The review of constitutional norms concerning local public administration in the view of the European Commission for Democracy through Law (Venice Commission)[*]

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Abstract
The proposals of the Commission to review the Constitution of Romania were subject to the analysis of experts from the European Commission for Democracy through Law (the Venice Commission), who expressed their opinion in a report adopted at the 98th plenary session of the European body. The article analyzes the recommendations of the Venice Commission regarding the proposed changes to the constitutional norms governing local public administration, comprising some general aspects concerning the role and importance of this advisory body of the Council of Europe.
Key words: *constitutional review, local public administration, the Venice Commission, constitutional court, Constitution*

1. Preamble

The experience gained in the 25 years after the fall of the communist regime together with the permanent changes in the Romanian society require a rethinking of constitutional norms. After two and a half decades of democracy, during which Romania became a member of the Council of Europe, NATO and the European Union, decision makers consider, and the state practice proves it, that there exists a need to refresh the meaning of certain constitutional norms in order to give expression to internal changes and also to conquests of doctrine, jurisprudence and state practice at European level. The Constitution, as any normative act, must keep up with social developments, adapt to the social, political, economic context and be able to respond to both internal and international trends. Although the essence of a Constitution is represented by its stability [1], its continuous adaptation to social reality is an objective necessity, since a lack of adaptation of the constitutional text would become an obstacle to the evolution of society [2]. As stated [3] by the Venice Commission, constitutional changes must be made so as not to affect the stability, predictability and protection offered by the Constitution, nor to block the adoption of the reforms necessary for society.

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After the adoption in 1991 of the Constitution which led to the disruption from the previous constitutional order, Romania witnessed, during this period, the first revision of the Constitution adopted in 1991, the amendments of this process mainly aiming at the construction of the constitutional framework for the accession to the European and Euro-Atlantic structures. Like other European countries, our country included in the fundamental act, with its review, a series of institutional guarantees for the obligations arising from the status of member of the European Union and NATO. If, at the time of the first constitutional review, the Romanian state was situated outside these organizations, at present, the constitutional review is approached from the standpoint of a member state of the European Union, which implies a new understanding of this important and complex process. The process of improving the fundamental act must take into account the European standards in the field, the changes in the European legal order, characterized by a rich normative production, a result of the work of European institutions, but also of the creative and strongly activist contribution of the Court of Justice in Luxembourg [4], as well as best practices and the need to enhance the clarity and coherence of the fundamental text.

In terms of European standards, the entity able to determine whether the proposed changes to the constitutional text are compatible with these standards is the European Commission for Democracy through Law (the Venice Commission).

2. The Venice Commission - the guardian of the rule of law and constitutional democracy

A specialized body of the Council of Europe, the European Commission for Democracy through Law has earned its place in the European institutional architecture, managing, since its creation, to give a strong imprint on the constitutional development at European level.

The Commission is based in the Italian city of Venice and is composed of independent experts who have contributed through their work to the strengthening of the law and political sciences in the state which appointed them [5]. The term of office for the members of the Venice Commission is of four years. The management of the Commission is ensured by a Bureau consisting of a president, three vice-presidents and four members. The Bureau is elected for a term of two years, with the right to reelection.

The activity of the members of the Commission takes place in plenary and Sub-Commissions. The plenary sessions are usually held four times a year and the Sub-Commissions meet whenever necessary. The working languages of the Commission are English and French. The Commission shall submit an annual report on its activities, together with an outline of its future actions to the Council of Europe Committee of Ministers.

With its vast experience in the field of constitutional law, the Venice Commission has managed to promote the democratic values and the principles of the rule of law, ensuring the informational support required for all the processes of modernization and strengthening of the democratic institutions in the countries that have requested support. Romania has benefited countless times from its experience.

3. The revision of the Romanian Constitution and local public administration

As a legal and political operation of the utmost importance, the constitutional review could not avoid the norms governing local public administration. Local public administration, from a constitutional perspective, enjoys a special status that allowed it to develop and diversify its forms of manifestation. The dynamics of the local administrative phenomenon implies a rethinking of the constitutional provisions that establish the general directions for action in the field [6]. The Commission proposals to review the Constitution in matters of local public administration proved to be largely in conflict with the norms relating to the limits of the review, which is why the Constitutional Court requested that some be eliminated and others reformulated or included in other parts of the fundamental act.

These proposals were mainly aimed to introduce new rights, such as the right to good administration, and new principles of organization and functioning of local public administration, such as the principle of subsidiarity and that of full insurance of financial resources for the transferred powers following decentralization; to include the region among the administrative-territorial units, along with the administrative-territorial units already covered by the constitutional text (commune, town, county); to enable the creation, within the region, of territorial-administrative subdivisions called traditional areas; to raise the constitutional status of the function of prefect; to eliminate the lawful suspension of the actions of local authorities in the appeal of the prefect before the administrative court [7].

4. The opinion of the Venice Commission regarding the review of constitutional norms governing local public administration

The proposals of the Commission to review the Constitution of Romania were subject to the analysis of experts from the European Commission for Democracy through Law, who expressed their opinion in a report adopted at the 98th plenary session of the European body. Moreover, the Venice Commission was asked to express its opinion [8] on the first constitutional review of 2003 in connection with those proposals, and also in 2012, when it was asked to verify the compatibility with the constitutional principles and the rule of law of the actions undertaken by the Romanian Government and Parliament in July 2012 with regard to other state institutions. Through its Report [9], adopted in December 2012, the Commission underlined the importance of loyal cooperation between the state institutions and recommended the clarification and improvement of a number of provisions of the Constitution of Romania.

Regarding the current draft revision of the Constitution of Romania, it was analyzed by the European Forum and the conclusions drawn from the analysis were included in Report no. 731/2013, adopted at its plenary by the Venice Commission in March 2014, and then sent to the Romanian authorities in order to harmonize the draft revision with the European standards and the Constitutional Court Decision no. 80/2014.

The Venice Commission found that the draft revision includes a considerable number of amendments, which would lead to a substantial review of the fundamental act. The Commission considers that a process with such implications for society should be characterized by full transparency, through a constructive dialogue between the government and the opposition and by involving all relevant actors in society, both from the public and private sectors, in the construction and polishing of the new constitutional edifice.

The Commission recalls in its report that *"transparency, openness and inclusion, the appropriate timeframe and the appropriate conditions that allow pluralism of opinions and the proper debate of the controversial issues are all essential requirements of a democratic process of drafting the Constitution"*. In its view, *"a broad and substantive debate involving the various political forces, NGOs and citizens associations, academia and the media is an important condition for the*

adoption of a sustainable text acceptable for the entire society and in accordance with democratic standards".

The Venice Commission report also includes observations regarding the amendments formulated for certain constitutional provisions governing local public administration.

Like the Constitutional Court of Romania, the Venice Commission considers that the concept of the traditional area included in Article 3 dedicated to the territory and the administrative-territorial division of the country, is unnatural, highlighting in the context the lack of clarity of this concept and of the type of administrative subdivision. Also, it expresses its surprise at the reasons underlying the initiative for grating the possible establishment of these *traditional areas* solely within the regions.

The Constitutional Court of Romania declared this amendment unconstitutional, considering that it violates the limits of the review. These limits are laid down in Article 152 of the Constitution and represent guarantees against any undemocratic constitutional changes [10].

Another assessment of the Commission is connected to the constitutional provision governing the right of EU citizens to vote and to be elected in local elections. The Commission considers that this provision is welcome, but proposes its relocation from Article 16 paragraph 4 concerning equal rights, in the constitutional provisions governing the electoral rights, namely Articles 36-38.

A significant proposal of the Commission experts is linked to the new right included in the catalogue of fundamental rights and freedoms, namely the right to good administration. The proposed wording for this is as follows: *"Any person, in their relations with the public administration, has the right to benefit from an impartial, fair treatment and to obtain, within reasonable time, a response to their requests"*. As seen, the exercise of this right by a person triggers the obligation of the public administration to offer a response to the request made. However, the Venice Commission rightfully considers unclear the nature of the response that a person is entitled to receive for their requests addressed to the public administration. In the absence of an express provision, the administration may treat this obligation of responding to the petitioner as a mere formality, something that it is frequently encountered in administrative practice. In order not to remain just a mere text contained in the Constitution, we consider that it must be clearly specified that the response of the administration must be motivated.

Other proposals analyzed by the Commission are those regarding the right of the prefect to address in court those acts of local and regional authorities that they consider illegal. According to these proposals, the legal action of the prefect no longer attracts the suspension of the contested measure, the suspension being then decided by the competent court. The Venice Commission considers that the court should be able to cancel the illegal acts of local and regional public administration authorities, not only to suspend the legal effects. But, at this time the court is able to both suspend the legal effects of administrative acts, and to cancel them. That is why we believe that the Commission proposal should be seen as an invitation to find a constitutional formulation showing that the prefect may ask the competent court to suspend both the act, and its cancellation in the event that they consider it illegal.

As for the review of the proposals that added to the already existing principles of organization and functioning of local public administration another two new principles (the principle of subsidiarity and that of ensuring the financial resources necessary for the powers transferred as a result of decentralization), the Commission considers this initiative valuable and encourages its materialization.

5. Conclusions

From the analysis it is clear that the recommendations of the Venice Commission are designed to strengthen the national fundamental act and to make it according to the common standards of democracy and the rule of law. Through its proposals, the Commission grants an important technical support to national decision makers to modernize the Constitution by providing solutions that lead to improving the clarity and coherence of the fundamental text and to harmonize the proposed wording with those encountered in various European documents. Such solutions were offered, as seen, also to improve the constitutional norms governing the field of local public administration. We hope that both the proposals coming from this prestigious European body and those of the Constitutional Court shall be considered by the Parliament when adopting the final form of the draft on the review of the Romanian Constitution.

References:

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[2] Mihai Cristian Apostolache, Mihaela Adina Apostolache, *Local public administration in the light of recent proposals to revise the Constitution of Romania, volumul* International Conference of Annals of the University of Bucharest - Series of Administrative Sciences – "THE PUBLIC ADMINISTRATION – CURRENT TRENDS", 31st October 2013, p. 7, http://aub-sas.faa.ro
[3] The Venice Commission, CDL-AD(2010)001, Report on Constitutional amendment (Raport privind modificarea Constituţională)
[4] Elena Simina Tănăsescu in Ioan Muraru, Elena Simina Tănăsescu et al. (2008), *Constituţia României. Comentariu pe articole*, C.H. Beck Publishing, Bucharest, p. 1429
[5] Each member state of the Council of Europe appoints one member and one substitute in the Venice Commission according to Article 2 paragraph 2 of The Revised Statute of the European Commission for Democracy through Law adopted by Resolution Res(2002)3 of the Committee of Ministers of the Council of Europe at the 784th meeting of 21 February 2002.
[6] Mihai Cristian Apostolache, Mihaela Adina Apostolache, *Local public administration in the light of recent proposals to revise the Constitution of Romania, volumul* International Conference of Annals of the University of Bucharest - Series of Administrative Sciences – "THE PUBLIC ADMINISTRATION – CURRENT TRENDS", 31st October 2013, p. 6, http://aub-sas.faa.ro
[7] For an overall image of the proposals to review the norms regulating local public administration, also see Mihai Cristian Apostolache, Mihaela Adina Apostolache, *Local public administration in the light of recent proposals to revise the Constitution of Romania, volume* International Conference of Annals of the University of Bucharest - Series of Administrative Sciences – "THE PUBLIC ADMINISTRATION – CURRENT TRENDS", 31st October 2013, pp. 6-13; Mihai Cristian Apostolache, *The review of constitutional norms regarding local public administration in the view of the Constitutional Court of Romania (Revizuirea normelor constituţionale privitoare la administraţia publică locală în viziunea Curţii Constituţionale a României)*, in the volume of the National Conference "Current trends in public law. A legal and philosophical approach", University Publishing, Bucharest, 2014, pp. 88- 96
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[9] Adopted by the Venice Commission within the 93rd plenary session, held in Venice, on 14 and 15 December 2012.
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