

Romanian Constitutional Identity in Historical Context

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ABSTRACT

This paper is approaching the Romanian constitutional identity as a tendential constitutional identity. This concept emphasizes a perpetual competition between two historical Romanian identity poles: a eurocentric and an ethnocentric one. From the nineteenth century, the Romanians constantly desired to obtain a full European constitutional identity but they always feared to give in their constitutional ethnocentric identity. This is why the Romanian constitutional identity was and still is nothing but a never-ending tendency towards constitutional Europeanization. Due to its dynamic character, the Romanian constitutional identity was closer either to its eurocentric pole or its ethnocentric one. Sometime it had a democratic-liberal European look, some other time it had a strong illiberal look.

KEYWORDS

Romanian constitutionalism, tendential constitutional identity, bipolar constitutional identity, eurocentric constitutional identity, ethnocentric constitutional identity.

1. Introduction

The Romanian modern and contemporary constitutional identities are intimately linked to the social, economic, religious, political and ideological Romanian contexts of the last two centuries, and the geopolitical context of Southeastern Europe has decisively influenced Romanians' perception about their constitutional self.

At the international level, the Romanian agenda was dominated by the birth of the unitary nation state, the unification of all territories inhabited by the Romanian ethnics and by the hope to gain and protect the integrity of the nation state's territory as well as its autonomy and independence. At the beginning of the nineteenth century, Romanians were politically organised in two autonomous principalities, Wallachia and Moldova, under Ottoman suzerainty. From 1711 until 1821, Phanariot (Greek) princes were installed on the Romanian thrones by the Ottomans with the clear purpose of containing the centrifugal tendencies of the autochthonous political elites (the boyars). Despite the efforts undertaken by some enlightened princes to implement social, economic and political reforms, the Phanariotes not only succeeded in

building an oriental-like absolutism but also transformed the huge state bureaucratic apparatus in the epitome of administrative inefficacy and endemic corruption. These inevitably triggered the reaction of the Romanian boyars, who, after an intense diplomatic pressure and numerous reform proposals sent to the Ottomans, Russians and even the French, obtained the return of princes of Romanian origin on the thrones. Against this backdrop, a national party developed in the Romanian principalities, which aimed at expanding and reinforcing their autonomy against the suzerain power. More or less unexpectedly, the Russians, who initially had seemed to be an ally against the Ottomans and Austrians, proved to be interested in expanding their own influence and even to annex the principalities. Self-proclaiming ‘the protecting power’, Russia succeeded to negotiate with the Ottomans and directly impose in each principality an Organic Regulation (1831/1832–1858). Made according to Russian instructions and reflecting some political and economic demands of the Romanian upper, middle and lower aristocracy, the Organic Regulations were designed as legal tools of Russian control. Although the absolutist ruling they gave birth sparked the Romanian revolutionary movements of 1848, the Regulations were repealed only in 1858, when the European Great Powers established the Paris Convention of August 1858 as the constitution of ‘the United Principalities of Wallachia and Moldova’.

This official state structure was the outcome of the harsh diplomatic bargaining between the European powers (especially France and Great Britain) and reflected only partially the Romanian expectations. From 1848, the Romanian national agenda gradually focused on the building of the unitary Romanian nation state, and the unification of Wallachia and Moldova under the ruling of a foreign Western European prince was at the very top of the Romanian political demands. Despite an increasing national self-perception on pure ethnic grounds, under the influence of the German Romanticism, the Romanian elites considered the foreign prince the ultimate guarantee of the future-to-be Romanian nation state. The birth of the unitary Romanian nation state occurred at the beginning of 1862, backed by the intense diplomatic efforts of the Romanian-origin prince Al. I. Cuza, elected in January 1859 as the monarch of both Romanian states. Soon after, in May 1866, Carol of Hohenzollern-Sigmaringen replaced the authoritarian prince Cuza and became the first foreign prince (king from 1881) of the united Romania. Under his ruling, Romania won its state independence (1878) and expanded its territory (the great Dobrogea in 1878 and the small Dobrogea in 1913).

Nevertheless, the Romanian national agenda was far from being fully fulfilled. The ethnic perception of the nation inevitably emphasised the objective elements of the Romanian nation, i.e. language, religion and territory. The intimate linkage between the ethnic nation and its territory maintained the process of national unification at stake. Especially Transylvania, a historic part of the Hungarian nation state inhabited by a majoritarian Romanian population and considered the birthplace of the Romanian nation centuries ago, was targeted by the Romanian nationalist discourse. In 1918, in a favourable diplomatic conjuncture, Transylvania, along with Bucovina and Bessarabia, joined the Romanian Old Kingdom and gave birth to what was proudly labelled ‘Great Romania’. Unfortunately, this dream became a

nightmare after successive international events, i.e. the Second Vienna Award, which was perceived by the Romanians as ‘the Vienna Dictate of August 1940’, the Russian ultimatum of June 1940 and the Craiova Treaty of September 1940, occurred. Romania lost Bessarabia, a part of Transylvania inhabited by the Hungarian minority, and the small Dobrogea, and perpetual frustration arose after 1945, when Bessarabia, north of Bucovina and small Dobrogea were definitively lost.

The communist regime installed after 1948 with the help of the Red Army had no national(ist) agenda until the mid-1960s. After Nicolae Ceaușescu became Secretary General of the Romanian Communist Party (1965), and especially after becoming the President of the Socialist Republic (1974), his desire to cut the strings with the USSR and his interest in consolidating the cult of his personality gave birth to an unprecedented xenophobic, exclusivist and repressive nationalist discourse. Somehow, its spirit survived the fall of communism (1989) but was heavily tamed by the Euro-Atlantic process of integration. All these evolutions explain (partially) not only the choice of the Romanian elites for the ethnic nationalism and ethnocentric national identity but also the preference for West European (not Central or Eastern European) political and constitutional models.

The Romanian national agenda was backed by a relative ethnic and religious homogeneity of the population during the nineteenth century and the beginning of the twentieth century. Until 1918, the number of ethnic minorities was constantly low, even after important groups of Jews coming from the Austrian and Russian empires started to immigrate to Romania in the second half of the nineteenth century (in 1899, 92.15% were ethnic Romanians). The ethnic homogeneity was doubled by a remarkable religious one, with almost all Romanian citizens belonging to the Christian Orthodox Church (in 1912, 93.10%). At the same time, the autocephalic organisation of the Christian Orthodoxy made the fusion between the Romanian state and the Romanian Orthodox Church even stronger and a serious cleavage between the State and Church did not occur until communism. However, the ethnic and religious composition of the population dramatically changed after 1918, when large groups of ethnic minorities (especially Hungarians and Germans) came under the Romanian state’s authority (the percentage of ethnic Romanian fell to 71.9). The high religious heterogeneity was even more problematic as an important part of the Transylvanian Romanians had belonged to the Greek-Catholic Church since the beginning of the eighteenth century. During communism, the Jews and the German minority drastically diminished, and the Hungarians and Roma were the most numerous ethnic minorities. This evolution from ethnical and religious relative homogeneity to heterogeneity explains both the magnitude and substance of the Romanian ethnocentric constitutionalism and the elements of the Romanian projected¹ national /constitutional identity.

1 In terms of L. Greenfeld, any national identity is a matter of self-perception and projection, even if it is linked to ethnic nationalism. Consequently, the so-called ‘objective elements of ethnicity’ are not automatically captured in the national identity and may not have the same weight. See Greenfeld, 1993, pp. 12–13. In the Romanian case, religious identity, in addition to linguistic identity, lies at the very core of national identity.

From the social point of view, the Romanian society had known, for decades, a binary structure comprising a small group of aristocratic elites (the boyars) and a huge mass of poor and illiterate peasants. The bourgeoisie started to significantly develop later in the nineteenth century and the beginning of the twentieth century. In addition to other economic factors,² this reality explains both the difficult economic development until 1948 and the constant economic backwardness compared with Western and Central Europe. Despite the forced process of industrialisation during the communism and intense economic planning, the Romanian society hardly became an urbanised one. These economic and social contexts not only backed the interest in a Western European-like economic and social modernisation (excepting the communist period) but also, as a contrarian approach, kept the traditional values at stake. The perpetual tension between modernity (urban) and traditional (rural) in the Romanian society also explains the never accomplished Romanian modernisation.

At the level of ideas, a considerable change occurred at the beginning of the nineteenth century, when the Romanian (aristocratic) elites discovered the Western Europe.³ The Greek-Phanariot culture soon lost its impetus, and a process of cultural modernisation started. At the political level, the idea of a post-Phanariot medieval restoration endorsed by the upper aristocracy gradually met the liberal constitutionalism endorsed especially by the elements coming from the lower aristocracy and the growing urban middle class. Both perspectives tried to answer two core questions: which was the best system of government to disempower the monarch? Which was the best system of government to empower the political elites? From 1848, the modern constitutionalism claimed victory; however, the liberal constitutionalism met a serious competition in the conservative-ethnocentric one.

This competition should be understood against the backdrop of ‘the fight’ between modernity and conservatism during the second half of the nineteenth century and the beginning of the twentieth century in Romania. On a general scale, many members of the Romanian intelligentsia of the mid-nineteenth century were convinced that Romania, a peripheral and backward agricultural country with underdeveloped public services and corrupt public officers, no modern infrastructure or a decent educational system, and a huge mass of illiterate peasants living in misery, had no chance to perform at the social, economic, cultural and political levels without heavily borrowing the Western European modern civilisation. The Western European culture and civilization – especially the French one – arrived in the Romanian principalities via multiple direct or indirect channels of acculturation. Highly transferable, Western European law – especially the French and Belgian ones – shaped the Romanian modern legal system. The Romanian state and society knew that it was an important change in only a few decades. Many Romanian politicians believed that a massive formal change of legal norms would magically produce a deep change of legal and social practices and mentalities overnight, which obviously did not happen.

2 Murgescu, 2010.

3 Drace-Francis, 2016.

From the 1850s, this ‘skip-foreword’ kind of modernisation gradually met a strong intellectual critique coming from those seeing in it a chimera. Especially the members of the conservative cultural cercles – many influenced by the German Historical School and the organicism of Herbert Spencer – accused this civilisational and institutional endeavour as being merely a ‘form without substance’.⁴ The law, especially the Constitution of 1866, was considered the epitome of cultural inadequacy of the whole process of modernisation. This critique opened an unprecedented public discussion in the Romanian society among a wide range of specialists: lawyers, historians, sociologist, economist, ethnologists, philosophers, theologians etc. The debate was still vivid in the period between the World Wars and tried to answer a core question: which was the most suited road to modernisation? The pioneers of the fast cultural imitation and adaptation of the Western European civilisation faced the adepts of slow organic evolution. The main concern of the critique was not only the denationalisation of the Romanian culture but the perish of the Romanians themselves as a distinct ethnic group. As a consequence, the process of modernisation had an ontological dimension.

In this context, a long and intense discussion about the Romanian self/character/way of being/essence/identity occurred before and especially between the World Wars.⁵ Following the paradigm of ethnic nationalism, the objective elements of the Romanian national identity (biologic origin, religion, language, traditions) were explored, and diverse strategies of cultural self-identification were constructed. The quest for the true and unique Romanian led many intellectual to the Romanian peasant, the keeper of the Romanian true spirit and the symbol of the Romanian perennity.⁶ Christian Orthodoxy, on the other hand, became the symbol of Romanian soul in the eyes of the extremist movements between the World Wars.⁷

Legal scholars did not ignore this topic; however, the problem of Romanian national identity in the legal field was much more delicate. It was obvious to many – especially the pioneers of public law – that the Romanian legal/constitutional traditions had poor resources to provide on the road towards political modernisation. At the same time, nobody had time to wait for an organic growth of Romanian constitutionalism, whatever it could have been. The building of a strong, unitary Romanian nation state was a matter of urgency, which is why legal/constitutional massive borrowing from the foreign legal/constitutional models was a necessity. Nevertheless, the problem of national legal/constitutional identity was not forgotten, and many tried to answer a difficult question: how to modernise the Romanian (constitutional) law via massive legal/constitutional borrowing from external legal/constitutional models and preserve, at the same time, the Romanian national/constitutional identity? Different

4 Guțan, 2015, pp. 481–530.

5 Verdery, 1995, pp. 103 et seq.

6 Verdery, 1995, pp. 115 et seq.

7 Hitchins, 1995, pp. 135 et seq.

intellectual strategies were discussed,⁸ among which was the idea of an original re-creation or adaptation of the foreign legal institutions.

Regardless of how tightly foreign constitutional institutions were wrapped in Romanian-looking clothes, the Western European constitutionalism remained (excepting the period of the right and left dictatorial regimes between 1938 and 1989) the benchmark of Romanian constitutional modernisation. As Vintilă Mihăilescu puts it,

(...) the fear produced by the [Romanian] backwardness comparing with the Occident was replaced by the fear of sliding towards the Occident – but the Occident only remained the mirror of our [Romanian] identity. We may say that, somehow, even our nationalisms were ... occidentalist.⁹

Against this backdrop, the Romanian constitutional identity was not built concomitantly at the European and Romanian levels but between them. In V. Mihăilescu's words, Romanians permanently needed Western Europe as a mirror of their own identity, and this perpetually produced a fear of becoming too European. In other words, Romanians accepted the Western European constitutional identity only as long as they were sure it would not destroy their national ethnocentric identity. On this ground, I shall try to build a dynamic concept of Romanian constitutional identity as a tendential¹⁰ constitutional identity. By this I mean a particular balance between eurocentric and ethnocentric identity poles, where the former perpetually tried and constantly failed to replace the latter as the core of the Romanian constitutional identity. This is why the Romanian constitutional identity was and still is nothing but a neverending tendency towards constitutional Europeanization.

2. Liberal and ethnocentric constitutionalism before WWI

The foundations of the Romanian constitutional identity were laid in the first half of the nineteenth century, when the Romanian political elites started looking for modern political and legal tools to contain the monarchical power. The Phanariot absolutism was followed by the absolutism of the princes ruling under the Organic Regulations, and the necessity to have the monarchical power constrained by legal strings became an utmost priority. The constitution and, gradually, liberal constitutionalism became the perfect solutions. A plethora of Romanian constitutional projects have incapsulated the monarchy in a modern constitutional design. Step by step, principles, values, concepts and institutions such as national/popular sovereignty,

8 Guțan, 2017, pp. 62–99.

9 Mihăilescu, 2017, p. 58.

10 I built my theory of tendential constitutional identity on Romanian sociologist Constantin Schifirneț's concept of 'tendential modernity'. See: Schifirneț, 2012.

representative government, rule of law, separation of powers, veto power, parliamentary government, governmental accountability, human rights, liberty, equality, democracy, citizenship etc. entered the Romanian political and constitutional language and Romanian constitutional thinking. Moreover, in 1857, when Wallachian and Moldavian ad-hoc assemblies were convened by the Great Powers to express the Romanian perspective with regards to their future political organisations, representative government, the unicameral parliament, ministerial accountability, separation of powers, independence of judiciary, the principle of equality before the law, personal liberty, the inviolability of the domicile, the suspensive veto of the monarch were mentioned as defining the Romanian constitutional thinking, in stark contrast with the constitutional experiments done by the Ottomans and Russians in the recent past in the Romanian principalities. All these values were constantly preached during Al. I. Cuza's authoritarian rule (1859–1866), and many were enshrined in the first official constitutional project of the Romanians, prepared by the Central Commission of Focșani (1859).

Featuring conservative characteristics (even if in 1858 the aristocratic titles were abolished, the Romanian politics remained in the hands of the reach landowners), the Romanian liberal constitutionalism was perpetually influenced by the Western European (especially French and Belgian) one. Although a historicist approach tried to capture the flow of West European wisdom in the imagined Romanian constitutional tradition, the sources of Romanian constitutional thinking could not be hidden. Eventually, the Romanian elites had no interest in doing that. On the one hand, they truly believed in the superiority of the Western European constitutional values and, on the other hand, they had to prove that the Romanian state was on the road to political modernisation. If constitutional modernisation meant Europeanisation, then constitutional borrowing and imitation became the most natural approach. The French constitutions of 1830 and 1848 and the Belgian Constitution of 1831 became the benchmarks of Romanian constitutional change. The former was the iconic model for the constitutional project of 1859 and the best institutional platform to build the parliamentary government when the first Romanian constitution was made (1866). Heavily assuming the French and Belgian liberal constitutionalism, the Romanian political elites acknowledged a Western European constitutional identity.

However, it is not that simple to equate the Romanian constitutional identity of the nineteenth century and the beginning of the twentieth century with the Western European one. Gradually, after 1848, the national agenda intermingled not only with the values, principles and institutions of liberal constitutionalism but also with the considerable influence coming from German Romanticism. After a phase of 'pre-nationalist civic patriotism rooted in a strong Christian morality' in the first decades of the nineteenth century¹¹ and a sincere moment of civic nationalism in 1848 (especially in Wallachia), the Romanian public discourse was irremediably captured by ethnic nationalism. The nation, as a concrete historical ethnic group, became the

11 Rusu, 2015, pp. 90 et seq.

very subject of the Romanian national agenda. Inevitably, the national self-consciousness focused on perennial objective elements of the Romanian national identity: common biological origin (Latin or/and Dacian), common language (Romanian as a Latin-origin language) and common religion (Christian Orthodoxy), common cultural traditions and common territory. In terms of U. Preuss, building a unitary nation state was not a ‘constitutive’ moment but a righteous political and legal achievement of a pre-existing ethnic community.¹² This is why the Romanian constitution had to play an expressivist function: it was expected to reflect the Romanian ethnic national identity, in addition to the Romanian constitutional values and hopes.

Not accidentally, the Romanian constitutional debates of 1857, 1859 and 1866 focused primarily on issues intimately related to the Romanian national identity, such as the definition of citizenship, freedom of religion, the place of the Romanian Orthodox Church in the constitutional architecture, and the Romanian constitutional traditions. As long as the Christian Orthodoxy epitomised the very essence of Romanian national identity in the Romanian imaginary, it was placed at the very core of Romanian citizenship. A strong understanding was initially discussed in 1857, equating Romanian citizenship, Romanian ethnicity and Christian Orthodoxy, while a soft understanding of Romanian citizenship was enshrined in the Romanian Constitution of 1866. Its famous Art. 7 para. 2 strictly linked the naturalisation of foreigners to the quality of being Christian (not Orthodox Christian). The provision was not less ethnocentric as in addition to its expressivist function, it had an exclusive-protective one: it was meant to prevent the alteration of the Romanian ethnic unity on the Romanian soil by its imagined enemies, i.e. the Muslims and the Jews. Inevitably, the sense of distinctiveness and the presence of the (ethnic) other forged the Romanian national identity.¹³ The increasing antisemitism,¹⁴ especially, succeeded to intertwine the obsession for preserving the Romanian national soul with the social and economic frustrations of Romanians. The tendency of the immigrant Jews to position themselves as the bourgeoisie layer was seen as a new form of imperialism by a Romanian society dominated by poor and illiterate peasants. Not directly related to the Jews, Art. 3 of the 1866 Constitution fortified even more the Romanian ethnic nation against the external perils: “The Romanian territory cannot be colonised with population of foreign race (*ginta*)”. At the end, the Constitution of 1866 succeeded in making the Romanian constitutional identity rely on the Romanian national ethnocentric identity.

From this process of constitution-making, it should not be assumed that ethnocentric constitutional identity overrode the declared Eurocentric constitutional identity. The Constitution of 1866 answered two urgent problems of the Romanian political elites: on the one hand, to limit the power of the Romanian head of state, which constantly manifested itself unconstrained; on the other hand, to express

12 Preuss, 2008, pp. 211 et seq.

13 Cinpoș, 2010, pp. 41–43; Boia, 2010, pp. 301 et seq.

14 For details, see Iordachi, 2019, pp. 265 et seq.

and protect the Romanian national identity at the constitutional level. The first issue was answered with the help of liberal constitutionalism and the massive borrowing of values, principles and institutions from the Belgian Constitution of 1831. The mechanisms of parliamentary government, the rule of law, representative democracy and human rights, as far as the conservative spirit of that epoch allowed, were sincerely accepted as pillars of the constitutional modernisation. The second issue was answered by incapsulating illiberal elements, and overall, the ethos of the constitution was ethnocentric.

From my point of view, the Constitution of 1866 had two poles of constitutional identity: a Eurocentric (liberal) one and an ethnocentric (illiberal)¹⁵ one; they were neither necessarily mutually exclusive nor out of any conflictual pattern. On the contrary, when the Congress of Berlin (1878) conditioned the international recognition of Romanian state independence by the amendment of Art. 7 in a more inclusive (liberal) sense, the negative reactions of the Romanian elites were firm. At the end, the article was amended, but this episode marked a clear limit of the Romanian appetite for Europeanisation: the preservation of the national ethnic identity. In other words, Romanians were interested in being European in their Romanian way, which forged a dynamic concept of Romanian constitutional identity – a tendential one. Romanians assumed the Western European constitutional (liberal) identity and enshrined its constitutional elements only as far as it made room for the Romanian national (ethnocentric) identity. Western European and ethnic national were the two poles of the Romanian tendential constitutional identity and situated in a delicate constitutional balance in 1866.

3. Liberal constitutionalism and ethnocratic state between the World Wars (1918–1944)

The concept of ‘tendential constitutional identity’ has the advantage of capturing the real dynamic of the Romanian constitutional thinking over decades. Depending on specific political, geopolitical, ideological, economic and social contexts, the tendency towards the European constitutional identity was more active, leaving little room for the ethnocentric constitutional identity; vice versa, in different conditions, the European constitutional identity was overwhelmed – or even overridden – by the ethnocentric constitutional identity.

The Constitution of 1923 (the constitution of all Romanians or of the Great Romania) seemed to perpetuate, at first sight, the equilibrium between the two Romanian identity poles established in 1866. More than 60% of the first Romanian Constitution’s articles were preserved in 1923, including the architecture of the

15 In this paper I understand ‘illiberal’ as a constitutional architecture and ethos favouring communitarianism over individualism, the rights of a majoritarian ethnic group over the constitutional rights of the citizens, and the ethnocentric constitutionalism over civic constitutionalism.

parliamentary government. New constitutional provisions backed the Western-like liberal democratic constitutionalism, e.g. the universal manhood suffrage and the constitutional review entrusted to the Romanian Supreme Court; however, the ethno-centric constitutional identity not only was still active, but its constitutional markers were considerably amplified.

Although Romanians had fully fulfilled their national agenda, and almost all ethnic Romanians were living in the boundaries of the Romanian nation state, the Romanian political elites had to face an unexpected challenge. On 9 December 1919, Romania had to sign the Treaty with regards to the ethnic minorities, which were endowed with pretty generous rights: full protection of their life and liberty, liberty of religion and expression, the right to Romanian citizenship, the liberty to use their mother tongue – including before of the courts, the right to establish private confessional schools, and – especially for the Transylvanian Hungarians (*secui*) and Germans (*sași*) – the right to local autonomy with regards to their religious and educational issues. The fathers of the 1923 Constitution not only approached the constitution-making process in the same ethnocentric spirit, but they preserved and multiplied the constitutional markers of the Romanian national and constitutional identity: Romania was proclaimed a ‘national state’ (Art. 1); no populations of foreign race could have been colonised on the Romanian territory (Art. 3); the Romanian Orthodox Church was proclaimed ‘the dominant church’, and the Greek-Catholic Church received full priority amidst the religious cults (Art. 22); and the Romanian language was proclaimed the official language of the state (Art. 126). The only concessions made to the Treaty of 1919 was Romanian citizenship, which was accorded to all inhabitants of the new Romanian provinces regardless of their religion (Jews included) and the recognition of political and civil rights “regardless the ethnic origin, language or religion.”¹⁶ Instead of opening the constitutional text for ethnic minorities’ rights, all these highlighted constitutional limits¹⁷ that Romanians were not ready to trespass.

Any demands of the ethnic minorities favouring the integrative character of the constitution were rejected during the constitutional debates. The conceptual confusion between ‘the Romanians’ and ‘the Romanian citizens’ was perpetuated, and the recognition of group rights to the ethnic minorities was firmly condemned. Overall, the Constitution of 1923 was perceived as a ‘national constitutional cathedral’ of the Romanian majoritarian ethnic group, where the individual members of the ethnic minorities were accepted as humble visitors. They had the full rights of a Romanian citizen but were actually only shadow citizens. This constitutional approach expressed

16 For comparison, the Polish Constitution of 1921, Section V not only recognized the ethnic minorities as a constitutional subject, but it also enshrined important provisions of the Minority Treaty signed by Poland with the Principal Allies on 28 of June 1919. The Czechoslovak Constitution of 1920 reserved a full section (VI) to The protection of National, Religious and Racial Minorities, enshrining provisions of the Minority Treaty signed with the Principal Allies on 10 September 1919. See also: Theodoresco, 1926, p. 337.

17 Focșeneanu, 1992, p. 63.

the Romanian dream to build an ethnically pure nation state on the Romanian historical territory,¹⁸ and this was nothing but an ethnocracy backed by an obvious illiberal ethos that was inherently authoritarian.

This kind of approach was the beginning of an identity dynamic favouring the national ethnic identity and the diminishing interest in the Western European liberal one. From the cultural point of view, the era was not one of joy and celebration but one of anxiety: considering the cultural diversity of Romanian groups living in the historical Romanian provinces, Romanian national identity was uncertain and prone to dissolution. This ‘fragmented [cultural] nature of the Romanian unitary state’¹⁹ needed public cultural-educational policies meant to override regional identities and build a clearer and unified concept of national identity.²⁰ The obsession for national ethnic identity was boosted by the perpetual anxiety of the Romanian elites with regards to the external and internal perils threatening the unitary character of the Romanian nation state. The syndrome of the city under siege linked the traditional Romanian ethnocentric nationalism with new ideological and political extremisms (Orthodoxism, legionarism, fascism) that glorified the Romanian (Christian) national identity and preached the submission of the state and its law to the fight for the unity and purity²¹ of the Romanian ethnic nation. Especially the Oriental-Orthodox essence of the Romanian national identity, which was favoured and preached by many Romanian intellectuals, created a public discourse that undermined Western values and endorsed authoritarian public policies of the Romanian state.²² Against the backdrop of a political and constitutional practice that merely mimicked constitutional democracy, of the increasing political and administrative corruption, of the incapacity of the political parties to adhere to a democratic game of power, of the increasing authoritarian behaviour of the king and of an inefficient parliamentary life, the tendency towards a Western European liberal constitutional identity gradually decreased until it perished after 1938.

In 1938, when the authoritarian constitution of King Carol II was made and ratified by plebiscite, the choice for a full ethnocentric constitutional identity was already made. The nationalist discourse was inevitably coupled with an illiberal constitutional architecture considerably empowering the executive and the king. Principles, values and institutions such as the central place of the Saviour King proclaimed both Chief and Head of the state, the priority and unaccountability of the executive power, the primacy of the execution over deliberation, the corporatism and the political monism and the primacy of the Nation State (*Patria*) over individual rights replaced the liberal

18 Of high significance was the banner welcoming the visitors of the Romanian national pavilion at the New York Universal Exposition of 1939: ‘Romania has more than 20 million people fully united in language, tradition and culture’. See Livezeanu, 1998, p. 9.

19 Livezeanu, 1998, p. 347.

20 See: Rusu, 2015, pp. 197 et seq.; Verdery, 1995, pp. 126 et seq.; Momoc, 2012.

21 Not accidentally, the interest in eugenics studies reached an unprecedented level in Romania. See Turda, 2014, pp. 122–131; Turda, 2017, pp. 108–125.

22 Maner, 2004, pp. 303 et seq.

democratic constitutionalism. The constitutional identity markers enshrined in the Constitution of 1923 were preserved, but the intimate linkage between authoritarianism/ethnocracy, law and nationalist ideology was fully disclosed in the subsequent legislation. A *Decree-Law with regard the legal status of the Romanian Jews* (9 August 1940) expressly outlined the bottom principles of the Romanian constitutional architecture: the law of the blood, the Romanian (ethnic) nation as founder of the nation state, and the legal distinction between biologic Romanian and the Romanian citizens.

All these principles turned into a ferocious racial policy after September 1940, when King Carol II abdicated, his son Mihai I became the Romanian (puppet) king, and power was seized by Marshall Ion Antonescu. The Constitution of 1938 was suspended, and inspired by the Nazis' *Führerprinzip*, Antonescu launched a military dictatorship. Ideologically, the intimate linkage between the (ethnic) nation, the state and the Marshall (proclaimed the 'ruler of the state') had both palingentic and protective aims.²³ Politically, the full accent on the Romanian national and ethnocentric constitutional identities in a dictatorial pro-Nazi context added Romania to the list of the countries participating in the Holocaust.

4. Communism and ethnocentric nationalism (1948–1989)

The gradual instalment of the communist regime after 1945, the forced abdication of Mihai I, the proclamation of the Romanian Republic of People (December 1947) and the making of the first communist constitution (1948) did not follow the paradigm of the tendential constitutional identity. The Marxist-Leninist constitutionalism replaced the liberal democratic one, and the French and Belgian constitutional models were replaced by the Soviet one. The old Romanian constitutional aims of the nineteenth century – i.e. to disempower the head of state and to express the Romanian national identity – seemed to be outdated. On the one hand, Marxism-Leninism was interested in the principle of collective ruling, and on the other hand, it was not interested in the ethnic unity of the nation. Consequently, the *topoi* of the Romanian communist constitutions (1948, 1952, 1965) were completely different: the working class, collectivist property, the cult of labour, the leading role of the Communist Party, the centralisation of power and administration, the planned economy and popular democracy.

Against this backdrop, all traditional constitutional identity markers (the national state, the primacy of the Romanian Orthodox and Greek-Catholic Churches, the Romanian language as official language) disappeared. Moreover, with regards to the ethnic minorities, officially rebranded as 'co-habiting nationalities' (naționalitățile conlocuitoare), all communist constitutions had a much more inclusive approach; not only any racial or nationalist hate speech was forbidden, but the ethnic minorities received rights that they could have only dreamed of before. They had the right to use their language in administration and justice (1948) or 'in all organs and institutions'

23 Cercel, 2020, pp. 313 et seq.

(1952, 1965) and to have schools and universities, as well as newspapers and theatres, in their language. Moreover, in the administrative units inhabited by ethnic minorities, public officers had to be recruited also amongst these minorities. The climax of this change of constitutional pattern in new ideological and geopolitical contexts was the birth (under the pressure of Stalin) of the Hungarian Autonomous Region (Constitution of 1952) in the Eastern part of Transylvania, which was inhabited by a compact population of Szekler.

However, this constitutional architecture was far from capturing the whole and true political and constitutional spirit of the Romanian communist era. Behind the constitutional texts, and in addition to the Marxist-Leninist orthodoxy, an official political nationalistic discourse developed, and political decisions bearing clear antiethnic overtones were made. After 1956, the Hungarian minority was catalogued by the Romanian elite of the Soviet-style dictatorship as a potential source of danger, and the dismantling of minority institutions created by the same regime began (e.g. the abolition of the autonomy of Bolyai University in 1959, the reorganisation [1960] and, finally, the dissolution of the Hungarian Autonomous Region [1968]). Nicolae Ceaușescu's seizure of power in 1965 gave a new magnitude and peculiar goals to the Romanian communist nationalism. His complete control over the Communist Party and the State apparatus, followed by an increasing megalomaniac cult of personality, were paralleled by an autonomous (from the USSR) international agenda. At the same time, the cultural inadequacy and lack of sincere popular support for Marxism-Leninism led Ceaușescu to recover and adapt the old, pre-communist, Romanian discourse on ethnocentric nationalism. The unity of the people on premises of common origins, territory, language and culture²⁴ created a much more reliable and efficient adhesive capable of gathering the entire nation (not only the proletariat) around the party, its official politics and its 'glorious' leader. Stripped of its religious/Christian Orthodox element, Romanian national identity was reinforced on the grounds of a glorious, mystified national past. A Romanian nationalistic exceptionalism measured in aggressive photochromism not only positioned Romanians in the great history of humankind but also gave them the chance to override the traditional Romanian complex of inferiority. In this context, historical resentiments inevitably arose. The traditional Romanian xenophobia was now targeting the Hungarian ethnic community and neighbouring Hungarian state, who were considered their internal and external enemies. Unfortunately, the communist nationalism had not only a protective function but also an integrative-repressive one,²⁵ making the reconciliation between the majoritarian and minoritarian ethnic groups a difficult task. The politics of social homogenisation aiming at 'building the unified working people'²⁶ brought interethnic tensions to an unprecedented level.

24 Cinpoș 2010, pp. 59 et seq.

25 Copilaș, 2015, p. 156.

26 Copilaș 2015, pp. 211 et seq.

5. Democratic-liberal or ethnocentric constitutionalism after the fall of the communism?

After the fall of the communist regime in Romania (December 1989), Romanians had to decide the political and constitutional paths to be followed. Inevitably, Romania recovered its pre-communist Western European sources of inspiration. Liberal democratic constitutionalism once again became the benchmark of the Romanian constitutional modernisation, and the French Constitution of 1958 the main constitutional model of the future Constitution of 1991. An ‘aversive constitutionalism’²⁷ recovered an old Romanian constitutional aim: disempowering the head of state. This is why the French-origin semi-presidentialism had a strong Romanian touch: because the dictator, Ceaușescu, was indirectly elected by the Great National Assembly, the future Romanian president had to be directly elected via universal and popular vote; because the Constitution of 1965 (modified in 1974) endowed President Ceaușescu with exorbitant powers, the future Romanian president had to have limited constitutional powers.²⁸ At the end, the Romanian Constitution of 1991 regulated a Romanian president benefitting of a very high political legitimacy but endowed with limited powers.

The same post-communist constitution was very sensitive in acquiring the standards of liberal democratic constitutionalism. The distribution of powers, human rights, rule of law, independence of judiciary, free elections, multi-party democracy and decentralisation became the supreme constitutional values of Romanians. Pursuing a process of ‘constitutional gardening’,²⁹ new constitutional institutions, such as the Constitutional Court, the ombudsman and the Supreme Council of Magistrature, were planted on the Romanian constitutional soil. The European integration became the new national agenda, and the Romanian political elites were ready to follow the necessary legal steps to fulfil it.

This evolution should not suggest that the Romanians had finally fully embraced the European (Western) constitutional identity. An identity crisis took place at the beginning of 1990s, and recalling the pre-communist constitutional past, it gave an important part of the expected answers. Cherished as the supreme expression of the Romanian liberal democracy, the Constitution of 1923 was largely considered by the fathers of the post-communist constitution, who, however, managed to recover not only some of its liberal elements but also its illiberal ethnocentric ethos and the constitutional markers of the Romanian national identity.

As many Romanian and foreign scholars have already emphasised,³⁰ the interest of the Romanian communist regime in ethno-nationalism considerably marked the Romanian political and constitutional cultures after 1989. From my point of view, it

27 I borrowed this concept from Scheppele, 2003.

28 See Guțan, 2012.

29 Ludwikowski, 1998, p. 64.

30 Șuteu, 2017, p. 417; Chen, 2003.

considerably helped to keep the Romanian national identity at the core of the Romanian constitutional identity. If one were interested in comparing the constitutional debates of 1866, 1923 and 1991,³¹ they would be shocked to notice the similarity of the problems and values at stake: the same eagerness to affirm the Romanian character of the state, the need to express the Romanian national identity, the imagined domestic enemies and the protective mission of the constitution. Consequently, the constitutional markers of the Romanian constitutional identity present in 1923 were enshrined in the Constitution of 1991: the national character of the Romanian state (Art. 1 para. 1); the interdiction to colonise foreign populations on Romanian territory (Art. 3 para. 4); and the Romanian language as official language. The Christian Orthodoxy disappeared as a Romanian identity marker, but others were included, e.g. ‘the unity of Romanian people’ was proclaimed the true foundation of the state (Art. 4 para. 4); in other words, the access to justice for ethnic minorities is possible only with the help of a translator and not directly in their mother tongue. Moreover, while an eternity clause was enshrined for the first time in a Romanian constitution (Art. 148 para. 1; Art. 152 para. 1 after the constitutional amendment of 2003), the majority of the values that cannot be amended are markers of the Romanian national identity and constitutive of an ‘exclusionary Romanian constitutional identity’³²: the national, independent, unitary and indivisible characters of the Romanian state, the integrity of the Romanian territory and the Romanian official language. During the debates of 1991, the constitutional status and rights of ethnic minorities were intensively disputed with the true purpose of eliminating any inner perils to the unity and indivisibility of the Romanian state.

Undoubtedly, ethnic minorities have received large and consistent rights but only as individuals. Any discussions about the minority group rights were firmly rejected in 1991 and the following years. Compared to 1923, individuals belonging to ethnic minorities were visible and equally protected citizens. According to Art. 6 para. 1, they had the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity; Art. 32 paras. 2 and 3 granted them the right to learn their mother tongue and to be taught in this language; Art. 62 granted the parliamentary representation by one deputy to minorities that failed to reach the electoral threshold; Art. 120 and 128 granted the right to use their minority language in administration and before the courts. However, this did not change the illiberal ethnocentric and potentially authoritarian ethos of the Romanian Constitution of 1991, which was built again as a national constitutional cathedral of the Romanian ethnic majority and as a protective rather than integrative fundamental legal act. No intention to eliminate the unamendable syntagm ‘national state’ from Art. 1 occurred in the last 30 years, although the Hungarian minority constantly requested it for integrative purposes.³³

31 Guţan, 2018(a).

32 Şuteu, 2021, pp. 110–111.

33 See: Salat and Novak, 2017, pp. 98 et seq.; Bakk, 2010, pp. 87–126.

6. Conclusions

The Romanian constitutional identity may be defined, from a historical perspective, as a tendential constitutional identity. It reflects the strong desire of the Romanians to acquire constitutional modernisation in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity. In other words, it reflects a permanent need of constitutional modernisation and change tamed by the anxiety to lose the national and constitutional self. This does not mean to be European and Romanian at the same time, but to be European only as long as the Romanian character is preserved. Romania did not have multiple constitutional identities, but rather, it was – and still is – between constitutional identities. This is why the Romanian (ethnic) identity permanently stood at the core of the Romanian constitutional identity, while gaining the European (Western) civic constitutional identity was always a tendency. The perpetual obsession of the Romanian elites with the Romanian way of being, soul or character and the ontological perception of the national identity made and still makes of Europeanisation a perpetually unfulfilled project, even after the EU integration. As far as the full Europeanisation meant the death of the ethnocentric national identity, it was out of question, and quitting the Western European road of constitutional modernisation was equally and regularly out of question. As a consequence, the greatest challenge of the Romanian elites and fathers of the constitution was to discover the line between being European and Romanian.

This path imprinted a predominantly liberal institutional architecture and a strong illiberal ethos to the constitutions of 1866, 1923 and 1991. The dosage was different between epochs depending on specific internal and external contexts. Serious disbalance occurred, with negative and positive effects. In the period of 1938–1989, the Western European liberal democracy was compromised and rejected for diverse reasons (the disappointing Romanian political and constitutional practice, the influence of fascism/Nazism, WWII or the Soviet imperialism), and the Romanian national identity was preferentially cherished by authoritarian/dictatorial/totalitarian regimes. Unfortunately, in these periods the Romanian ethnocentric nationalism powered the public discourse of autocratic leaders. After 1991, in the context of European integration, the interest in acquiring a European constitutional identity was unprecedented. Romanian constitutional scholars, at least, have gradually succeeded to approach the constitutional markers of the Romanian identity in a more liberal manner through the lens of European civic constitutionalism³⁴; however, nobody can predict a future full

34 A single example would be sufficient. The first edition of the popular *Constituția României. Comentariu pe articole* edited by I. Muraru and E.S. Tănăsescu (2008) defined the [Romanian] nation on ethnic-cultural grounds, as “expressing the history, continuity and, especially, the spiritual and material unity linking the members of a community, [unity] based on specific cohesive and solidarity elements like origin or common past, language and/or common culture, customs, ideas, and equally shared sentiments” (p.3). In the second edition (2019), the *concept* of ‘national’ is merely linked to an historical process of nation-state building (accepting its ethnocentric impetus), while the legal concept of ‘*popor* (people)’ used by the Constitution has a civic meaning, as *demos*, and

adherence of the Romanians to the European civic constitutional identity to the detriment of the ethnocentric communitarian Romanian constitutional identity.³⁵ Romanian ethnocentric nationalism and constitutionalism still have their strong adherents,³⁶ which is why the paradigm of tendential constitutional identity is still at stake.

To a superficial observer, the constant back-and-forth dynamic of the Romanian tendential constitutional identity may be deceiving. Having the European (constitutional) integration as their declared aim, Romanians may give the false impression of a sincere and full interest in the European constitutional values. This increasing appetite for Europeanisation is backed by an official pro-European discourse and by normative (constitutional) support. Moreover, a certain degree of civic constitutionalism may be noticed. As long as the Romanian national ethnocentric identity is not endangered, an outsider may perceive a fully accepted European (constitutional) identity. However, the recent (September 2021) rejection in the Romanian parliament of any form of legal recognition for same-sex relationships is just one but significant example of the tendential character of the Romanian constitutional identity. At the same time, to other observers, the Romanian constitutional identity may seem fully attached to the Romanian national ethnic identity. The constitutional ‘referendum for the traditional family’ (October 2018) may look, despite its unexpected failure,³⁷ like an exclusive attachment to the Romanian national ethnic values; however, perceiving a full ethnocentric and anti-European Romanian constitutional identity is again a false impression. Romanians are interested in the European constitutional identity but not interested in becoming fully European; they perpetually want to be European in their Romanian way. The official statement made by the Romanian Academy in February 2017 with the occasion of the massive anti-governmental and pro-European street protests is relevant for this particular approach to Europeanisation:

Let’s cherish our heroes, let’s be worthy of their greatness by letting to the next generations, to all inhabitants of Romania a united and sovereign country, marked by love to its past and culture, with self-respect, master of its land, educated and prosper, a country belonging to United Europe but having its own identity, a Romanian one.³⁸

not an ethnical one (pp. 3–4). The ethos of the Constitution is blurred, but this approach could be interpreted as an intention to imprint a much more liberal meaning to the constitutional text.
35 Guțan, 2018(b).

36 Neumann, 2013, pp. 41–67.

37 The referendum of 7 October 2018 was the only constitutional referendum organised after 2003. At stake was the amendment of Art. 48 of the Romanian Constitution (1991); the constitutional definition of the family, i.e. ‘the family is founded on the freely consented marriage of the spouses (...)’ was amended in a Christian spirit: ‘the family is founded on the freely consented marriage between a man and a woman (...)’. However, its failure was rather caused by political considerations than by a significant swich in the Romanian national identity.

38 Excerpt from the Romanian Academy’s call to the Romanian People and the institutions of the Romanian state labelled ‘Identity, Sovereignty and National Unity’ from 8 February 2017 – signed by 84 out of 203 members.

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