

ABSTRACTS

Gabriel Andreescu: Alienating Civic Values by Abusing Constitutional Rights

Approaching the Romanian Constitution from the point of view of rights and freedoms raises technical rather than theoretical problems. Apart from these, there are clear grounds for determining the cases when the legislature enters into conflict with the European Charter on Human Rights and the corresponding constitutional prescriptions. The most difficult issue from this point of view is determining the consequences of abusing discretionary constitutional rights. These appear to convey additional rights based on the national legislative tradition, but their problematic wording may disturb the whole system of rights and freedoms, resulting in abuses against the values of open society and the spirit of the constitution, as in the cases analysed.

Therefore the most sensitive issue to be addressed by a potential constitutional reform is the problem of delimiting discretionary constitutional rights. The authors of the constitution, keeping in mind the innovations of international law, have exposed our society to unforeseeable dangers. 19 years after the first post-communist constitution was adopted, these consequences threaten the values of open society.

Should a future Parliament undertake a constitutional reform, the most important task before civil society will be to influence the Constituent Assembly with regard to the discretionary rights. The question remains, "which civil society?" In the recent period, the gap between the sphere of politics and civil society has deepened. Civil society itself is divided into conservative and anti-liberal groups opposed by social groups pursuing the modernisation of the structure and values of society, following the principles of open society.

Keywords: *Romanian Constitution, constitutional prescription, discretionary constitutional rights*

Miklós Bakk: Identity and Political Community in the Constitution

The reality of political communities is very different from the way they are represented in certain normative theories, e.g. the contractual ones.

There are numerous (generally mediocre) theories addressing the workings of this political reality. However, there are relatively few ones which address the relationship between political community and constitutional order from the point of view of the survival and identity of political community.

The study presents theoretical models of political communities relevant for the constitution. It then discusses the supposed or constructed identity-types of these communities, and formulates recommendations for re-evaluating the relationships between the political communities and the constitutional institutions meant to strengthen their identities.

Keywords: *Romanian Constitution, political community, constitutional order, identity*

Lucian Bojin: Commentaries on the Structure of Executive Power

Any voter with an average culture could probably answer the question “What is the executive power?” According to the widely accepted view, as well as the most popular Romanian textbook on constitutional right, the executive power is made up of the institutions meant to execute the law. However, this simple answer does not render futile all further reflections on the question. Such reflections could raise further questions like “which are the institutions making up the executive power” or “where is the border between the legislative and executive power?” These two questions do not arise by chance. It appears that the first is the more difficult to answer. The second has been addressed much too rarely by Romanian legal scholars, especially as the two branches of power are organised in a different manner, and are run according to different, or even opposing principles.

Keywords: *Romanian Constitution, constitutional right, Executive Power*

Capelle-Pogăcean, Antonela-Ragaru, Nadège: What Makes “Ethnic Parties” Ethnic? The MFR and the DAHR

A rather neglected theme in Soviet and Eastern European studies before the end of communism, ethnic politics and minority policies in Central and South-East Europe have given birth to a very rich body of literature in the 1990s. Some analyses have been influenced by the so-called “transitology” paradigm; others have borrowed from ethnic conflict studies. In both cases, though, ethno-cultural diversity has mostly been treated in a

normative way and portrayed as an obstacle to democratization. As for ethnic parties, they have alternatively been presented as conducive to better political participation and integration for the minorities (in a multiculturalist perspective) or as a threat to state stability and to democracy. Regardless of these cleavages, most research on ethnic identifications and on their mobilization in politics has been grounded upon substantial definitions of ethnic "groups" and has reified differences between "generalist" and "ethnic" parties. The present comparison between the trajectory of the Movement for Rights and Freedoms (MFR, which represents the interests of the Turks and other Muslims in Bulgaria) and that of the Democratic Alliance of Hungarians in Romania (DAHR, representing the Hungarian population) departs from these approaches in two ways. First, it emphasizes the centrality of the sociology of collective action to understanding the politicization of ethnicity, while insisting on the need to trace the particular historical processes through which ethnicity has been constructed and politicized in every single case. Second, attention is brought to the role social imaginings play in shaping the strategies of social and political actors. To put it otherwise, we make the argument that identities are not exogenous to politicization processes; they are redefined, renegotiated and reappropriated as social actors invest the political field. "Ethnic parties" are in urgent need of de-exoticization: Like most parties, they cannot elude the traditional dilemmas of political representation, in particular the need to be perceived as both responsive and accountable.

Keywords: *ethnic parties, ethnocultural diversity, Movement for Rights and Freedoms, Democratic Alliance of Hungarians in Romania*

Valentin Constantin: The Romanian Constitution from the Perspective of Rule of Law

The present study was born in the context of initiatives and debates concerning the revision of the Romanian Constitution. The necessity of the revision is emphasized by members of the political class as well as politically involved professionals. Their arguments start from claiming that the law meant to serve as the foundation of state organisation leads to "institutional blockages." The conception of "institutional blockages" generated by the shortcomings of the Constitution, although fundamentally wrong, seems easy to spread, as even a large part of lawyers find it acceptable. The institutional blockages however go back to a single common cause: the fact

that the main organs of the state exceed or monopolize the powers they are endowed with by the constitution.

This study argues that the constitution contains a series of “teleological contradictions” which make a revision necessary. Although it set out the basic values of the state clearly and probably appropriately, the Constitution failed to create a coherent and effective set of acts to realize these values, and/or failed to ensure the financial means necessary. It is these shortcomings that, from a legal point of view, constitute the “teleological contradictions.”

Keywords: *Romanian Constitution, Rule of Law, institutional blockage*

Tihamér Czika: Minority Law Aspects of the Stanomir-Report

What is minority law? Some professionals consider minority law a separate branch of the law, others regard it as a sub-branch of international law, while there are some who consider that it is but a small element in regulating basic human rights. According to the definition by Gyula Fábrián and Patricia Ötvös, “minority law is the branch of the law containing all the domestic and international acts regulating the relationship between the majority and the minority populations of a given country, and which aim at preserving the language, culture, customs, in one word the alterity of the minority, both at group and individual level.”

Starting from these considerations, this study attempts to map the recommendations of the Stanomir revision report which would protect the rights of minorities, or serve the preservation of their values. The recommendations are divided into two categories. Recommendations directly involving an institution of minority rights are discussed separately from the ones indirectly contributing to the enforcement of minority rights.

Keywords: *Romanian Constitution, minority law, minority rights*

Éva Fórika: “Europeanization” as a Cause and Motivation for Revising the Romanian Constitution

The study investigates the relationship between Romanian domestic law and European as well as international law. The relationship between international and domestic law in general should explicitly be regulated according to the monistic principle. This necessity is strengthened by the fact that

whether by force or choice, the legal paragraphs regulating the relationship between domestic law and international norms explicitly mentioned by the constitution (international human rights treaties, the law of the European Union) follow this principle.

In our opinion, the only realistic conception is the theory of the primacy of the international law. International legal norms clearly regulate social relations where the necessity of international legal regulation arose. International law has by now surpassed the phase when it could exist separately from the domestic law of a state. We must accept the fact that mankind reached a situation when it is no longer a mass of people concentrated in different states, but makes up a society with its own legal order: the international law. This makes it necessary to re-consider the concept of sovereignty in light of the current social relations. It might also be necessary to reconsider the competence of the Supreme Court in reviewing international treaties, which, according to the monistic theory as well, is incompatible with the status of international treaties. In our opinion, international treaties cannot be reviewed by a court of one of the parties (be it the Supreme Court), as the treaty is not the result of a unilateral act of will (sovereignty) of the given party (state.) International treaties can be reviewed and interpreted by bodies stipulated in the treaty, or, in lack of such stipulations, the bodies defined by the general norms of international law. The Supreme Court of a party to the treaty can only review the constitutionality of the ratification / signature.

Keywords: *Romanian Constitution, international law, monistic principle*

Gergely Illyés: International Comparisons for Creating a Constitutional Preamble

The presidential commission analysing the Romanian political and constitutional regime, lead by dr. Ioan Stanomir, investigated several aspects of the problems of the current constitutional system, and outlined the possible directions of constitutional reform.

Investigating the first section of the constitution, the committee concluded that although it has not been endowed with the status of a preamble, it sets out the principles and values that serve as the foundation of the Romanian constitutional system. Therefore it would be necessary and felicitous to set them apart as a preamble.

If the process of revising the constitution would allow for the formulation of a preamble, the revision and completion of these principles and values might also be considered.

In an attempt to map the possible solutions or examples to be followed, the study offers a brief international overview of preambles of constitutions of other states, highlighting the common points as well as the unique formulations. Although the analysis focuses on the member states of the European Union, where 14 constitutions of the 27 member states have a preamble, the study also includes the United States and Russia, as well as Serbia and the Ukraine, two countries with a large Hungarian minority.

Keywords: *Romanian Constitution, constitutional reform, preambles of constitutions*

Árpád Márton: Revising the Constitution - a Hungarian perspective

The study addresses the possible revision of the constitution primarily with reference to chapters *C. Directions for Development and Recommendations for Institutional Reform* and *D. Conclusions* of the Stanomir-report. The constitution should be revised to make the state more functional, and to offer better protection to its citizens and communities. It is from this point of view that we need to address the problems in the functioning of the state and the possible solutions proposed by the experts. In analysing these problems, like the problem of a single or double chamber Parliament, the republic as a form of state, regionalism etc., the study pays special attention to the interests of the Hungarian minority, and evaluates the proposals from this point of view as well.

Keywords: *Romanian Constitution, constitutional reform, minority rights*

Ioan Stanomir et al.: Report of the Presidential Commission of Analysis of the Political and Constitutional Regime in Romania

The presidential Commission of analysis of the political and constitutional regime in Romania has been created with the purpose to draw up a document which has to identify the political and constitutional limits of the governing regime and to suggest the frame of the debate on the revision of the Constitution and the institutional re-organization of the state.

The analysis commission has chosen as a starting point the identification of the big questions, which can organize the debate around the Consti-

tution and the political regime. Attention was paid, as much as possible, to ensuring an organic link among three levels of the text. They are an introductory segment, devoted to the Constitution as the basis of the political and constitutional regime, a middle segment of analysis, devoted to the crises and the sensitive points, and last but not least a segment devoted to all the lines of evolution and the recommendations of institutional reform.

In this respect, the option in favour of the identification of the crises and the sensitive points would be decisive for the profile of our entire report. The Commission has been aware of the existence of some points which have mobilized the interest of the public. But it has been forced, through the very nature of the mandate entrusted to it by the president of Romania, to avoid the tendency of ignoring the relationship between the political and the legal aspects, the tendency to veer to a partisan discourse.

Keywords: political regime, constitutional regime, institutional reform

Attila Varga: A Forgotten, Misunderstood Report

It appears as an increasingly obvious and undisputable fact that the Constitution as a legal norm and the constitutional order it creates has serious shortcomings, and operates with derangements and conflicts that seem impossible to solve.

Therefore it is necessary that political decision-makers undertake a thorough, comprehensive revision of the constitution, or the adoption of a new one, based on a serious analysis. However, it appears that there is no real will for either. The showcase intentions are only meant to bring in more votes, and not to offer real, long-term solutions to the problems revealed and obvious.

Attitudes towards the question are characterised by an exceptional short-sightedness, with suggestions for revision being determined by the political interests of the moment.

The development of the Romanian constitution appears to prove that the people or their political leadership are incapable of thoroughly rethinking their constitutional order, of determining the legal and political framework that would allow them to live under a constitutional rule of law, in conditions of political predictability, with the ability to plan forward in the long term, or at least for a few decades.

Keywords: political regime, Romanian Constitution, constitutional reform

Emőd Veress: Reforming the Administration, the State, the Constitution

The necessity of revising the constitution periodically arises in each country. The report of the Stanomir-commission shows that the revision of the constitution could make it to the political agenda in Romania as well.

Proclaiming the urgency of constitutional reform is a fundamental error. It is undeniable that the Romanian state struggles with basic civil law problems, and the rule of law should be strengthened further. But these do not account for a constitutional “emergency situation.” Most “saving” reforms could be passed as organic or simple laws, without a two-third majority. However, there is no political will and professional political capacity to do so. Therefore, politicians talking about constitutional reform are only engaging in demagogical exercises’ or chasing illusions.

This study presents the substantive issues regarding the possibilities of constitutional reform, with special regard to the position and reform of the executive power.

Keywords: *Romanian Constitution, constitutional reform, reform of the executive power*