

CONSTITUTIONAL LANDMARKS OF POLITICAL PLURALISM

ERHARD NICULESCU*

Abstract

In order for democracy to result from freedom, the citizens' participation in the creation and exercise of democratic power must be structured in a pluralist way. Art. 8(1) of the Romanian Constitution firstly imposes the organization of the company in parallel with the State's organic structure as an indispensable requisite for the existence of democracy. In other words, there is no democracy without a civil society, distinct from the State. The organization of the civil society is necessary because the individual alone cannot determine a certain attitude of the political power: structuring gives weight to the action; the organization of citizens contributes to rendering their political participation more efficient. But the organization, structuring limits the freedom of people adhering to the structure.

Keywords: constitution, pluralism, political party, democracy, political will

A. Introduction

Pluralism - a condition and guarantee of constitutional democracy

The core issue of power in democracy is how the individual can remain free from political point of view, being however subject to the power of the *demos*. H. Kelsen gives the following answer to this issue: *the subject of a legal order, which takes part in the creation of such order, is politically free ... Democracy means that the will expressed in the state's legal order is identical to its subjects' will.*¹ The freedom of the subjects of a rule of law has therefore limited necessities, but guaranteed by the equal participation in the creation of the rules that limit it. Four ideas are determined so that the democratic power results from freedom: (1) freedom must be necessarily limited; (2) subjects of the rule of law must take part in its creation; (3) this participation must be equal; (4) the participation must be structured in a pluralist way.

Art. 8 paragraph (1) of the Romanian Constitution is a materialization of the fourth condition that makes democracy result from freedom and guarantees it: *pluralism*.

In order for democracy to result from freedom, the citizens' participation in the creation and exercise of democratic power must be structured in a pluralist way. Art. 8 paragraph (1) of the Constitution firstly imposes the organization of the company in parallel with the State's organic structure as an indispensable requisite for the existence of democracy. In other words, *there is no democracy without a civil society, distinct from the State*. The organization of the civil society is necessary because the individual alone cannot determine a certain attitude of the political power: structuring gives weight to the action; the organization of citizens contributes to rendering their political participation more efficient. But the organization, structuring limits the freedom of people adhering to the structure.

One must give up on a part of his/her freedom as a citizen in order to be part of a political party, just as it was necessary to give up on part of one's natural freedom in order to be part of the society. Whereas organizations facilitate participation, they also restrict it. Democracy bears this way a constant tension between the need of structuring the civil society and the limitation of individual freedom, due to the increase of the role of the structure and oligarchic tendencies within them.

The relative way out of this tension is given by the pluralism of the structures of civil society. First, *categorial pluralism*: a civil society implies the existence of political parties, pressure groups,

* Assistant Lecturer, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest - (erhard.niculescu@yahoo.de).

¹ Hans Kelsen, *Théorie générale du droit et de l'Etat*, Bruylant, L.G.D.J. Bruxelles, Paris, 1997, page 333.

media etc., as structures independent from each other and with regard to the State. Then, *intercategorical pluralism*, which implies the possibility to create many structures within each associative category: several competing parties, pluralism of the pressure groups, pluralism of information.

Pluralism is, as expressed in art. 8 of the Romanian Constitution, a requisite and guarantee of constitutional democracy. A requisite and guarantee because the freedom of individuals is guaranteed on one hand by the State power limitation, due to pluralism of influence centres and eligible elites and on the other hand by the limitation of the power of the structures of the civil society themselves through mutual controls between categories and infra-categorical ones. Pluralist structuring is therefore an essential characteristic of liberal democracy, a characteristic that makes it different from totalitarianism. Totalitarianism implies a people as a deconstructed mass of individuals. Destructuring ensures the domination of the State. In order for the State to be limited, the people must be structured; only this way it can be *demos*.

Art. 8 uses in its first paragraph the notion of pluralism with a very wide meaning. Not a certain type of pluralism, but pluralism in general is a requisite and guarantee of constitutional democracy. Art. 8 paragraph (1) does not only guarantee political pluralism, even if paragraph (2) refers afterwards only to political parties, combining, as any times in the text of the Constitution, a principle disposition with a particularization that makes it problematic. The scope of pluralism is therefore general and it does not only refer to the existence of several political parties.

The exigency of pluralism, deriving from the democratic nature of the Romanian state stipulated in art. 1 paragraph (3) has an express nature established by art. 8 paragraph (1). The Constitution restricts the scope of pluralism when it refers to it as a supreme value, as only political pluralism has this quality according to art. 1 paragraph (3). This must not lead to a restriction of the scope of art. 8. It refers to all spheres of civil society: political, economic, information, cultural.

The signification of this pluralism is not too easy to clarify. "*Pluralism is a conception about political and legal order that privileges the diversity of opinions, interests and their grouping in a civil society and makes the guarantee of their plurality a requisite of freedom.*"²

Democracy is in this vision a society that not only admits diversity, but makes it a constitutive requisite. As Joh Stuart Mill stated already, diversity is not a bad, but a good thing. The passage from this philosophy to its institutionalization at the level of the State organization is first transposed in the separation of powers and relativization of the State unity, either by different degrees of decentralization that go as far as regionalization, or by federalization. This institutional pluralism forbids both the accumulation of powers and their concentration into the hands of the central powers and the creation of an inequality between powers that would make one of them dominant.

As Ion Deleanu stated back in 1992, in a composite and competitive society – as all societies are in fact – *institutional pluralism is logical and necessary*.³ On the other hand, this fact of pluralism implies that none of the State institutions may determine the moral, social, political or legal values that are mandatory in the society based on a single comprehensive doctrine hypothesized as a truth. On the contrary, democratic society implies the fact of pluralism, namely it implies that it is impossible for a single doctrine to obtain the approval of all citizens.

The Democracy implies this way the fact that the diversity of conflicting doctrines cannot be reduced in any way by acts of will of the State or one of its powers. Article 8 of the Constitution ensures this way an additional guarantee to the constitutional dispositions that impose the separation of powers and decentralization of the State. It guarantees the quality between the State powers as only this way pluralism and democracy and State's ideological neutrality can be maintained.

² P. Bouretz, *Pluralisme* in O. Duhamel, Y. Meny, *Dictionnaire constitutionnel*, P.U.F., Paris, 1992, page 756.

³ M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Constituția României comentată și adnotată (Constitution of Romania commented and annotated)*, Regia Autonomă Monitorul Oficial, Bucharest, 1992, page 27.

Democracy seems therefore to be a society of conflict. Pluralism is its requisite because its guarantee preserves the contradiction within the structure of the civil society that feed the State institutions with social impulse. The contradiction is not overcome in a problematic general will or common interest, but is maintained by integrating the conflict in the political system. This means that the legislative system cannot cancel the social conflict by banning diversity.

What art. 8 imposes to the State is the obligation to preserve diversity by the implementation of conflict integration procedures. Basically this means that art. 8 paragraph (1) of the Constitution limits the type of consensus that is possible in the Romanian society. The main problem of the pluralist regime stipulated by art. 8 of the Constitution of Romania, is how to reach a balance between national approval and constant contestation. In other words, what are the restrictions of consensus that may be requested in a democracy and what are the limits of conflict so that it remains democratic?

The fundamental limits stipulated by art. 8 paragraph (1) to the State by the fact that it guarantees pluralism are given by the prohibition to transgress by the legislation of these limits of consensus. On the other hand, it has a positive obligation to ensure the procedures necessary for the integration of conflicts and their peaceful resolution.⁴

B. Paper content

Categorial pluralism

a. Categorial pluralism. The pluralism that the Constitution refers to, considering it a requisite and guarantee of constitutional democracy is first of all a categorial pluralism. The Romanian society must have a pluralist structure at all levels and all spheres of social relations. In principle any organization of citizens, created in order to carry out any activity, is allowed. The prohibition of a type of activity or a type of association must be express, made by law, according to the provisions of art. 53 of the Constitution without endangering pluralism. The pluralism that art. 8 refers to therefore, comprises political pluralism, economic pluralism, media pluralism, trade union pluralism, that of professional and employers' associations, cultural pluralism, religious pluralism and any other type of pluralism.

b. The associations' independence from each other. Categorial pluralism imposes the independence of these types of associations from each other. The first aspect of mutual independence of the associations is the *specialization of their purposes*. That is the reason why each type of association is restricted to exercise its own function. Thus, the parties contribute to the definition and expression of the *political will* of citizens, trade unions, employers' associations and professional associations contribute to the defense of the rights and promotion of the *professional, economic and social* interests of their members, the mass media ensure the *correct information* of the public opinion. It is prohibited to exceed the purpose that a type of association is authorized for. Parties cannot express the political will of a group, but of the citizens, trade unions, employers' associations and professional associations cannot defend the political interests of their members; the mass media cannot favour a political or social force against another, as information must be correct etc.

On the other hand, associations must be *functionally independent* among themselves. This means that their internal organization and their relations with other individuals or legal entities must be independent. Eventually, associations must be relatively independent from each other. That's why, for example, more and more systems build a mechanism of public funding of political parties or limit the level of their private funding.

c. The associations' independence from the State. Pluralism also imposes the independence of the associations of civil society with regard to the State. This implies the freedom of their creation. This freedom is not *absolute*, but the law imposes the framework without barring their creation apart

⁴ Romanian Pandects, Wolters Kluwer Publishing, *Pluralismul și partidele politice conform art. 8 din Constituție (Pluralism and political parties according to art. 8 of the Constitution)*, no. 5 of June 2008, page 43.

from the reasons and limits established by art. 53 of the Constitution and art. 40 on the right of association. As a matter of fact, this right of association is the particularization of pluralism imposed by art. 8 paragraph (1). It stipulates that *citizens may associate freely into political parties, trade unions, employers' organizations and other forms of association*. This implies that in principle *any form of association is allowed, associations cannot be in principle subject to a prior authorization regime and no social sphere can be excluded from the domain of free association*.

Also, the independence of associations with regard to the State implies the *impossibility to suppress them for reasons different than the ones established by the Constitutions or the law within the constitutional limits*. Thus, the parties or organizations *are unconstitutional if they advocate against political pluralism*, the principles of the rule of law or sovereignty, integrity or independence of Romania [art. 40 paragraph (2)], and publications cannot be suppressed [art. 30 paragraph (4)]. The principle is however autonomous with regard to the applications enforced to it by the Constitution, having its own norms. This means that in principle no type of association can be suppressed, even in absence of an express prohibition.

The possibility to suppress an association or another does not imply the possibility to suppress an associative category in its entirety. The suppression of a private association must then not be expressly banned by the Constitution and must be made for the reasons and within the limits of art. 53 of the Constitution. The independence with regard to the State implies that the latter cannot dissolve a legally incorporated association. Thus, the Constitutional Court decided that „the Government may not modify or invalidate by ordinance a Court resolution for the incorporation of an association, irrespective of its nature”⁵.

According to the Decision of the Constitutional Court no. 33/2002 as well, the independence of the associations towards the State, also implies their *functional independence*. Thus, art. 9 stipulates that trade unions, employers' associations and professional associations carry out their activities according to their by-laws, art. 29 paragraph (3) stipulates that religions are organized according to their own by-laws, art. 30 stipulates the fact that all types of censorship are prohibited, and art. 32 paragraph (6) states that university autonomy is guaranteed.

But from the pluralism principle set forth in art. 8 results a general functional independence of any association within civil society, even in the lack of an express provision. The limitations of this functional independence can only be applied within the limits of art. 53 of the Constitution.

Intercategorical pluralism

a. Intercategorical pluralism. The pluralism imposed by the art. 8 is an *intercategorical pluralism*. This means that within each associative category several associations must exist. Sometimes, the Constitution imposes intercategorical pluralism expressly, as it does with political pluralism [art. 1 paragraph (2) and art. 152 paragraph (1)]. Some other times, this pluralism necessary inside each associative category does not expressly result from the constitutional provisions, but it is imposed in case of all associative categories directly by art. 8 of the Constitution as requisite of democracy. In principle, pursuant to art. 8 of the Constitution, the State may not create in a certain domain a single association under which it places the individuals or orders the mandatory membership of the individuals in one of the associations existing in a certain domain.

b. The banning of the creation or authorization of a single association in a certain sphere of social relations. The first rule imposed by intercategorical pluralism is the fact that the State cannot create nor authorize a single association in a certain sphere of social relations. This is the principle applied by the European Court of Human Rights in the case *Eglise Métropolitaine de Bassarabie et autres c. Moldova* when it shows that the measures of the State „meant to restrict the community or place part of it against its will under a single direction represents (...) a violation of the freedom or religion”, in this case, Moldavia doing this by not recognizing the Metropolitan Church of Basarabia

⁵ Decision no. 333/2002, published in the Official Gazette no. 95 of February 2003.

motivating the fact that there already is a church that gathers Orthodox believers recognized by the State.

The European Court shows that the freedom of religion can only be effective if „the right of the believers to the religious freedom that includes the right to express their religion collectively implies the fact that they can associate freely, without an arbitrary intrusion of the State” and this implies that the individuals are not forced to place themselves, against their will, under a single legal entity representing a religious faith, the State infringing the art. 9 of the European Convention of Human Rights as it deprives the Metropolitan Church of Bessarabia of moral personality.⁶

Extrapolating, we may say that any right exerted collectively, implies, in order not to infringe the European Convention of Human Rights or the Constitution of Romania, the freedom or organization of the individuals into several structures with legal personality, any limitation that would tend to create a single associative structure in a domain of free association, irrespective of the criterion, being unconventional and unconstitutional.

c. Banning of mandatory membership. Thus, article 8 bans the mandatory membership of the citizens in a single association, irrespective of its category. The association must result from the free adhesion of the citizen in any collective framework of exercise of the individual rights he/she wants. The mandatory membership in an association can only arise if the exercise of a profession is managed privately, but the profession also implies the exercise of a public service mission. The public service mission must not be mistaken for the public mission. The meaning of the notion is precise: it is a service of the State that it grants for exercise to individuals that do not hold a public function, being private-law individuals.

The Constitutional Court states that the public mission should not be confounded with the State mission⁷. Thus, political parties exert a public mission, not one of public service, as notaries public do, for example. The Court links the public mission to two criteria: the nature of the legal personality and nature of the interest of the association. Thus, the Court claims that as „*the party is a public legal entity – a fact not contested by the authors of the notifications – its mission can only be a public one, as it has public interest and its objective is to form a general political will that the representativeness and legitimacy necessary for the fulfillment of its political programme depend on*”.

Conclusions

a. Pluralism - a requisite of democracy.

Pluralism is declared in art. 8 of the revised Constitution of Romania as a «requisite» of constitutional democracy. But democracy is a normative principle pursuant to art. 1 paragraph (3). This means that art. 8 does not only make a remark: it *imposes pluralism*. Without pluralism the democratic nature of the State is denied, consequently the disposition of art. 1 paragraph (3) is violated. Art. 8 paragraph (1) materializes the democracy principle, particularizing it as a «constitutional» democracy.

The meaning of pluralism in the constitutional law cannot be dissociated from the political sciences, as the principles of constitutional democracy, defined as substantiation of the democratic process on the Constitution or as a political regime in which the State serves the individual (Dominique Chagnollaud), gravitates around the idea of political, ideological, social pluralism, tolerance and mutual respect of the elements of the society. The life of democracy, substantiated on an essentially legal act, the Constitution, is however carried out mainly in the sphere of the political

⁶ Pandectele române (Romanian pandects), Wolters Kluwer Publishing, *Pluralismul și partidele politice conform art. 8 din Constituție (Pluralism and political parties according to art. 8 of the Constitution)*, no. 5 of June 2008, page 45.

⁷ Decision no. 35/1996, published in the Official Gazette no. 75 of April 11, 1996.

power and in the sphere of the political parties and groups, essential elements of any democratic society.⁸

b. Pluralism as a guarantee

The text of art. 8 paragraph (1) calls pluralism a «guarantee». It is not about stating the fact that without pluralism there is no democracy, but a right granted to the citizens to request pluralism. *The guarantee is granted to the citizens, not to democracy.* This means that pursuant to art. 8 citizens may request the notification of the Constitutional Court so that it imposes pluralism in case of possible abuses of the legislative power, even if no other fundamental right is directly involved. Article 8 of the Constitution therefore guarantees a different fundamental right: *a right to pluralism.*

Of course, this right is related to the freedom of association, but should not be confounded with it. For example, economic pluralism does not necessarily imply the right of association. A single person, as an individual, can invoke, if he/she wants to become a trader and the law unreasonably restricts this right, the violation of economic pluralism.

The true milestone for the democratization process is political pluralism. Political pluralism suggests the existence in the society of a plurality of parties or political groups created and acting in conditions of equal treatment from the State. Under these circumstances, *pluralism appears as a guarantee for each party or political force that another party will not be able to act secretly with illegal means, imposing its will and interests over the others.*

The coexistence between contrary political forces, tolerance, dialogue, competition to gain adepts represents the essence of pluralist societies, of constitutional democracy. Although art. 8 of the Constitution as a whole includes pluralism in its political side, namely in the activity of political parties, paragraph 1 of art. 8 contains the general conception of the constituent according to which *pluralism in Romanian society is a requisite and guarantee of constitutional democracy.*

c. Pluralism – a fundament and characteristic of constitutional democracy

Pluralism commonly means a variety of equivalent factors that cannot be reduced to a unity. In the social domain we often speak, in order to express pluralism, about “unity in diversity”. Before representing anything else, pluralism represents the belief in the value of diversity, and in the diversity, dialectics is at the antipode of the confidence in the level conflict.⁹ Consequently, what the democracy theory gains from the pluralist matrix is not and cannot be a praise of *conflict*, on the contrary, a dynamic processing based on the principle according to which anything meant to be fair or true must resist and be verified by criticisms and differences.

Liberal ambiance is indispensable for *constitutional democracy*. The reduction of the conceptions, ideas, opinions, options, aspirations, attitudes to the common denominator of a so-called *ideal*, prefabricated *model*, the standardization and therefore uniformization of the individualism in spite of the diversity of their opinions means totalitarianism. The spirit of democracy is first of all the *sense of dialogue*. Democracy is not compatible with monopoly, or with the privilege of a doctrine that by fact or by law, it tends to ensure its exclusivity and permanence. It refuses any form of ideological orthodoxy. Irrespective of the origin or quality of the opinion, it must enjoy the same opportunity; it must neither be labeled as irrepressible nor stigmatized. Equality, indispensable in the civil legal relations, can be interpreted in the sphere of the opinions, contradictory or just different, as obligations of the public authorities to ensure to all these opinions equality in fact.¹⁰

The majority principle is the generally-admitted rule regarding the adoption of the decisions in constitutional democracies. Another solution – compatible with democracy – does not exist. The

⁸ Ioan Muraru, Elena Simina Tănăsescu, Dana Apostol Tofan, *Constituția României Comentariu pe articole (Constitution of Romania Comment by articles)*, C.H. Beck Publishing, Bucharest 2008, page 358.

⁹ Giovanni Sartori, *Teoria democrației reinterpretată (Theory of democracy reinterpreted)*, Polirom, 1999, page 104.

¹⁰ Ion Deleanu, op. cit., page 398.

majority principle is the *pivot of democratic governance, an incontestable precept* deriving from pluralism, as essentially pluralism has tends to confer power to the many. For some of them the majority principle is therefore absolute, its application does not have restrictions or hesitations. There is here however the risk of a *majority dictatorship*, that cancels the meaning of pluralism. A more nuanced approach is therefore preferable. Majority must be formed in a climate of tolerance and respect towards the opinions of the minority that could virtually be tomorrow's majority. We may therefore consider that the majority rule is a conventionalism, it is rather an experiment than a solution, a temporary transaction formula, necessary but not arrogant and exclusivist.

The pluralism principle also opposes to the uniqueness of power, expressed – in totalitarian political regimes – by conferring the leading party in society to the single party. Institutions are only the background for the affirmation of the dictatorship of that party that subordinates all the other social structures. In a composite and competitive society – as all the societies are in fact – *institutional pluralism is logical and necessary*.¹¹

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¹¹ Ion Deleanu, op. cit., page 400.