

Constitutional cooperation and institutional efficiency

Abstract: *The general belief that institutions have a great impact on individuals is proven by the large number of analyses on the schemes regarding the separation and monitoring of state powers, of the rights and obligations of the citizens, of legally accepted doctrines. In fact, one of the main preoccupations of social sciences is the likelihood of survival of some institutions, from the point of view of their efficiency. Of course, the question: "Who has the right to evaluate the efficiency of institutions?" arises. Since their participating members are affected in various ways and invest resources in institutions, they must evaluate if their interests are adequately managed. When rational and free actors are in the position to make a choice, they will prefer those rules which ensure an institutional cooperation balance. Rational and independent individuals can only make a Pareto optimal or superior choice, since they know they will be directly affected at the levels inferior to the primary collective choice level, hereinafter referred to as constitutional choice. This paper examines the extent to which the rational choice scheme can be integrated in the constitutional organisation of an institution as the starting point in the analysis of institutional efficiency.*

Keywords: institutions, cooperation, constitution, institutions, constitutional choice, institutional efficiency, post-constitutional level, status-quo, methodological and normative individualism, unanimity

Introduction

Having as background the dynamics of the Romanian post-socialist period, characterised by both public and academic debates

regarding the systems of political representation, organisation and separation of state political institutions, there is the need for a greater focus on the organisation methods of the interests these institutions represent. The common point of

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diagnoses specific to the Romanian academic field is the following: political institutions are associated with poor efficiency. However, even the simplest arguments show that institutions have significant effects on the interests of participating actors². Institutions, in their political form, stand as forms of representation and management of citizens' interests. Their efficiency implies the achievement of the expected result, defined by the ratio between results and efforts made within institutional limits. In the case of political institutions, interests cover the dimensions of representation-political and civil

freedom. Therefore, the viability of democracy is often evaluated in terms of one institutional system or another (Diamond, Przeworski, Alvarez, Cheibub, Limongi: 1997, 2004), by searching the most adequate characteristics which can ensure both political freedom and representation, equally distributed and at the highest degree. At the same time, besides the weight of institutional issues, democracies also have to deal with the "incompetence, corruption and stubbornness" 3 of political actors. High efficiency in the representation of citizens' interests and the anticipation or limitation of the faults of political actors, these are the two major problems which democratic political systems seem to face. From this point of view, the need of strong and well designed institutions is often proclaimed. In the following pages, I will show that these key challenges must first be addressed to constitutions, and that they must be solved in a certain way, by preserving the freedom of individuals and by representing their interests.

References to the need for institutions to be strong and efficient can be frequently encountered. Some interpret this opinion as the need for a "strong hand" to lead the institutional system⁴. This type of social preferences is frequently explained in the terms of political culture. Thus, the development and preservation of a stable democracy depends on a certain set of political and civic attitudes, on a certain level of the citizens' political culture. However, if the purpose of the collective institutional choice is the preservation of freedom and of the possibility to represent interests, the individuals will exclusively prefer a democratic institutionalisation. Only after a constitutional election of institutions can one talk about political culture and socialisation. Besides the role of managing participants' interests, institutions also have to promote their symbolic image⁵. Of course, an asymmetrical distribution of the decision-making authorities would lead to a reduction in the interdependence costs. However, beyond reaching a balance when resorting to Leviathan, this also implies the requirement of a perfect administration in terms of information, enforcement and efficiency of sanctions. Such a solution clearly illustrates the practical irrationality of its basic assumptions.

One may ask why the institutional development of a society must be based on a constitutional contract. The constitution is important because it must generate clear competitive guidelines for the political parties or society's intermediary organisations operating at collective levels. The constitution tips the balance towards one system of electoral competition or another, thus influencing political pluralism. The social contract is designed to answer the following question: Which type of partisan polarisation is best suited for society? Should we favour through the electoral system a polarised pluralism which defers political decision, while also helping voters differentiate between available options? Or, on the contrary, should we ensure the proliferation of moderation and compromise?

The particular importance for freedom and individual input in constitutional moments favours criticism as regards the practicality of such a standard. However, at a constitutional level, moderation, convergence, consensus and reduced volatility are favoured in society, in particular when the structure of interaction upon the constitutional moment is legitimate. In the following pages I will outline the normative formula which can ensure that the constitutional moment is characterised by both legitimacy and consensus. These normative standards suggest that there are no sufficiently powerful reasons for the moments of choice or constitutional change to be deprived of the participation of individuals to the decision.

A conceptual framework for analysing the constitutional movements and choices

If institutions do matter, their mode of operation is also important for the institution itself, and implicitly for its participants. What I want to point out is that once it is established that institutions have effects on the participants, we must know when to grant them special attention. The moment when both the operating regulations and the authority and responsibility structure are defined explains the future method of operation, as well as its justification. At an operational level, if the drama of an institution is connected to the way in which it controls pressure in order to obtain the most equitable distribution of income, then solvability attempts shall reunite the consent of individuals regarding the way in which the institution should operate.

We search for the conditions which allow the existence of efficient institutions in terms of stability, social desirability and consistency in time. Thus, my premises are largely based on the idea that the legitimacy of the constitutional contract and of secondary regulations at this level influences the performance of institutions at primary level. My assumption is that the performance of institutions at a primary post-constitutional level (measured by the applicability of the proposed set of constraints, acknowledgement, social validation and desirability and form of specialisation) may be explained by the legitimacy of the form of institutional cooperation. The way in which the constitutional contract is concluded has effects on the contract itself and particularly on the levels it further influences. According to some explanations, the forms of cooperation are not stable when the future is less important than the present (Axelrod: 1984). Under these circumstances, the possibility of creating a stable cooperation emerges from more durable and frequent interactions. This is also the case of the model presented in this paper. The parable of Hume's farmers shows us that players can cooperate only by repeated interaction. Following empirical research, Axelrod (1984) claims that, even in an *ius in omnia* moment, collected stability seems to be supported by two conditions, i.e. reciprocity and probability of the situation to be repeated. In other words, the evolution of cooperation is directly proportional with the number of interactions. Individuals want to pass from individual aggressive actions to a social state of cooperation. Repeated dilemmas and tragedies lead to a cooperation balance based on similar experiences, trust and sometimes group conscience. Thus, we accept that successful institutional strategies may be implemented even in the absence of rationality (Axelrod: 1984, p. 187), but, as the following reasons explain, we will not consider this to be a warning. The analysis only refers to political institutions, theoretically labelled as balanced preferences with regard to the way in which public resources are managed. As this implies power, it would be hard to separate rationality to at least direct participation to such institutions. What I would like to suggest here is that the constitutional economics approach is useful in particular for those who want to deliberate upon constitutional elections rather than for those who have already made these choices.

Of course, there is the question of how can one assess the legitimacy of a constitutional change. This approach proposes the evaluation of the constitutional moment by using three conditions, presented in the following section.

The status quo

In order to answer the question of why people want to limit their actions by defining an institutional and structural context, we will present an example which was thoroughly analysed by the philosophical and political theory studies relevant for defining new political systems emerged after 1989 in Eastern Europe. The siren metaphor, when Ulysses chooses to tie himself to the ship mast and encourages the crew members to plug their ears with wax reflects the free adoption of a private constitution (Elster: 2000, p. 1-9). However, in the presented situation, Ulysses' optimal balance strategy implies a time inconsistency problem, caused by the fact that the strategy is being modified while being implemented (Van den Hauwe: 2004). His optimal plan was to listen to the sirens and then continue his journey. But this was time-inconsistent because, once he had embarked on the plan by listening to the sirens, he would not have been able to implement the later part of the plan, the rest of his journey. Thus, if he stooped to listen to the sirens, Ulysses would have been able to continue his journey. Therefore, the options are contradictory and cannot create an optimal strategy. The optimal strategic alternative is the following. We have a sequence of actions $(A_t, A_{t+1}, A_{t+2}, A_{t+3}, \dots, A_{t+n})$ for each moment in time $[T, T+1, T+2 \dots T+n]$, characterised by the fact that the individual will actually choose in each time period the action specified by the strategy. Thus, if according to the initial plan the best strategy is action A_{t+1} , when $T+1$ occurs, having undertaken A_t in T , the individual will still choose A_{t+1} in $T+1$. The time inconsistency occurs when Ulysses' preferences change in the middle of the strategy. Thus, Ulysses changes his preference for action A_{t+1} during $T+1$ and in the middle of implementing the strategy. Therefore, in order to implement his initial optimal plan, he uses a set of constraints relating to what he can do in the second part of the implementation of the initial strategy. This set of constraints establish a private constitution which guide *ex ante* his future actions, a constitution imposed in order to subvert certain inclinations of potential actions that could postpone or destroy the initial comprehensive optimal strategy. Why did Ulysses want to deny himself freedom, by accepting a set of rules that constrain and guide his actions? Because there was the risk of deviating from the initial strategy and thus modifying the desired balance. The accepted rules establish a private constitution. Therefore, Ulysses institutionalises an optimal strategy and the private constitution has the role to prevent, limit and eliminate inclinations of deviating from the optimal strategy.

Of course, Ulysses and his private constitution are labels for a community of individuals who need to organise their social space. Thus, they deliberately choose how to interact, under the form of a general prescription, which, from a legal point of view, represents the constitution. One may notice that the main concern of the constitutional political economy approach is the creation of a mutually agreed constitution, valid for the interactions and social structures present at the level of a community. Finally, a solid argument which supports the idea that constitutional choice is essential for individuals is made by Ostrom (2005), through his three levels of action arenas. According to him, the first level is represented by the operational rules which directly influence the daily decisions and actions of the participants to a situation. The second level refers to collective choice rules which affect operational rules by prescribing which participants have the authority to change operational rules and which are the rules to be followed in this situation. Constitutional choice rules are rules which directly affect the second level, i.e. who can participate in the

collective choice level and which are the rules for choosing collective rules. Therefore, the constitutional level influences the collective choice level and the collective choice level affects the last level, of daily choices.

However, we still have to clarify which are the dimensions that could characterise the institutionalisation constraint. As previously explained, institutionalisation implies the balancing of various interests with a view to managing public resources, and the possibility for the benefits of each participant to be equal with those of other participants, not necessarily *hic et nunc*. Since we reserve the quality of being rational for each individual, limitations are imposed for consequences which affect intra-institutional cooperation, between the participants⁶. Thus, the main objectives must be the limitation of vices, passions, selfishness and opportunist behaviour, including the limitation of time inconsistency, of the inclination to accept smaller gains in the present against the possibility of greater future gains, and even the neutralisation, deferral or prevention of preference changes. Buchanan (1993) argues an analogy between the market and politics. Each of them undergoes some sort of evolutionist selection. The only difference between the economic and political actor is finality. If the market legitimises individual efficiency, politicians *acting on the political market have to undertake objectives which are different from their interests: institutional efficiency*. However, the structure of the political game can favour behaviours which are contrary to the general interest. That is why Buchanan redefines the problems in terms of designing a constitution allowing politicians who seek to "serve public interest" to survive⁷.

Going back to the dimensions of the constraint to cooperate, individuals are able to foresee some of them: the possibility of exclusion, defining costs or rewards, *delay*⁸, bargaining power⁹, limitations regarding the change of preferences, inducement of ignorance by promoting a common culture¹⁰.

From the perspective of the status-quo, the constitutional choice is first of all a *social* choice, if it implies an interaction scheme. The idea of order arises from the repeated occurrence of conflicts and deviations from the initial strategies and plans, established by interaction¹¹. It involves the set of social behaviours which participating individuals must adopt in order to comply with the generally accepted prescriptions. Taking into account the above mentioned aspects, all free human communities reach a point when they define a minimum set of general prescriptions and rules which have proven their utility and thus become the benchmarks of a strong balance. They will represent the guidelines for interactions. By repeating a situation, individuals learn better strategies, either by comparing their strategies with the strategies and results obtained by others, or by adjustment, imitation or learning in time (Axelrod: 1984, Gintis: 2004, Ostrom: 2005). The unifying idea is that constitutional choice implies experience and repetition. But not all norms become rules, therefore a constitution ensures not only the interpretation of social normativity, but also the instruments for maintaining and enforcing commitments. Since people *are not inclined to strictly observe rules and norms, there is the need to define a formula* which ensures that individuals do not obtain significant gains by breaking these rules and norms. It is hard to believe that individuals will always observe rules if their rational interest guides their actions to gain. Therefore, the rules and institutions to be created must coordinate the individuals' behaviour in such a way that observing institutional rules is profitable to them. It thus becomes clear that institutions should manage the interests of individuals so as to convince them that collective management is the most profitable so-

lution. As it is true that not all collective interest management formulas are efficient in the light of the freedom and representation pre-requisites, not all the interests of individuals can be managed institutionally, if we keep the same standards.

Constitutional contracts are characterised by three dimensions (Buchanan: 1962, 1990): normative individualism, transferring the rule of consensus or unanimity from the post-constitutional level to the constitutional level and constraint by constitutional rules for both private individuals and political actors. Therefore, the process of mutual agreement on a defining constitution for the social arrangements of a community becomes the challenge for analysis undertaken in this paper.

Methodological and normative individualism criteria

According to methodological individualism, any analysis of the social action must ultimately be reduced to the individual participating to that situation. The cooperation between individuals must be considered a free individual action, following the acceptance of a set of rules which ensure survival for all. Although the explanation of any social situation will concentrate on individual actions, the analysis scheme may undertake more or less complex forms. However, this analysis model may account in particular for the choice of structural constraints. We assume that human actions are intentional and rational and focus on the constitutional moment defined as a choice situation. Choices and actions are attributes of individuals. Therefore, the method used to explain a phenomenon must describe how individual choices interact and merge into social decisions¹². The approach is useful because it helps us understand the connection between the decision framework, influenced by elements such as culture, information, physical environment and the choice itself made by the individual. However, the elements associated with the decisional framework are not subject to interpretation.

Normative individualism is promoted by James Buchanan (1975). He criticises and rejects all organic conceptions on social actions, which infer that there is a common and acknowledged general good, transcending individuals¹³. According to Buchanan, the state and all institutions can only be justified by appealing to the participant individuals. The conclusion is that, upon the constitutional moment, all individuals must be treated equally. At the same time, Buchanan rejects all Marxist theories on society, based on the fundamental idea that a group always succeeds in enforcing its preferences over another group. His key, contractualist question is whether individuals have given their consent on the rules. If yes, then we can speak about a legitimate, justifiable institution. The problem that may arise is related to the potential conflicts between the preferences of rational and free people. Preferences may be different and even opposed, which results in the classic prisoner's dilemma, characterised either way by a general unfavourable result. However, the need for a constitution is much more imperative if social cooperation leads to mutual gains, such as public goods.

Unanimity criteria

According to Buchanan and Tullock, the evaluation of an institution must begin with the consensus of its members. Therefore, we need a criterion to assess the appropriateness of adopting a set of rules. The efforts to change the results associated to parti-

icipating to an institution must focus on the rules which influence actions and not on the individuals' behaviour. All attempts to increase the efficiency of an institution relying directly on criticised human actions fail, since the people decisions are mainly influenced by rules. For example, when we appeal to human conscience, Riker (1980) shows that very rarely a balance is reached. If the sets of allowed and prohibited actions are not defined, a participant may as well change his preference or dissimulate it (Riker: 1980), thus affecting the institutional balance. On the other hand, when the sets of allowed and prohibited actions are not specified, if one wants to replace the \bar{a} status alternative with a' , so that a' overcomes $a_n \dots a_j \dots a_k$, then this may be possible by controlling the agenda (Riker:1980, Cox, Shepsle: 2007). Institutional choice represents a voluntary exchange of benefits. That is why the efficiency of some rules and institutions must be measured by the consensus, the consent of participant individuals. Therefore, what individuals agree upon is efficient¹⁴, and the ideal situation is that individuals unanimously agree upon the choice of structural rules. Thus, these social actions must occur in the first stage, the constitutional stage.

Democracy and the constitutional contract tend to evolve together. Of course, in the *process of reaching a consensus*, all decision-making bodies with real power, adopting collective decisions, incur, at least theoretically, the risk of reaching a standstill. Democratic experience specific to constitutional changes or the adoption of a constitution shows that unanimity is impossible in the case of constitutional decisions. Moreover, these moments tend to favour some irrational aspects, although they should be the collective decisions most thoroughly analysed. On the other hand, major collective decisions must be founded on the principle of unanimity and practically on the majority rule. The majority rule implies the coordinated strategic behaviour of individuals and the rationality in the convergence of some preferences. Negotiations are based on blocks of votes and any rational individual may exchange votes. This is how we create moderation, consensus and convergence, which are needed to grant legitimacy to the constitutional moment.

In the previous paragraphs we mentioned the possibility of cooperation problems such as the prisoner's dilemma. That is why the constitution is justified as far as it ensures subsequent legitimate supply of public goods. Even if we assume that this set of rules may be spontaneously agreed upon, it is clear that some participants will identify gain opportunities arising from breaking the rules, at post-constitutional level. Therefore, there is the temptation for some individuals to observe only some rules, and it is difficult to argue that a public interest contractual evolution may guarantee a balance in the absence of a real legal system administrated by the state, such as private ordering (Williamson: 1985, 2002). This way, the contract must be secured.

The second type of post-contractual opportunism derives from the fact that the choice instruments are to some extent controlled by some individuals or groups participating to *the constitutional choice*. Since they have greater access than other individuals, the former will try to deviate the choice, so as to benefit from gains paid by the others¹⁵. That is why interest and coalition groups will appear in all choice systems which are not founded on the principle of unanimity, and they will try to obtain the representation of some special, individual or group interests. Unequal distribution of political power has the tendency to become dominant when the distribution system is allowed or guaranteed by the constitutional contract¹⁶. This refers to majoritarian systems, where the tendency of dominant

groups is to put pressure for the implementation of public policies which are in the interest of their own members, but whose costs are borne by all the other.

The Constitutional Choice Level

The third condition imposed by the normative model proposed by James Buchanan is that actions at the level of the political process be constrained by the constitutional level. As he explains, the constitutional level shall guide political processes, the actions of the elected representatives, as well as the voters, bureaucrats and jurists. As mentioned before (Elster: 2001, Ostrom: 2005), the constitutional level must influence the post-constitutional level. In conclusion, the history of constitutional contracts explains to a large extent the efficiency of institutions, as described in the following sections.

The Romanian Case

The institutional reconstruction of Romania after 1989 is characterised by the connection between constitution and social revolution. The problem of this connection is complex. One of the main points on the agenda of the Programme-Platform of the National Salvation Front Council, drawn up in a matter of hours as of the beginning of the Romanian Revolution of 1989, was the need to create a new Constitution. Although it was drawn up following ample debates and it was approved by the referendum of December 1991, the Romanian Constitution was, shortly after these moments, subject to revision requests. It is true however that the pressure to revise society's fundamental relations was not generated only by the participants to the domestic institutional organisation, which were directly affected, but it was also the result of the accession efforts of Romania to the European Union. On the other hand, the fact that immediately after 1991 a significant part of the society began to challenge its constitutional relations is mainly indicative of the fact that constitutional principles are indeed society's fundamental principles. They include criteria which, when applied, lead to a certain evolution of the inter- and intra-institutional reports, as well as to a certain distribution of fundamental goods. The most controversial aspects of these claims show that the unanimity principle was only partially observed between 1990-1991. Indeed, there were ample debates on the fundamental texts, but only in Parliament, with the participation of some experts or relevant public persons of the time. Of course, taking into account the fact that the Parliament of Romania was invested by vote by the people to form the Constituent Assembly, we cannot assert that the entire society, directly affected at the level of practical aspects regulated by the fundamental constitutional relations, was ignored. But the legitimacy of the debates could have been easily increased by a better convergence with the citizens' preferences. No research is available on the crystallisation of some social preferences in the period in question. For example, defining the state's powers may represent an occasion to generate discussions within society.

Some may ask to what extent did the people consent to adopting the constitutional framework in the context of a major change. From a legal-institutional point of view, the problem of the legitimacy of the Constitution of 1991 is quite clear. In principle, any *coup d'état*, putsch or revolution is illegal, since it is directed against the constitutional balance. Moreover, the classic constitutional doctrine requires that the investment of an autho-

rity with constituent power be made legally, not as a result of obtaining political power by unconstitutional means. However, a fundamental moral-political principle laid down in the American pre-revolutionary period as the 6th article of the Declaration of Rights adopted in 1767 says that "the doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of Mankind". This principle is also included in the Declaration of the Rights of Man and of the Citizen of 1789 adopted by the National Constituent Assembly of France, and becomes one of the articles of the Constitution of 1791. Therefore, we may assert that there was a certain constitutional legitimacy in the Romanian social-political space in 1991. It emerges from the popular legitimacy of the revolution, in its turn confirmed by a democratic organisation form. Naturally, they are followed by the legal-constitutional support. On the other hand, the classic constitutional perspective and constitutional economics consider that a genuine Constituent Assembly is not founded on the overthrow of a constitutional order, but on free and democratic choice. Thus, we have to confirm that this is not a perfect beginning of democracy as a method of managing society. To support this deduction, the Decree-Law no. 2/1989 on the set up of the National Salvation Front and its territorial councils grants this structure the authority to issue decree-laws or decrees. This article dissolved Communist institutions, for it modified the Constitution of 1965. FSN (National Salvation Front) proclaimed itself the supreme state power body, in the context of separation of state powers. In fact, it radically defines a new overall framework. Therefore, the legitimacy of the constitutional moment is questioned only from this point of view. As for the rest, it may be accepted that the normative acts issued by the new institutional organisation subsequent to the revolution are social or moral conventions. Evolutionist theoretical explanations state that they should become constitutional if they are repeated and largely supported in society.

Taking into account the condition of normative and methodological individualism, the Constitution of 1991 involves, to a certain extent, potential conflicts of preferences. In fact, as previously explained, constitutional choice tends to favour agreement, moderation, convergence, compromise, unlike constitutional re-evaluation and revision moments, as shown below. The Constitution of 1991 was adopted two years after the Revolution of 1989. Between the fall of Communism and the adoption of the new democratic constitution, Romania was governed by decree-laws. Until November-December 1991, post-socialist Romania had never experienced an institutional organisation. The Constitution of 1991 represents a balance, but not because it absorbs and optimally represents the actors' preferences, but because the negotiation and transaction alternatives would have been too costly (Shepsle: 1989, p. 144) in such a moment of deep social change. Therefore, the fundamental act of 1991 is a structurally induced balance. However, we know that some debates regarding constitutional modification began immediately after the adoption of the Fundamental Law of 1991. This may suggest that it would have been more appropriate to defer the constitutional moment in order to initiate debates in society on the first post-socialist constitution. However, the formal discussions regarding the revision of the constitution only began after the legislative elections in 1991. In general, having this type of discussions during the same executive term of office may be suspected of authoritarianism or at least of encouragement, through the issued constitutional texts, of some post-constitutional opportunities, which affect the institutional distribution of resources and power. At the same time, this aspect may suggest that applying the constitution

to the newly-created institutional system may generate uncertainty and even conflicts at collective, post-constitutional operational levels. The source of the inter-institutional conflicts or of conflicts between actors, which dominate and influence the functioning of the institutional system, is the Constitution.

On the other hand, the revised Constitution of 2003 offers a balance of strategies which is decisive for social choices, combined with preferences (Shepsle: 1989: p.137). The fundamental constitutional texts subject to revision were largely debated, but one of the problems was the fact that the Constituent Assembly in question was composed of Parliament members, even if classic theories of constitutional law state that a legitimate initial constituent is the result of democratic elections. At that moment, the Parliament had already been elected for three years.

The Constitution of 1991 rapidly led to situations where institutions generated contradictory effects. When evaluated by the citizens and civil society, one of the main objections to the Constitution was that, in various situations, it did not entail a generally favourable outcome for all participants to the institutional organisation. The constitutional contract is necessary because it defines relations which structure social cooperation and bring about mutual gains, such as public goods. The Constitution of 1991 allowed for the unequal distribution of some rights, due to the fact that they were insufficiently explained. This resulted in special gains for some citizens. For example, the constitutional contract guaranteed Romanians "the protection of private property", and not the right to private property. At the same time, although article 41 of the Constitution of 2003 was revised, it still prohibited foreigners or stateless persons to acquire land. As a matter of fact, the article had been modified specifically to ensure their right to acquire land. However, this right was conditioned by Romania's accession to the European Union and its participation to international law treaties.

These are only some of the applications to particular situations of the institutional organisation defined by the institutional contract. Repeated cases are another balance assessment method, due to the fact that, at some point, they may be used to determine the extent to which the state institutional system systematically excludes more and more prominent preferences or values (Riker: 1980, p.446). For that matter, we also have the following moral dilemma. To what extent should some preferences be excluded from representation? And, at the same time, which is the right moment to request a constitutional revision based on this aspect? On the other hand, an institution or an institutional complex implies a translation of the people's preferences and, since sometimes these preferences contradict themselves, only some of them are chosen following adequate debates. Thus, in order to limit claims and conflicts related to resources management, which is regulated by the Constitution at a superior level, it is vital to ensure the legitimacy of the debate, *ex ante* the adoption or revision of the constitution. On the other hand, creating a unity of different or even opposed preferences is impossible. That is why, as less resources are allocated in their favour, unrepresented social fragments shall exert pressure to obtain changes. This leads to a renegotiation of the constitutional contract. In some cases, the contract may even be broken. The events in 1989 may be interpreted as breaking a contract, and at the same time as an attempt to redefine balance. In a political system which favours the creation of a dominant majority, the minority shall try to reach a constitutional change rather than satisfy its own special preferences (Anderson, Hill: 1986, Merville and Osborne: 1990). This also the case of Romania in the period of

post-socialist transition to democracy. The 2003 constitutional revision was based, to a certain extent, on social demands. But the project was largely politic because one of the EU accession conditions involved the regulation of the relation between state powers, in order to optimise the decision-making process and some aspects of constitutionally guaranteed rights. They also explain the political support by compromise of the constitutional project. One of the most controversial aspects is the decentralisation of the public administration services, included in the constitutional texts of 2003. The objective was to maintain the bureaucratic process at the state's disposal, but to create at the same time a closer relationship with the citizen.

As previously indicated, Gordon Tullock forcefully argues that there is certain regularity as regards the behaviour of power coalitions at a collective level. In Romania, the practice is the following. The parliamentary majority, supporting the Executive, supports them *ipso facto* and the adoption of structural policies and interventions favourable for the group interests. After 1991, the adoption by the governments of the emergency ordinances follows a practice permitted even by Constitution. Very frequently, the Legislative Body was requested to issue laws for the approval of certain emergency ordinances which were, in fact, previously repealed by other emergency ordinances. Other times, the Government bills were abandoned before being debated in the second Chamber, because they were subject to amendments following the debates of a Chamber. The purpose was to issue emergency ordinances with the initial text proposed by the Government. Consequently, this led to a special gain for certain individuals or groups. The substance consisted of a constitutional support by the fact that the terms of the emergency ordinance were not clearly defined. The constitutional quorum of 2003 debated on and regulated the aspect of legislative assignment. Another relevant case was also the fact that the constitutional contract did not guarantee an equal and unitary justice. The operational effects were obvious, being subject to the critics of the citizens and of the European institutions. There are frequent cases where the courts of law having the same competence delivered different judgments for the same cases. The consequence was a poor confidence of the Romanian people in justice. The replacement of the Supreme Court of Justice by the High Court of Cassation and Justice led to changes at a collective level. Consequently, after 2003, legislation was subject to amendments relating to the principle of the unitary enforcement of the law as a first dimension of the rule of law. However, the legislative procedure represented the stake for the revision of the constitutional contract of 2003. The procedure of mediation between the two Legislative Chambers had sub-optimal effects on the decision-making process. Thus, it affected the Constitution itself, which provided for a legislative process in two stages. Results such as the deferral of the legislative decision by successively rejecting the legislative project within each of the two debates or conflicts unsolved following mediation, these were frequent cases in Romania in the period of transition to democracy. The problem arose from the failure to differentiate between the debating functions of each Chamber.

The theory of the principal-agent (Anderson, Hill: 1986, Merville and Osborne: 1990) provides an explanatory framework for all the cases briefly mentioned in the previous paragraphs, regarding behaviours focused on an allocation of resources which is not advantageous for all participants. This source shows us how contributors are deceived by the governmental institutions themselves. According to this theory, pressures will be made for the renegotiation or even breaking of the constitutional contract. Take for exam-

ple the Romanian case, the huge efforts made by the society in order to increase the transparency and integrity of public institutions by regulations and practice internalisation.

From a legal and procedural point of view, the Romanian Constitution is a rigid constitution. In this case, the Constituent Legislator clearly sets forth the limits of constitutional revision. The associated procedure is rather complex for all three possible revision initiative types. But the fact that the initiative of revision may come from the citizens ensures their participation to the decision-making process. This right derives from the fact that individuals know and are free at the operational level of the society they live in. The latter is influenced by the constitutional level. However, we do not know if Romanians preferred more flexible rebalancing conditions. The themes of public debates taking place between 2002-2003 did not cover this aspect.

Therefore, constitutional politics limits the Constitution revision options. Firstly, there are a series of limitations related to the initiation of the constitutional revision procedure. Their purpose was to protect the Constitution from possible abuses of political representatives of competent institutions. As a consequence, we avoid the risk of the problem of constitutional revision becoming the object of negotiations aimed in particular at political power balances between parties or personalities and the solutions to be reached – if they are indeed reached – by winning disputes or temporary alliances between parliamentary parties or the President and parliamentary parties. We must point out the fact that the problem of constitutional revision and the method of approaching constitutional politics are not differently solved by different political formulas of competent institutions. Legislatures having different political members will not treat the same problem differently. Political competition can be extremely customized in institutionalised political societies. Political competition must be as institutionalised as possible. Thus, political actors tend to apply the same inefficient negotiation method as in the case of institutional decision-making processes. Making and implementing institutional decisions cannot be carried out based on the momentary political advantages of the representatives of institutions authorised to negotiate the revision of the Constitution. On the other hand, constitutional solutions must always be institutional solutions. They must not be customised. Political competition may however always be customised – which may be beneficial from the point of view of the quality of the electoral offer. So, the object of political competition must not be represented by institutional problems. Based on these aspects, we can clearly differentiate between a constitution-based institutionally integrated political society and a political society which struggles with constitution institutionalisation or legitimacy problems. In the latter case, institutional problems are settled by customised political negotiation and the decision-making process is characterised by temporary alliances, created by speculating on advantages and tactics used by political actors to gain control or power. The method used for debating and negotiating political problems tends to be the same for purely institutional problems, which are to be solved only constitutionally. These include the electoral system, the organisation of the state-level institutional assembly, constitutional changes. Under these circumstances, political competitors may treat institutional problems as political problems, which will cause dissension and will bring about institutional inefficiency.

Of course, one may say that it is natural for political actors to take into account political problems, even if the problems in question need to be solved at a constitutional level. Certainly not. Most probably, political competition contributes to a large extent to the increase of democracy quality. This way, the electoral or governing offers received by

citizens are constantly improving. However, this does not mean that institutional problems may not be solved by using constitutional tools, just for the purpose of avoiding a partisan solution, guided by the position of political actors in the game of power. The object of this argument is not political partisanship, but purely political solutions. Moreover, constitutionality implies a certain political philosophy. The balance between political positions is obtained by continuous adjustments and negotiations. The interaction is dominated by competition and momentary advantageous positions, and the balances are fragile and volatile. However, constitutional political moments imply cooperation rather than competition. On the other hand, an inefficient constitutional system allows, upon constitutional moments, the undermining of cooperation in favour of competition. Constitutional political and change moments are not solved easily, but their development must be prepared institutionally. This is especially important since a constitution sets forth the state institutions' functioning patterns and these institutions deal with public goods. The management of public goods by public institutions follows the principle of serving the broader interest, not the principle of favouring just some societal, group or political interests.

That is why the constitutional decision balance must be stable. In other words, in order to reach it, constitutional balance must be regulated by certain pre-requisites, which limit balance re-evaluation abuses created by litigations specific to the competition for power and public offices. The constitutional debate takes place among political actors, but it must also be integrated in society. Therefore, the accent on the compatibility of motivations and continuous adjustment of political positions falls at the very best on a secondary level of importance. If constitutional modifications must be made institutionally, then the constitution must stipulate a status-quo and this status-quo must be enforceable, able to consolidate itself and self-regulating under certain conditions. This explains the fact that some constitutional articles cannot be revised. Article 152 of the Romanian Constitution stipulates:

(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime.¹⁷

The nature of this revision limitation is double: both material and situational. The revision limitations aim at avoiding possible abuse or decisions which severely infringe Romania's territorial and national integrity. We may also discuss about express and implicit limitations. Express limitations are explicitly stipulated in the constitution, while implicit limits are not set forth in the constitution text, they must be deduced by interpretation. Taking into account these aspects, the Constitution of Romania offers few opportunities for the parties and political alliances or the President to exploit litigious aspects in the competition for obtaining advantages subsequent to constitutional modifications. According to article 150 of the Constitution of Romania:

Revision of the Constitution may be initiated by the President of Romania on the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote. (2) The citizens who initiate the revision of the Constitution must originate from at least half the number of the counties in the country, and in each of the respective counties or in the

*Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative*¹⁸.

By analysing the population's opportunity in the constitutional revision initiative, we notice that the unanimity test, proposed by Buchanan and Tullock as a normative standard, is observed. The starting point in the evaluation of a constitutional choice must be the consensus of its members. Therefore, we need a set of criteria to assess the appropriateness of adopting a set of rules. The creation of an opportunity for citizens to participate in the revision of the fundamental act ensures the legitimacy of this undertaking. The provision of such a condition in the constitutional text is motivated by legitimacy. Please note however that this option is one of two possibilities of initiating constitutional revision. The decisive involvement of the constitutional body in the constitutional revision initiative is made by ensuring the control of constitutionality. For the constitution revision initiative, article 146 (a) of the Constitution stipulates the *ex officio* adjudication on the initiation of the revision. Thus, its role in this case is only to make sure that the provisions of article 152 are observed, as well as if the number of mandatory procedural signatures is reached.

Please note that the Constitution grants the Constitutional Court a key role in the constitution revision process. The decisions of the fundamental institution of the rule of law are of utter importance for this type of undertaking. According to the fundamental law, the Court shall decide within maximum 10 days as of the referral of the revision proposal and within maximum 60 days when the revision is initiated by the citizens. A positive endorsement issued by the Constitutional Court initiates the legislation procedure in the Parliament Chamber in question. A negative endorsement means that the revisions procedure is not constitutional. In this case, the revision procedure is interrupted. To summarize, article 150 of the Constitution of Romania stipulates four possibilities of revision:

*(1) Revision of the Constitution may be initiated by the President of Romania on the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote. (2) The citizens who initiate the revision of the Constitution must originate from at least half the number of the counties in the country, and in each of the respective counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative.*¹⁹

I do not wish that the first implication of this analysis be represented by the reasons of re-evaluation of opportunities of some state institution as compared to other private institutions. We know and we accept that a private, non-state related administration order is possible. In fact, we cannot and it would not be clear from a methodological point of view to make a distinction between types of institutional order. As shown in this paper, institutionalisation implies a dimension of constitutionality. And constitutionality implies collective choice by cooperation. At the same time, it also involves setting up an exterior supervision authority, or at least an attribute of functionality which is different from the main institutional plan. Within the limitations herein, institutions assume public administration of resources for its participants. At the same time, we cannot even foresee if the institutional mechanism will lead to the development of associated markets. It is absolutely impossible to find complex cooperation situations, involving the management of resources and at the same time being purely public or purely private. The centralised planning Communist system is characteristic for what we understand as common public order. Let us remember that besides the tolerance for underground markets, Communists were compelled to use some type of trial and error in the resource allocation system, with the

definite purpose of restoring the production quantity. Conversely, access is unrestricted even on the free market. The conclusion drawn here is the following. Whatever the type of order management, it is essential for individuals to choose a constitution, because it will represent the standard for actions at inferior society levels.

Finally, if collective choice involves a rational and practical association of individual preferences, then the respect for normative individualism is a matter of course. Please note that, in the case of complex collective decisions, the level of rationality is higher than that manifested in a natural state. Moreover, constitutionality is based on a meta-constitutional level, as explained by the American institutionalists at Bloomington. This framework is defined by factors such as cultural elements and physical environment. Therefore, the constitution is founded on a set of moral and social conventions. At the same time, the inclusion in the constitution of these lines of interaction, consolidated by exchange and significance, may be considered necessary. The answer is this. It is not mandatory. On the other hand, social choices tend to become institutionalised when common resources are considerable. It is obvious that a cooperation balance may be maintained even in the absence of constitutions. But the undeniable quality of institutionalisation is that it reduces the frailty of cooperation. The measure of this frailty is represented by how we constitutionally approve or reject various actions. Of course, it is difficult to foresee various obliquitous effects of the institutional basis which we set up or revise. All the more so, the extended participation to the debate on the constitutional contract is beneficial, through the confrontation of errors. By pragmatically neglecting the classical methods of exercising democracy, there are ways for the citizens to participate to the decision-making process. Non-governmental structures represent voluntarily organised citizens before the state. They can become decision partners of government members. The good news is that the Constituent Assembly also approved such decision-making methods.

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- 1 This does not include institutions whose scheme of interest organisation is authoritatively or artificially created or maintained, as in the case of some institutions specific to socialism. For example, the centralised socialist planning authority had to formally create a rational balance of prices, either once and for all, or by periodic adjustments. Given the different income and needs of the people, the institution's mission was in fact impossible.
- 2 "Institutions matter" is the common saying of both institutionalists (Ostrom: 1990, North: 1994) and researchers working with other paradigms (O' Donnell: 1979, 1986, 1997, Schmitter, Whitehead :1986, Przeworski:1997).
- 3 Diamond, Chu (coord.) 1997(2004): *Cum se consolidează democrația*, Polirom, Iași, Larry Diamond, În căutarea consolidării, p. 25.
- 4 According to a series of surveys, a large percentage of Romanian citizens preferred in the '90s a strong, hardline leader, able to enforce his decisions and bring order to society.
- 5 In this case, the values upon which the constitutional choice of the institutional system is founded: liberty, representation of interests in democratic and legitimate conditions.
- 6 For this explanatory outline, cooperation may be initiated only by free and rational persons. It may be aimed both at the creation of an adequate group and at setting forth equal benefits for all participants, but this does not necessarily mean that what is gained by one participant must be gained by the others. It means that all participants have equal opportunities of obtaining a certain benefit if they comply with institutional rules and observe the same type of intra-institutional interaction.
- 7 Buchanan, James (1993): How can constitutions be designed so that politicians who seek to serve "public interest" can survive?, *Constitutional Political Economy*, 4 (1), 1-6.
- 8 In order to use this method to increase the level of cooperation, the solution is to resort to delays immediately before the implementation of the next part of the strategy, so as to allow the previous part of the strategy to be implemented in case there are deviations from the initial plan.
- 9 *Bargaining power*, the original English term, is an established concept in the theory of games, economy, negotiation and diplomacy. It refers to the parties' capacity to exercise their authority one over another, to influence the partner's behaviour without agreeing to a preliminary agreement.
- 10 There is a connection between culture and human action. Weber's paradigm launches the hypothesis that some human actions (preferences, individual choices) must be analysed by resorting to some previous action elements. More recent analysis schemes can be found in the *Journal of Social Behavior* (Ikuenobe: 2001). Thus, responsibility is defined based on specific standards and cultural values, which limits the process of assuming responsibility.
- 11 Obviously, we exclude the possibility of a series of individuals not part of a repeated interaction scheme wanting to voluntarily choose a constitution.
- 12 Vanberg, V.J. (1994): *Rules and Choice in Economics*, London, Rotledge, p.1.
- 13 Buchanan, James, G. Tullock (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, Ann Arbor, MI:University of Michigan Press, online edition, Chapter 2, The Individualistic Postulate.
- 14 Van den Hauwe (2001): The Elgar companion to law and economics, Chapter II, Constitutional economics, online edition, p.6.
- 15 Gordon Tullock uses for this situation the term of *rent-seeking*.
- 16 Buchanan, James (1993): How can constitutions be designed so that politicians who seek "to serve" public interest can survive?, *Constitutional Political Economy*, Vol. 4, No. 1, p. 6.
- 17 Constitution of Romania, 1991.
- 18 Constitution of Romania, 1991.
- 19 Constitution of Romania 1991, art. 150.

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