council, the People's Councils, the party and State organs, the mass and communal organisations, etc.

In those historical circumstances, the Council of the National Salvation Front was the one entrusted with the exercise of the State power. The Communiqué to the Country issued by the Council of the National Salvation Front of 22 December 1989 established the need for adoption of a new Constitution: "A new Constitution drafting committee will start operating immediately". Of course, the drafting of a new Constitution is not a mere revolutionary act. Therefore, a series of preparatory measures have been taken in order to draft the new Basic Law. Decree Law no. 8 of 1990 on the registration and functioning of Political Parties and Public Organisations in Romania[20] has re-opened the path for the multi-party formation and the re-establishment of democracy in Romania. The Government of Romania was established,

[18] E. Focşăneanu, *cited paper,* p. 136.
[19] *Ibidem.*
[20] Published in Official Gazette of Romania no. 9 of 31 December 1989.

and the Council of the National Salvation Front was transformed by Decree-Law no. 81/1990 into the Provisional National Unity Council, by involving representatives of the political parties in its organisation and functioning.

These political decisions were adopted concurrently with the street confrontations and virulent challenges, the "University Square" phenomenon, the actions of 13-15 June 1990, and others that followed. Within this framework, the Council of the Provisional Front of National Union adopted Decree-Law no. 92/1990 for the election of the Parliament and the President of Romania.

2. The process of adoption of the Constitution

The provisions of Decree-Law no. 92/1990 were not only limited to the organisation of the new elections, but also established a series of principles regarding the relations between the President, the Parliament and the Government, the competence and the manner of election of the Assembly of Deputies, the Senate and the President of Romania, and a new set of principles of governance. On the basis of this pre-constitutional act the elections for the Assembly of Deputies and the Senate were held on 20 May 1990. The Chambers of the new Parliament had a dual function: on the one hand, to act as legislative authorities, and on the other hand, to form the Constituent Assembly which, within 18 months of its establishment, was to adopt the Constitution of Romania.

The Constituent Assembly has set up its own working bodies made up of a Board and a Committee established for the drafting of the new Constitution.

The Drafting Committee multiparty membership, being composed of 23 members with voting rights, representatives of political formations, and of the national minorities present in the Constituent Assembly. The committee was composed of members proposed by the political parties based on their legal training and experience, such as: Marian Enache, Ioan Leş, Ioan Timiş, György Frunda, Vasile Giona, Echim Andrei, Victor Anagnoste, Ion Predescu, Ioan Rus, Augustin Zegrean, Mircea Curelea, Hajdu Menyhért Gábor, and Antonie Iorgovan, an independent parliamentarian, as well as of other parliamentarians, specialists in sociology, economics, psychology, history and literature, such as: Alexandru Albu, Mihai Golu, Nicolae S. Dumitru, Dan Amedeu Lazarescu, Ioan Florea, Nicolae Iuruc, Mihai Iacobescu, Mihăiță Postolache, Romulus Vulpescu, Adrian-Ovidiu Moțiu.

The Committee was supplemented with five other members, without the right to vote, specialists in public law: Florin Bucur Vasilescu, Mihai Constantinescu, Ioan Vida, Ioan Muraru, Ioan Deleanu.

The Constituent Assembly's proceedings were conducted in such a way as to ensure the adoption of the Constitution in two readings.

The first reading focused on the acquaintance of the members of the Constituent Assembly with the process aimed at the drafting of a Constitution, and on informing the Deputies and the Senators of the content of Constitutions of the other democratic States.

The debate on articles began in December 1991, with the general principles that would form the basis of the future Constitution. Many of these were accepted, some were amended and others were rejected by the plenary of the Constitutional Assembly.

On the basis of comments with respect to those articles, the Drafting Committee drew up the draft of the Constitution of Romania, which was distributed to the members of the Constituent Assembly. They lodged a number of 1019 amendments[21], which were reviewed by the Committee, and then submitted to the Constituent Assembly for a second reading.

The professors and specialists who participated in the drafting of the Constitution have shown in their works[22] that the process of drafting the Constitution benefited from a substantial international assistance, using the experience of the States with a democratic tradition. The Committee had meetings with "representatives of interest groups or public authorities, and also with representatives of international authorities, notably bodies of the UN and the Council of Europe, or of foreign authorities. [...] Subsequently, the Committee's work was analysed by the Commission for Democracy through Law, *i.e.* the Venice Commission, and during scientific meetings organised abroad, such as those in Switzerland or the US (...). An important role was played by the opinions communicated by various organisations, such as the Helsinki Committee [...], and the discussions with various constitutional law specialists from different countries. [...]". It is worth underlying the French influence, which materialized both in the valorisation of the traditions of the Romanian constitutionalism that took over the principles of the French Revolution and, subsequently, the French doctrine of constitutional law, as well as the direct participation of some French specialists in the debates that preceded the elaboration of the Constitution.

The Constitution was adopted by roll-call vote on 21 November 1991. Thus, out of the total 510 Deputies and Senators constituting the Constituent Assembly, 476 were present at the roll-call vote, out of which 371 Deputies and 105 Senators. 33 parliamentarians voted by post. In total, 414 MPs (*i.e.* more than two-thirds of the total number of members of the Constituent Assembly) voted for the adoption of the Constitution. 95 parliamentarians voted against the adoption of the Constitution[23]. On 8 December 1991, the Constitution was subjected to a referendum during which 77.31 % of the participants voted in favour of the Constitution and 20.4 % voted against it[24]. The Constitution entered into force on the date of its approval by referendum.

3. Normative content. General characterisation.

The Romanian Constitution of 1991 contains in Title I the General principles relating to the organisation and functioning of the Romanian State. In the following order, it established that Romania is a sovereign, independent, unitary, and indivisible national State; that the form of government of the Romanian State is the Republic; that 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 and shall be guaranteed. We observe the continuity, in the constitutional arch, of some principles taken from the first democratic Constitutions, namely the preservation of the

[21] 68 amendments were accepted by the Drafting Committee.

[22] I. Muraru, M. Constantinescu, *cited paper,* p. 56

[23] The data are taken from A. Iorgovan, Odiseea elaborării Constituției [The Odyssey of the Drafting of the Constitution], Uniunea Vatra Românească Publishing House, Târgu Mureș, 1998, pp. 695-696.

[24] *Ibidem*, p. 705.

national, unitary, indivisible character of the State, enshrined in the first article of the Constitution, as well as the commitment to the values of the rule of law and democracy. We make this specification to emphasize that any revision initiative must have as starting point and be based on the same values that we can characterize as intrinsic to an outlined identity.

The Constitution of 1991 stipulates that national sovereignty belongs to the Romanian people, who exercise it through their representative bodies and by referendum. No group and no person can exercise sovereignty in own name. The country's borders are laid down by organic law, in accordance with the principles and other generally accepted rules of international law. The national territory is administratively organized in communes, towns and counties; the towns can be declared municipalities. No foreign populations can be displaced or colonized on the territory of the Romanian State, a rule which was also taken from the Constitution of 1866 based on the same principle of constitutional continuity.

The State is based on the unity of the Romanian people, Romania being the common and indivisible homeland of all its citizens, irrespective of race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth or social origin.

Romanian citizenship is acquired, is preserved or lost under the conditions laid down by organic law and cannot be withdrawn to a person who acquired it by birth.

The State recognizes and guarantees to persons belonging to national minorities the right to preserve, develop and express their ethnic, linguistic and religious identity, and the measures taken by the Romanian State in this respect must comply with the principles of equality and non-discrimination in relation to other Romanian citizens.

The State supports the strengthening of ties with the Romanians living abroad and acts accordingly for the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, with the observance of the legislation of the State whose citizens they are.

The Constitution guarantees the principle of political pluralism. Political parties, established under the law, contribute to the definition and expression of the political will of the citizens, while observing national sovereignty, territorial integrity, the legal order and the principles of democracy.

Trade unions are constituted and operate according to their statutes, in accordance with the law, contributing to the protection of rights and interests of professional, economic and social interests of employees.

Regarding international relations, Romania fosters and develops peaceful relations with all the states, and in this context, good neighbourly relations based on the principles and other generally recognized rules of international law.

The State undertakes to fulfil as such and in good faith its obligations stemming from the treaties to which it is a party and which are part of national law.

The Romanian national symbols are the flag, national anthem, national day, the State coat of arms and the State seal.

The official language is Romanian and the capital city is Bucharest.

Title II of the Constitution is devoted to fundamental rights, freedoms and duties. Their extensive catalogue is based on the provisions of the Romanian Constitutions and the treaties on human rights to which Romania is a party. It is worth noting the "connection" with the

international framework for the protection of fundamental rights and freedoms and with the highest standards of protection thereof, by expressly establishing the rule that the constitutional provisions on the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and the other treaties to which Romania is a party. Any inconsistencies between them are solved in favour of international regulations (this provision was amended with the occasion of the revision of the Constitution in 2003, when an exception was introduced for the cases where the Constitution or the domestic laws contains more favourable provisions). For the realization of the same idea, *i.e.* in order to guarantee the fundamental rights and freedoms, the institution of the People's Advocate was enshrined in the Constitution, an institution which was also taken from the Constitutions of democratic States. The Ombudsman/Advocate of the People acts for the public good by protecting individual rights. The Romanian constituent opted for the name "Advocate of the People", considering it to be the name that best expresses the role and legal significance of this institution.

Title III of the Constitution covers the public authorities. Thus, Parliament consists of the Chamber of Deputies and the Senate, Chambers designed from the outset as being equal in terms of rights and obligations. The Section referring to Parliament contains the rules governing the status of Deputies and Senators, the law-making process and the Legislative Council. The same Chapter refers to the President of Romania, the Government, the public administration and the judiciary.

Title IV is devoted to the economy and finance, and Title V to the Romanian Constitutional Court. It is worth pointing out that despite the controversies that existed in the Constituent Assembly, the current Constitution enshrined in Romania the European model of constitutional review, entrusting to the Constitutional Court, a distinct and independent authority from the other State authorities, the role of guarantor of the supremacy of the Constitution. The option of the majority of the members of the Drafting Committee for a review exercised by a single special and specialized body (opposed to those who advocated for a review exercised by the courts, according to the model of the Constitution of 1923) was mainly based on the following arguments, highlighted during the works of Constituent Assembly: taking from the courts of general jurisdiction the competence to verify, upon settling disputes between individuals, the constitutionality of laws, is a guarantee for case-law homogeneity; whereas a decisions establishing a law's compliance or, on the contrary, its non-compliance with the Constitution produces effects *erga omnes*, such is undoubtedly a more satisfactory result than the *res judicata* of a judicial decision; the strict framework in which the laws go through the constitutional scrutiny reduces to a great extent legal insecurity; the modality of appointment of the members of the Constitutional Court ensures not only the professionalism of this body but, above all, its neutrality; whereas it is not an essentially and exclusively jurisdictional body, and it is in-between powers, it can exercise other prerogatives as well[25]. We believe that, also under this aspect, the

[25] The Minutes of the Session of 14 May 1991, published in the Official Gazette of Romania, Part II, No.18 of 16 May 1991, in Geneza Constituției României – Lucrările Adunării Constituante [the Genesis of the Constitution of Romania - Works of The Constituent Assembly], Regia Autonomă Monitorul Oficial, p. 854 et seq. Marieta Safta, Drept constituțional şi instituții politice [Constitutional Law and Political Institutions], Vol I – Teoria generală a dreptului constituțional [The General Theory of Constitutional Law], Hamangiu Publishing House, Bucharest, 2016, p. 101.

current Constitution marks an evolution and a connection to the developments of European constitutionalism. Moreover, as stated by the founders of this Constitution, the Constitutional Court is entitled to defend the new democratic Constitution of the country. This role is "the result of the initial stage of formation of the new political and juridical post totalitarian concepts", determined by the transition to a democratic society, "being thus complex by its diversity, and honouring by the goals driving it"[26]. This stage in the evolution of the Constitutional Court "represents a process of revival of constitutionalism and democratic traditions [...]. For the first time in the countries of this part of Europe the phenomenon of the constitutionalisation of the branches of law is manifested under the influence and creativity of the Constitutional Courts, which can only increase the prestige of the Constitutions, the respect for their content and their continuity being thus ensured"[27].

Title VI of the 1991 Constitution contains rules regarding the revision of the Constitution and Title VII contains the final and transitional provisions. Regarding the regulation of the revision procedure of the Constitution, it is worth noticing the limits for this procedure which are stipulated in the Constitution, namely the clauses regarding the impossibility to modify, by way of revision, some provisions considered to be the essence of the political and constitutional regime. We believe that these limits are an expression of the formation of a genuine constitutional identity, as long as we identify here the constants of the Romanian democratic Constitutions. Thus, according to the Constitution of Romania, the following cannot be the subject of a revision: the national, independent, unitary and indivisible character of the State, the republican form of government, the integrity of the territory, the independence of the judiciary, the political pluralism and the official language. Likewise, revision initiatives aimed at suppressing public rights and freedoms or aimed at suppressing the guarantee of these rights and freedoms are not allowed.

4. The revision of the Constitution in 2003

The Romanian Constitution of 1991 has been revised especially in view of Romania's accession to the European Union and NATO, so the necessary provisions for this purpose were added, carrying out also a series of improvements to the existing regulations, some of them in response to the criticisms formulated against the original drafting of the constitutional text.

An example in this regard is the fact that the Constitution of 1991 did not expressly provide the principle of the separation of powers, this omission being severely criticised during the period in which the initial form of the Constitution was in force. Therefore, paragraph 4 was added to the first article of the Constitution, stating that: "*The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of a constitutional democracy*". This regulation raises some issues in relation to Title III of the Constitution, which speaks neither about the legislative power, nor about the executive power or about the judiciary, but about the public authorities.

[26] Florin Bucur Vasilescu, Fine de mileniu: Triumful constituționalismului european [End of Millennium: The Triumph of European Constitutionalism], in the volume Constituționalitate şi constituționalism [Constitutionality and Constitutionalism], Național Publishing House, Bucharest, 1997, pp. 13-33.

[27] *Ibidem*, p. 109.

Thus, the Constitution of Romania defines the constituent elements of the three State powers, but the title "Public Authorities" comprises also other public authorities. Thus, if in the conception of the Romanian Constituent the legislative power is represented by the Parliament, in the sphere of the executive power it places the President of Romania and the Government. In addition, the same title includes the public administration and its elements, the specialized public administration and the local public administration. The specialized public administration includes also the autonomous administrative authorities. This way of structuring Title III can induce us the conclusion that the Public Administration is part of the executive power when in fact it is subordinated to the Government. With regard to the judicial authority, the inclusion of the Prosecutor's Office and the Superior Council of Magistracy within its structure exceeds the limits of the judiciary. Moreover, in the legal standards and in the specialised literature it is stated that the judicial power, although not expressly defined by the Constitution, refers only to courts. The two other components of the judicial authority are not be considered to be part of the judiciary. The judicial authority notion is taken from the French Constitution, but that text does not refer to the judicial power either, although in French literature it is expressed the opinion that the judicial authority is nothing else but the judicial power.

In our opinion, the terms "State authority" and "State power" are not identical. This inconsistency between the terms "State authority" and "power" calls into question the provisions of Article 1 (4) of the Constitution, which integrate the principle of separation and balance of powers at the basis of the Basic Law without defining them within the Constitution, a matter which should be considered when the Constitution will be revised.

With reference to the same Title III, we note another fundamental change brought about by the 2003 revision, namely with regard to Article 75 which makes a distinction between the powers of the Chambers of Parliament. Under the new regulation, in some situations, one of the Chambers is a reflection Chamber, and the other one is a decisional Chamber. However, this division of powers results in the infringement of the principle of bicameralism enshrined in Article 61 (2) of the Constitution of Romania. This conclusion can be reached because one of the Chambers, when it is the decisional Chamber, can also decide for the reflection Chamber. This Chamber can often tacitly adopt a bill, and sometimes it can adopt it with amendments that the decisional Chamber is not obliged to take into account. We would like to mention here, as a reference for a possible revision of the Basic Law, the preference/recommendation of the Constitutional Court for the preservation of the bicameral structure of the Romanian Parliament, whereas "in expressing this option, it should not be ignored the Romanian State's tradition and the advantages of a bicameral parliamentary structure in relation to the unicameral" (Decision no. 799 of 17 June 2011[28]), as well as the case-law referring to the principle of bicameralism. Although this case-law has set a number of benchmarks likely to compensate the shortcomings of the current regulation, we feel that there is a need for a clearer regulation of the powers of the two Chambers in the law-making procedure, which would ensure the full respect for the principle of bicameralism.

[28] Published in the Official Gazette of Romania, Part I, no. 440 of 23rd June 2011.

Regarding the same matter, if in the initial form of the Constitution, Article 73 established that the Parliament adopts three categories of laws, in the new form of the Constitution a new category was added, category which, according to the experts, does not fall into these three categories which were initially foreseen. We refer to the laws on Romania's accession to the European Union and NATO, which were adopted in the joint sitting of the Chamber of Deputies and the Senate by a two-thirds majority of the Deputies and Senators. This provision, introduced during the revision of the Constitution, raises the question whether or not these laws fall into the category of constitutional, organic or ordinary laws, both in terms of content and in terms of adoption procedure[29]. We consider that a constitutional clarification is needed in this respect, in the sense of correlating and completing the constitutional norms related to these categories of laws.

The revision of the Constitution in 2003 has also led, both directly and indirectly, to the extension of the powers of the Constitutional Court; directly by regulating new attributions in the very text of the Constitution (the constitutional review of international treaties and the settlement of legal conflicts of a constitutional nature between public authorities) and indirectly by regulating the possibility of adding new attributions through the organic law of the Court. On this constitutional basis, Constitutional Court was empowered to rule on the Law for the revision of the Constitution adopted by the Parliament, by Law no. 232/2004[30], as well as to rule on the constitutionality of the resolutions of the Plenary of the Chamber of Deputies, the resolutions of the Plenary of the Senate, and the resolutions of the Plenary of the two joint Chambers of the Parliament, by Law no. 177/2010[31].

IV. Attempts to Revise the Constitution of 1991

There have been several initiatives to revise the Constitution, some originated from the Parliament [in 1996, the Article 41 (7) of the Constitution of 1991, which governed the presumption of lawful acquisition of wealth (the Decision of the Constitutional Court no 85 of 3 September 1996[32]), in 2014, on several provisions, in fact the most extensive proposal for a revision after 2003 (the Decision of the Constitutional Court no. 80 of 16 February 2014, on the legislative proposal for the revision of the Constitution of Romania[33])], and some originated from citizens [in 2000, regarding the provisions of the Article 41 (2) on the right to private property (Decision of the Constitutional Court no. 82 of 27 April 2000[34]), in 2007 and 2016 on the provisions of Article 48 regarding family (Decision of the Constitutional Court no. 6 of 4 July 2007[35] and the Decision of the Constitutional Court no 580 of 20 July 2016[36])], as well as

[29] See I. Vida, *Legistică formală. Introducere în tehnica şi procedura legislativă* [*Formal Legislative Drafting. Introduction to the Legal Technique and Procedure*], Universul Juridic Publishing House, Bucharest, 2012, p. 43 *et seq.*

[30] Published in Official Gazette of Romania, Part I, no. 502 of 3 June 2004.

[31] Published in Official Gazette of Romania, Part I, no. 672 of 4 October 2010.

[32] Published in Official Gazette of Romania, Part I, no. 211 of 06 September 1996.

[33] Published in Official Gazette of Romania, Part I, no. 246 of 07 April 2014.

[34] Published in Official Gazette of Romania, Part I, no. 193 of 04 May 2000.

[35] Published in Official Gazette of Romania, Part I, no. 540 of 08 August 2007.

[36] Published in Official Gazette of Romania, Part I, no. 857 of 27 October 2016.

originating from the President of Romania [in 2011, which targeted several texts of the Constitution (Decision of the Constitutional Court no. 799 of 17 June 2011, already cited)].

Those initiatives have not led to the adoption of laws amending the Constitution, some being found to be unconstitutional as they infringed the limits of the revision of the Constitution, others were not finalized in the parliamentary process, and others are in parliamentary proceedings, after the Constitutional Court ruled on them.

In this context, we emphasize the importance of ensuring the stability of the Constitution, as one of its essential features,[37] a feature determined by the fact that it regulates essential relations for the society, much more stable than those regulated by ordinary laws. Any Constitution must be stable, because it defines the basic axis of the whole public and private life of a human community, as well as the perspective coordinates of its development[38].

The need to review the Constitution where social dynamics so requires does not deny its stability but, on the contrary, opens the path to the adaptation of the Constitution to the new and complex conditions of social life. In other words, a reasonable balance must always be achieved between the requirement of stability and the option to revise the Constitution.[39]

V. Benchmarks in the revision of the Constitution drawn from the case law of the Constitutional Court

The entire constitutional evolution of Romania must be the basis of any attempt to revise the Basic Law, as an expression of an outlined constitutional identity, of continuity, but also of a natural accumulation and development of its legal institutions enshrined over time. Constitutional identity does not mean a petrification in time but a set of ideas, values, principles, institutions and legal practices assumed and lived by generations, it is subject to reconfiguration, revaluation, and institutional modifications.[40]

The observations we have made in this context can be a reference in such an endeavour. A revision will also have to use the statements made by the Constitutional Court through interpretation of the Constitution, and also to constitutionalize rules and principles that are now established through a jurisprudential approach, as for example public authorities' duty of constitutional loyalty or the principle of legal certainty. Similarly, it necessarily needs to take into account the decisions of the Constitutional Court regarding the initiatives for revision of the Constitution.

Referring here to some of the most significant decisions in this matter, we note the following principle observation, *i.e.* «***the level of detail of the constitutional principles must be minimal, this task belonging to lower normative acts. Furthermore, a too detailed regulation of a particular field/ social relation results in the uncertainty of the constitutional text.*** In this

[37] In detail, M. Enache, Revizuirea Constituțiilor [Revision of the Constitutions], the Public Law Magazine Issue no. 4/2011, pp. 87-95.

[38] T. Drăganu, Drept constituțional şi instituții politice [Constitutional Law and Political Institutions], vol. I, Lumina Lex Publishing House, Bucharest, 1998, p. 45.

[39] In detail, M. Enache, Revizuirea Constituției României [Revision of the Constitution of Romania], Universul juridic Publishing House, Bucharest, 2012, p. 16.

[40] Michael Rosenfeld, The Identity of the Constitutional Subject, in Cordozo Law Review, vol. 16/1994-1995, p. 1051-1053.

respect, the European Commission for Democracy Through Law (the Venice Commission) has stated that "the need for change in a given system is dependent on the duration and level of detail of the constitutional text". If the constitutional text has a high level of details, it is more likely to be closely related to ordinary legislation, and thus, more exposed to relatively frequent changes (see the Report on the Revision of the Constitution, adopted by the Venice Commission at its 81st Plenary Session, 11-12 December 2009)» (Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, par. 74), in other words, **constitutional norms "must be characterized, inter alia, by generality and stability"** (par. 75 of the same decision)

While still keeping the discussion in the scope of the issues of principle, we note, in conjunction with the significant development in case-law of the principle of legal certainty, a proposal designed to ensure the objective of accessibility of the law, namely the regulation of the access to the electronic version of the Official Gazette, Part I. The Constitutional Court noted that "**the advantage of permanent access from any location, free of charge, to the legal acts published in the Official Gazette of Romania creates the premises for the valorisation of the right of a person to have access to any information of public interest, a right provided by Article 31 of the Constitution**. **This way, the requirement for accessibility of normative acts is also met,** as required also by international rules on fundamental rights and freedoms" (par. 256 of Decision no. 80 of 16 February 2014). The Court also referred to the similar provision adopted by the European Union regarding the acts adopted by the European Union institutions, namely Council Regulation (EU) no. 216/2013 of 7 March 2013, on the electronic publication of the Official Journal of the European Union, which states in Article 2 (3) that "*The electronic edition of the Official Journal is made available to the public on the EUR-Lex website in a format which is not obsolete and for a indefinite period of time*. *Its consultation shall be free of charge."*

Regarding the **regime of public authorities**, referring first to institution of the Parliament, we would like to emphasize the principles laid down by the Constitutional Court regarding ***parliamentary immunity***, in the sense that its constitutional regulation "***is justified by the need to protect the parliamentary mandate, as a guarantee of the exercise of the constitutional prerogatives and, at the same time, as a condition for the functioning of the rule of law*.** In his work, the MP must enjoy a genuine freedom of thought, expression and action so that he can exercise his mandate effectively. The concept of parliamentary immunity, in its two forms, protects the MP from possible pressure or abuse against his person, thus ensuring his independence, freedom and security in exercising his rights and obligations under the Constitution and the laws" (Decision no. 80 of 16 February 2014, paragraph 222, with reference to Decision no. 799 of 17 June 2011). Framing this issue into what we called the "constitutional edifice", we also note the considerations of the Constitutional Court which stated that «the current regulation of parliamentary immunity under its two forms, namely the lack of legal accountability for the votes or for the political opinions expressed in the exercise of the mandate [paragraph (1) of Article 72] and the MP's inviolability [paragraphs (2) and (3) of Art. 72], continue the tradition of the Romanian State, whose foundation has been laid since 1864. According to Article VIII of the Statute expanding the Paris Convention, the members of the

Ponderatrice Assembly, as well as members of the Elective Assembly, enjoy "inviolability", they cannot be arrested throughout the term of the parliamentary session, or criminally prosecuted, except where they commit a *flagrante delicto*, and even so only once the Assembly authorises the prosecution. ***The concept of parliamentary immunity has been taken over and strengthened by the subsequent Constitutions, except for those of the period of the communist dictatorship.*** The Romanian Constitution of 1991 re-enshrined the concept of parliamentary immunity, which was practically abolished in the period 1948-1989, ***and it thus obtained a regulation of principle, in line with the constitutions of the European States, influenced in particular by the French model, which regulates distinctly the lack of legal liability and the inviolability of the Members of the Parliament***. Thus, the parliamentary immunity is governed both in terms of immunity for expressing opinions, being generally accepted that no Member of the Parliament can be prosecuted, either civilly or criminally, for the statements made and the votes cast in the exercise of his mandate, and in terms of material immunity, also called relative immunity, unprofessional immunity or inviolability, whereas it is admitted, as a rule, that a Member of Parliament cannot be arrested, investigated or prosecuted in criminal matters without the authorisation of the Chamber of which he is a member (*e.g.* the Constitutions of Belgium (Article 58 and Article 59), Finland (Article 30), France (Article 26), Greece (Article 60-62), Italy (Article 68), Poland (Article 105), Portugal (Article 157) Spain (Article 71)]. Moreover, in some cases, even if the Member of the Parliament was caught in flagrante delicto, he can only be arrested if the offence is punishable by a prison term of at least 5 years [the Constitutions of Croatia (Article 75), Macedonia (Article 64), Slovenia (Article 83)]. [...] Thus, ***the abolition of any of these forms of parliamentary immunity has the direct effect of suppressing a guaranteed right that concerns both the mandate of the Chambers of Parliament and the mandate of each individual Member of Parliament, having serious consequences for the fulfilment by the Parliament of its constitutional role***. With regard to the person holding the public dignity of Member of Parliament, the elimination of any of these forms of parliamentary immunity is a violation of the guarantees of fundamental rights and freedoms, namely the individual liberty and the freedom of expression" (Decision no. 799 of 17 June 2011).

Strengthening the role of the Parliament is necessary and can be achieved through a clearer regulation of some concepts connected to its relationship with the Government. We have in mind, in particular, ***the assumption of responsibility by the Government over a draft of law and the legislative delegation***.

We would like to mention here the proposal for the revision of Article 114 - ***Government's Assumption of Responsibility*** in 2014, in order to establish the possibility for the Government to assume, once for each parliamentary session, the responsibility before the joint sitting of the Senate and the Chamber of Deputies, on a programme, a general policy statement, or a draft law. The proposed amendment was in line with those held in Decision no. 799 of 17 June 2011 on the draft of law regarding the revision of the Constitution of Romania, when the Constitutional Court stated that "the quantitative limitation of the possibility of the Government to use this procedure during a parliamentary session is aimed at removing the premises for the abusive exercise by the Government of its constitutional right to assume responsibility before Parliament, and, as far as legislative authority is concerned, it can exercise

its competence in its fullness, as conferred by Article 61 (1) of the Constitution". However, in par. 336 of the Decision 80 of 16 February 2014, the Court recalled a recommendation proposed in Decision no. 799 of 17 June 2011, relating to the completion of Article 114 (1) of the Constitution, in the sense of *limiting the object on which the Government can assume its responsibility as to a governmental programme, a general policy statement or a single draft law that regulates in a unitary manner the social relations concerning a single domain*. By that decision, the Court stated that "the lack of a sufficient degree of conditionality regarding the scope of the draft law would lead to circumvention of the constitutional provisions proposed for amendment, namely the possibility of assuming responsibility once per parliamentary session, since they give the Government the opportunity to assume responsibility through a draft law that formally fulfils the constitutional conditions but which, through a complex structure and heterogeneous content, includes regulations from very different social domains". We deem necessary a reconsideration of a procedure for Government's assumption of responsibility on a draft law in agreement with both decisions of the Constitutional Court (Decision no. 799 of 17 June 2011 and Decision no. 80 of 16 February 2014).

Regarding the regime of legislative delegation, we recall the suggestion of the Constitutional Court regarding the exact specification the date of entry into force of the Emergency Ordinance, namely the first day after its publication in the Official Gazette of Romania, Part I, "since the emergency ordinance is an normative act and has the same value as a law, those who are subject to the emergency ordinance must have the minimum of time to take note of its provisions and adapt their conduct accordingly" (par. 340 of Decision no. 80 of 16 February 2014). We also consider that it is necessary to define/specify certain terms used in the constitutional text (especially "urgency" and "extraordinary situation"), in order to clarify the regime of this category of normative acts. The rich case-law of the Constitutional Court on this issue offers benchmarks for a clear and precise regulation of the concept of legislative delegation[41].

Regarding the institution of the President of Romania, it is necessary to clarify the attributions and role of the President, as well as the relations with other public authorities, especially with the Government and the Prime Minister. Thus, for example, we recall the intention of the initiators of the Law for the revision of the Constitution, on which the Constitutional Court ruled in 2014, to determine the scope of issues of national interest that may be the subject of the ***referendum initiated by the President of Romania***, excluding those issues susceptible to purport a revision of the Constitution. The Court has held that «the proposal is in line with the provisions of Article 150 of the Constitution, which stipulates that "Revision of the Constitution may be initiated by [...] at least 500,000 citizens with the right to vote". Citizens can therefore express their initiative to revise the Constitution in this way, as stipulated by the Constitution and in the law, thus avoiding the arguable situation of organising two referendums on the same subject: one triggering the procedure of revision of the Constitution, and one marking the completion of the revision procedure, in accordance with

[41] M. Safta – "Limite constituționale ale legiferării pe calea ordonanțelor de urgență ale Guvernului" [Constitutional Limits of Lawmaking through Government Emergency Ordinances] – in the volume Directiva – Act de dreptul Uniunii Europene – şi dreptul român [Directive – Act of European Union Law – and Romanian Law], Universitară Publishing House, Bucharest, 2016, pp. 111-131.

Article 151 (3) of the Constitution. (Decision no. 80 of 16 February 2014, paragraph 280)». In any case, in order to avoid any conflicts or divergent interpretations of the constitutional text of reference, it is necessary to specify/define the issues that are "of national interest" and which may form the subject of the consultative referendum stipulated by the constitutional text of reference. It is also necessary to clarify the effects of such a referendum, by taking into account those established in the case law of the Constitutional Court, namely that "the referendum, irrespective of its character – decisional or advisory – is a way of exercising the national sovereignty, based on Article 2 of the Constitution, which enshrines the will of the Romanian constituent, according to which, in the framework of representative democracy, the national sovereignty belongs to the Romanian people, but it cannot be exercised directly at the individual level, the form of exercising it being indirect, mediated through the process of choosing the representative organs, by expressing the will of the citizens during free, regular and fair elections, as well as by referendum. Whereas there may be situations where the issue for which the people are being called to express their will affects the interests of elected representatives (such as reducing the number of Members of Parliament or reducing their allowances), the Venice Commission in the document entitled "Guidelines for the Organization of the Referendum, adopted at its 68th Plenary Session (13-14 October 2007), noted that the effects of the referendum must be expressly provided by the Constitution or by law, regardless of whether the referendum is consultative or decisional. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules. If the referendum has a consultative nature, the fact that no such subsequent procedure is established does not translate into a lack of effects of such referendum. From this perspective, what distinguishes a consultative referendum from a decision-making referendum is not, mainly, the question regarding whether or not the will of the people is complied with - this will cannot be ignored by elected officials, as it is an expression of national sovereignty - but the effect of the referendum (direct or indirect). Unlike the decisional referendum, the consultative referendum produces an indirect effect in the sense that it requires the intervention of other bodies, most of the time legislative ones, to execute the will expressed by the electoral body" (Decision no. 80 of 16 February 2014, para. 283-285, with reference to the Decision no. 682 of 27 June 2012[42]). The Court also held that «this interpretation is also based on the principle of constitutional loyalty, detached and interpreted by corroborating the constitutional provisions of Article 1 –"The Romanian State", of Article 2 – "Sovereignty" and of Article 61 – "Role and Structure" (Parliament), a principle which, in this field, requires that decision-making authorities in the areas covered by the referendum (in this case the Parliament) consider, analyse and identify ways of putting into practice the will expressed by the people. Another view on the effects of the consultative referendum would reduce it to a purely formal exercise, a simple opinion survey" (par. 286), the Court recommending, therefore, "the regulation, under the provisions of Article 90 (1) of the Constitution, of the legal effects that the consultative referendum produces, as well as the procedure subsequent to the organisation of such a referendum" (par. 287 of Decision no. 80 of 16 February 2014).

[42] Published in the Official Gazette of Romania, Part I, no. 473 of 11 July 2012.

Another constitutional concept, the interpretation and application of which led to legal disputes of a constitutional nature[43] and which would require modification on the occasion of a revision of the Constitution, is that of ***appointment of Ministers in case of reshuffle or vacancy of office*** (the current Article 85 of the Constitution). In this respect, the Constitutional Court has recommended ***the express regulation of the President's right to refuse the Prime Minister's proposal to appoint members of the Government for failing to comply with the legal requirements*** (par. 271 of Decision no. 80 of 16 February 2014), after having previously noted that the supplementation of the constitutional text in the sense of consultation of the President by the Prime Minister prior to the proposal to revoke or appoint members of the Government represents the enshrining in the constitutional rule of the Constitutional Court's solution pronounced in the settlement of legal disputes of a constitutional nature occurred in connection with this procedure (Decision no. 799 of 17 June 2011).

Symmetrically, it is necessary to clarify the concept of ***investiture of Government***, in the sense of the Constitutional Court's considerations that the procedure of appointing the candidate for the office of Prime Minister by the President of Romania cannot ignore the electoral result of the competitors, nor the finality of the procedure, namely the appointment of a candidate who can ensure the coagulation of a parliamentary majority in order to obtain a vote of confidence. Thus, "the President of Romania, not being a decision-maker in this procedure, but an arbitrator and mediator between the political forces, has only the power to nominate, as candidate, the representative proposed by the political alliance or the political party holding the absolute majority of parliamentary mandates or, in the absence of such a majority, the representative proposed by the political alliance or the political party that can provide the parliamentary support necessary to obtain Parliament's vote of confidence" (Decision no. 80 of 16 February 2014, par. 319). We believe, however, that the Court's conclusion regarding the refusal to appoint a nominee (in this case the appointment of a candidate) for failure to comply with the legal requirements should be duly taken into account. In other words, the constitutional text should distinguish between the legality and opportunity aspects in the appointment of the candidate for the office of Prime Minister, stressing the competence of the President to appreciate exclusively the fulfilment of the legality requirements in this procedure, by virtue of his constitutional role to see to the observance of the Constitution. In order to avoid institutional bottlenecks, it would be necessary to regulate a transparent procedure for appointing the Prime Minister that would allow the possibility of verifying the way in which the subjects involved in this procedure comply with their constitutional obligations.

Another source of legal conflicts of a constitutional nature that involved the two executive powers was the ***representation of Romania at the European Council***. In this case too, the Constitutional Court has made a series of clarifications in its decisions, but these clarifications should be transposed into express constitutional provisions. We recall, in this context, the Constitutional Court's considerations that "the wording of the second sentence of Article 10 (2)

[43] See, for example, Decision no. 98 of 7 February 2008, published in Official Gazette of Romania, Part I, no. 140 of 22 February 2008.

and the Article 15 (2) of the Treaty regarding the European Union, concerning the composition of the European Council – heads of State or Governments of the Member States – is generic and does not oblige the Member States with a bicephalous executive structure to ensure their representation both by the Head of State and the Government, but rather, by the teleological interpretation of the text, it results that its purpose is to ensure the representation of the Member State at the highest level by the competent public authority" (par. 295 of the Decision no. 80 of 16 February 2014), as well as its conclusion regarding the circumstantiation of the obligation to represent Romania at the meetings of the European Council by the head of State (par. 297 of the same decision). Symmetrically, it is necessary to clarify the competence of the Government in the representation relations at the level of the European Union.

Last but not least, we mention the considerations regarding the modification of the ***attributions of the Constitutional Court***, namely the recommendations regarding the constitutional review of international treaties, in the sense that it concerns "the establishment of the constitutional review as a compulsory stage in the ratification procedure of the treaties or other international agreements, the appropriate legislative solution is to regulate a systematic and *ex officio* constitutional review. In this situation, it would no longer be necessary to set up an alternative method of referral, that is to say by qualified subjects, but only the intra-constitutional regulation of the mechanism by which international treaties and agreements are submitted to the Constitutional Court for a decision in their regard. Such a regulation is not likely to exclude the possibility for the authorities with attributes in the negotiation / conclusion / ratification of international treaties and agreements to formulate criticism of unconstitutionality, whereas they will be duly asked for their views, a matter whose regulation must also made by organic law. The adoption of this legislative solution requires the correlation of the provisions of Article 146 (b) with those of Article 147 (3) of the Constitution, namely the elimination of the hypothesis according to which the international treaty or agreement was not subject to the *a priori* review of constitutionality. Following the logic of constitutional norms, the abolition of this hypothesis would have the effect of excluding the international treaties or agreements from the scope of the *a posteriori* review, so these treaties or international agreements would not form the subject of the exceptions of unconstitutionality under the conditions of Article 146 (d) of the Constitution. Of course, this legislative solution is in itself questionable as long as some aspects of unconstitutionality can only be noted upon applying these provisions in practice, that is, after the ratification of the international treaty" (para. 426-428 of Decision no. 80 of 16 February 2014). It should also be noted that, according to the same decision of the Constitutional Court, "a solution other than an ex officio referral would mean to extend the number of subjects who can refer the Constitutional Court by including public authorities with specific competences in the procedure of negotiation / ratification of treaties". The Court found that, according to the first sentence of Article 91 (1) of the Constitution, "The President concludes, in the name and on behalf of Romania, international treaties negotiated by the Government, which he then submits to Parliament within a reasonable time, for ratification". At the same time, given the role of the Advocate of the People, as circumscribed under the provisions of Article 58 of the Constitution,

i.e. a defender of the rights and freedoms of individuals, it would be justified to introduce the same among the subjects who may refer the Constitutional Court. The Court has also held that, in order to correlate Article 146 (b) and Article 11 (3) of the Constitution, the constitutional text should provide a stage (in the negotiation/conclusion/ratification of treaties) in which the Constitutional Court may be notified. Such a clarification would lead to greater clarity of the constitutional norm, which at the moment makes no mentioning on this issue.

We consider that it is also necessary to supplement the provisions of Article 146 (a) and (c) of the Constitution in the sense of constitutionalizing the norms contained in Article 23 (1) and Article 27 (1) of Law no. 47/1992, texts governing the powers of the Constitutional Court to review the Law for the revision of the Constitution, adopted by the Parliament and, respectively, to review the constitutionality of the resolutions of the Plenary of the Chamber of Deputies, the resolutions of the Plenary of the Senate and the resolutions of the joint Chambers of Parliament. We recall in this context the recommendations of the Venice Commission, which stated that "by its regulation and other general rules, the Parliament adopts normative acts, which are the reference framework for the Parliament as a whole and for its members as individuals. The judicial review of the application of such normative acts is a key component of the rule of law. The lack of judicial control is equivalent to a transformation of the parliamentary majority into the judge of one's own acts. If only the majority can decide on compliance with the parliamentary norms, the minority has no one to ask for help if those rules are violated. Although the concerned acts are individual acts, they affect not only the right of the parliamentary minority but also, as a consequence, the right to vote of the citizens who have elected the parliamentary minority. Thus, "the judicial control of Parliament's individual acts is not just a question of the rule of law but, if the right to vote is affected, even a matter of human rights". (Opinion on the compatibility with the constitutional principles and the rule of law of the actions of the Government and the Parliament of Romania with regard to other State institutions and the Government Emergency Ordinance amending Law no. 47/1992 on the organisation and functioning of the Constitutional Court and the Government Emergency Ordinance amending and supplementing Law no. 3/2000 on the organisation and conduct of the referendum in Romania, adopted by the Venice Commission at its 93 Plenary Session, 14-15 December 2012). In the same vein, the Constitutional Court stressed that the establishment of this attribution is the expression of the diversification and consolidation of the competence of the Constitutional Court and a gain in the efforts to achieve democratic State governed by the rule of law. The constitutional review as a whole, and as a part of it, the constitutional review of the Parliament's resolutions, represents a fundamental legal guarantee of the supremacy of the Constitution (Decision no.727 of 9 July 2012[44]).

The role of the Constitutional Court should also be reconsidered in the procedure for suspension of the President, respectively the effects of the act it delivers. The Court held in this regard that "in exercising the competence conferred upon it by the Constitution, namely that of analysing the perpetration of serious acts whereby the President violates the provisions of the Constitution and of delivering a solution on these matters, the Constitutional Court

[44] Published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012.

assumes the role of a guarantor of the supremacy of the Constitution. By virtue of this capacity, the Court is the only authority that can rule on the acts of violation of the constitutional legal order referred to in Article 95 (1) of the Basic Law, such as decision-making acts or failure to fulfil mandatory decision-making acts, whereby the President of Romania would impede the functioning of public authorities, would suppress or restrict the rights and freedoms of citizens, would disturb the constitutional order or would pursue the change of constitutional order or other acts of the same nature that would have or might have similar effects". (Decision no. 799 of 17 June 2011).

VI. Conclusions

It was noted that "the year 1866 is a proper date on which to stop for a moment to measure the distance travelled by Romanians from the last decades of the eighteenth century; the unification of the Principalities had been accomplished, and the independence of Romania, as the Romanians now called their country, had been practically assured. Important progress had been made in setting up a governance process on rational grounds. Both Romanian citizens and foreign governments could expect the Government to take a predictable set of actions and respect its commitments. The new State had acquired the necessary tools to fulfil its responsibilities: a powerful executive, which would ensure leadership, a Parliament representing a diversity of opinions, political parties serving a machinery of exchange of political opinions and modern codes, fostering thus social stability, liberalism and conservatism and guiding politicians and intellectuals in the drafting of the national program. But, more important than anything else, the elite had crossed the threshold of Europe, accepting to be a permanent, albeit not always profitable, member of the community of nations."

125 years after the adoption of the first Constitution of Romania (1866), the 1991 Constitution has reaffirmed the democratic values that had put Romania on the path of European constitutionalism, adapting those values to the new political realities of the country.

In essence, the constitutional arch of Romania marks the long and sinuous process of forming a constitutional identity. As suggestively put by an author, a constitution acquires an identity as a result of experiences, and the current Constitution of Romania is the result of such an experience, it is a set of political aspirations and commitments, illustrative in terms of the nation's past and offering a set of options for the future. The firm attachment of the current Constitution to the highest forms of protection of fundamental rights and freedoms (Article 20 of the Constitution), as well as to values shared by the Member States of the European Union (Article 148 of the Constitution) gives the Constitution of Romania a broad democratic dimension.

We have outlined some benchmarks for the revision of the Constitution, the necessity of which has been revealed in time, and which can be drawn from the constitutional jurisprudence. It is true, however, that the revision presupposes, in itself, a complex decision-making process that reflects, on the one hand, a real need to modify constitutional concepts and, on the other hand, to ensure the widest involvement of law specialists, politicians and civil society.