

DO CONSTITUTIONAL TRADITIONS HAVE AN EXPLANATORY ROLE FOR THE PHILOSOPHY OF PUBLIC LAW AND AN EVOCATIVE ROLE FOR THE POLITICAL HISTORY OF THE PEOPLE?

Cristian IONESCU¹

Abstract. *The constitutional declaration of democratic traditions or insurrectional ideals at a constitutional level is legitimate and explicable as an element of public law philosophy and social psychology, but also of national identification, especially in situations where the Constituent Assembly establishes a democratic political regime, opened to the aspirations of a nation that has liberated itself from the authoritarianism of a tyrannical government system. However, the issue we are raising is whether constitutional traditions are justified in a normative regulation. In my opinion, the proper place to preserve the national values and the historical political and juridical traditions of a people cannot be the normative text of the Constitution, because it, as a fundamental normative act, has the role to regulate political, social and economic relations and others as valid phenomena as positive, measurable, politically and legally nature. The original place of the traditions and values of a community lies in its public consciousness and in the general lifestyle. Here, they retain intact the ideological content and form as they penetrated through objective scientific knowledge, as well as through a spiritual path in the individual's consciousness, and extended to successive generations. In this way, traditions acquire an explanatory role for the philosophy of public law. A question arises: if traditions are transposed by constitutional norms in the national legal order, can they be challenged scientifically and historically? Contesting the democratic traditions in a scientific work or denying their existence, as well as legislating some areas of social life without taking into account the Romanian's constitutional traditions, are subjected to malpractice or even sanctioned by the law?*

Keywords: constitutional traditions, philosophy of public law, constitution, national legal order

1. Introduction

Normally, a constitution contains normative provisions designed to regulate fundamental social relations of power, which primarily concern state-citizen relations as well as the relations between state's powers. Sometimes, however, the constitutional text refers to non-judicial concepts, such as values, traditions, or ideals, which they directly refer to terms that have explicit constitutional content. In this way, the normative regulation of a constitutional level, connected to certain values and historical traditions, receives the idea of continuity and constant in the

¹Prof., PhD, affiliation: Dimitrie Cantemir University, Bucharest, Romania; full member of the Academy of Romanian Scientists (cristian.ionescu@cdep.ro)

development of the political and legal practice. Traditions, as well as the ideals from a specifically historical stage of a geographically and politically determined community of citizens, have the role of law-making factors. They exist perpetually, apart from the political will and the positive legal orders, however, they can influence them by setting a certain content and form given by the legislative power.

2. Do constitutional traditions have an explanatory role for the philosophy of public law and an evocative role for the political history of the people?

The constitutional declaration of democratic traditions or values expressing such traditions is legitimate and explicable as an element of social psychology and national identity, especially in situations where the Constituent Assembly establishes a democratic political regime, open to the aspirations of a nation that has liberated itself from the authoritarianism of a tyrannical government system. The practical problem that arises in connection with the decision for such a consecration is the choice of the form in which the consecration of traditions is established. Could this be a normative regulation of traditions? [1]. The proper place to preserve the national values and the historical political and juridical traditions of a people cannot, however, be the normative text of the Constitution because it, as a fundamental normative act, has the role of regulating political, socio-economic and other kind of relations, as positive, measurable and politically and legally binding imperatives. Let's be clear. The original place of the traditions and values of a community lies in its public consciousness. Here, they retain intact the ideological content and form as they penetrated throughout the scientific knowledge, as well as throughout the spiritual channel in the consciousness of each individual, and extended to successive generations. A question cannot be avoided: if traditions are transposed by constitutional norms in the national legal order, can they be challenged scientifically and historically?²

To contest in a scientific work some of the democratic traditions or denying their existence, as well as legislating some areas of social life without taking into

¹ Senator Antonie Iorgovan, Chairman of the Constitutional Commission for drafting the Constitution, presented in the opening of the Constituent Assembly the principles and structure of the draft Constitution referring to the inspiration of the commission: "the democratic constitutional traditions of our country, among them those reflected in the Constitution in 1923 (...), as well as the aspirations and ideals of the Revolution of December 1989 "(see Genesis of the Constitution of Romania, 1991. The Constituent Assembly, the Official Gazette, Bucharest, 1998, p. 56).

² In the case of *Roger Garaudy v. France*, dated 24 June 2003, the ECHR ruled that it was unquestionable to challenge the reality of the definitively established historical facts, such as the Holocaust, as the applicant does in his work (the work of *R. Garaudy*, *Founding myths of Israeli policy* – n.a. CI), does not under any circumstances engage in a research of historical research animated by the desire to discover the truth. The objective and implications of such an approach are totally different, as it is, in reality, the rehabilitation of the national-socialist regime and, as a consequence, the accusation of the victims themselves by falsifying history (...).

account the traditions of the Romanian constitutional life, is reason of malpractice or even sanctioned by the law. I ask these questions, indeed forcefully, to draw attention to a need to ensure a minimum of caution of the legislative act when it comes into question the legal consecration of the people's traditions.

The normative enactment of values and traditions that characterize a certain community's "way of thinking" is risky because, through their constitutional institutionalization, they can be artificially perverted at some point by the interests of a parliamentary majority. In this way, the traditions and fundamental values preserved in the septic environment of a nation's spirituality can be infiltrated by hostile political interests, predominant by a majority in government, which intends to legitimize current political decisions with an imposing pedigree. The consequence of such an exposure of national traditions and values to a political environment, vulnerable to party influences and even corruption, may compromise or lose their substance. From the moment the Constituent Assembly institutionalizes certain historical traditions, it offers successive legislative the vocation to convey to those traditions its own political color. Hence, the danger of legislative normalization of pseudo-traditions, do not find their correspondence in public consciousness.

However, Art. 1 par. (3) of the Romanian Constitution states that: *in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.*"

Conceptually, by tradition, we understand a set of concepts, customs and beliefs that have established themselves in a long historical process within social or national groups and are transmitted from generation to generation, constituting for each social group its specific characteristic [2]. Traditions are formed and transmitted independently of the political will of the governing factors. These may speed up or slow the process of forging traditions, but do not determine them as such. Traditions are devoted, sustainable and an entire society is related to them over many generations. Traditions have the vocation to enter and become a part of national consciousness can be identified, as appropriate, in artistic, literary, scientific and even political, including legislative works. If some traditions appear in the form of documents that incorporate a state will, they may be visible in political and civic behavior, determining, along with other factors, the way of being and thinking of a people. Occasionally, some traditions can be legislated, thus becoming generally binding rules for their recipients, and as such they are defended by state power. Democratic traditions form a set of ideas, concepts, habits, attitudes and behaviors regarding political acts, events, ruling decisions from a relatively distant past of a people, who keep their current knowledge and

ability to determine and animate political actions in regard of these traditions. Traditions, in general, and democratic ones in particular, keep their contents intact, they are transmitted from one generation to another, thereby contributing to their spiritual and civic modeling. It is also essential for traditions to have real content, to be certain. But there is also an identifiable image of democratic traditions, a propaganda - fluctuating according to the political and ideological interests of the governor temporarily in power - which can deform the very substance of traditions as such. Moreover, throughout scientific publications can be transmitted "false traditions," which generate axiological confusions on the historical past of a people. Similarly, social, political, democratic, neglected or disregarded traditions, long out of the citizens' daily attention, degrade themselves in time and are transformed into myths, and they can easily be denied and considered inventions. It is necessary for the constitutional legislators to consider these aspects in order to prevent the legalization of traditions that cannot be sustained, but also in order not to deprive a people of their true traditions.

One thing that needs to be explained in advance is the very concept of political and legal traditions in a written law system. We should refer to the legal political traditions, because these are "species" in a scientific definition, their democratic character in the sense given by art. 1 par. (3) of the Constitution of Romania, is the specific difference. Modern Romanian law is a written right, unlike, for example, English law, where tradition is judged made law. Referring to the Romanian constitutional right, we will say that the legal and democratic political traditions, in particular, are based on documents, the tradition emerging from the way they have imposed on the population and were constantly received and conserved in the public consciousness, thus as such - constitutions, laws, acts of governments, parliamentary debates, regulations of the Legislative Chambers, etc. - came out of force. Returning to a tradition or reviving it, by legislating in its spirit, is a matter of opportunity, the legislator being free to appreciate whether the conditions to resume a new normative act or to continue a certain tradition are now met, relying on the fact that the recipient the new legal norm - which will incorporate the spirit of tradition - easily perceives it and will implement it without reluctance because it "intuitively" knows that the tradition is desirable.

The formation of legal and political traditions belonging to a well-organized social group presupposes the passing of a relatively long period of time in which the constitutional principles and provisions, the decisions of the governments - which represent the formal support of constitutional traditions - are applied with constant repetition, like any constitutional custom. Like customs, legal provisions and other political decisions that are traditionally considered must also have a psychological element, that is, to enter into public consciousness, and the population is convinced that they exist as such. If democratic traditions are

preserved as a spiritual and behavioral constant, the image and perception of each new generation differs under the influence of ideological factors, policies, education and civic culture. Evidence in this respect is the monarchical tradition in Romania that has permeated after 1947 under the influence of the communist party ideology and was partially and for the moment revived after 1990, with the abolition of the repressive political regime¹.

It is also important in this perception the will of the political class to preserve traditions and to constantly report to them. It depends on the Governor's political will and the willingness of each individual to connect or relate to the old traditions. The interruption of traditions, as was the case with the democratic traditions of the Romanian people formed at the end of the nineteenth century and those of the interwar period can cause their flattening, and they can be subjected to a process of oblivion. Democratic traditions are based on governance models and power-exercise procedures that have expressed the political will of the citizens' community at one point and have had their electoral acceptance over several legislatures and executive mandates. If traditions are disputable, democratic governance models that functioned as such will lose their prototype virtues and thereby create confusion, mistrust of the political system's ability to function democratically.

Conclusions

For us, the Romanians, the Constitution of 1866 was the vehicle that mechanically and quickly transposed Western European constitutionalism. Once it arrived in Bucharest, it was planted on a socially, politically, culturally less germinating soil. Hence, the institutional improvisations that then gave rise to serious, complex problems in political practice for which no solutions were found immediately [3]. For instance, one is to create political institutions that suit you and reflect your way of thinking and being, and another is to adopt a reactionary behavior towards a political institution that the Constituent has borrowed from other people and adapted for you and with whom you need to adapt, to understand its meaning, role, functioning mechanisms, advantages and risks of using it. Every nation in its historical evolution owes itself through its positive and creative attitude to form its own governing structures, organization in all spheres of social life. Only in this way are these structures sustainable and they themselves become formative tools

¹ The forced and inadequately deep and historically and politically argued institution of the Romanian monarchy with the democratic traditions of the interwar Romanian political regime, and those insufficiently clear and generally accepted in the scientific environment, hypothetically risks giving the Hohenzollern dynasty as a whole, of constitutional tradition in the spirit of art. 1 par. (3) of the Basic Law. Such a hypothesis, not impossible to conceive and sustain on media channels, contradicts constitutional provisions that enshrine the form of republican rule.

for expressing a unitary social will. Like other people, the Romanian people also have certain psycho-social characteristics, certain spiritual experiences, beliefs and social demands, aspirations, and all these are factors that guide it, lead it to life, made it act on material, cultural, political impulses and so on. I also believe that there is a direct link between the character of the political traditions of our people and the character of the political class, from which all these impulses come. In the absence of mental and behavioral fundamental thinking, the individuals conviction that constitutional settlements fit and are appropriated and respected, the democratic traditions born of the application of these settlements are quite differently than we would like them to be.

Returning to the formal normalization of traditions, we consider it risky for the Government's decision to impose formally and explicitly, through historical and social or political ideals, models of political and civic behavior converted into constitutional provisions with erga omnes effects, whose non-compliance attracts legal sanctions. We refer here to the supreme values guaranteed in art. 1 par. (3) of the Romanian Constitution. The role of law is to regulate social relations and to transpose them through its force of persuasion or coercion, in legal relations that correspond to social realities living in a dynamic and permanent dynamic, and not to normalize manifestations of a national spirituality.

Is there any justification that the Parliament, for example, makes the content of specific legal concepts such as those outlined in Art. 1 par. (3) of the Constitution, of their observance of the spirit of historical traditions formed over a century ago, in accordance with political, social realities, which today are missing? It is productive for the constitutional theory and practice to introduce by express normative text, on a constitutional level, the historical tradition in the equation of the current normative decision taking as the determinant factor of the legal norm the political and legal reflection of the forerunners corresponding to social realities which today exist? It seems to me that these are essential questions for the understanding and application of art. 1 par. (3) of the Romanian Constitution revised in 2003.

R E F E R E N C E S

- [1] Genesis of the Constitution of Romania, 1991. The Constituent Assembly, the Official Gazette, Bucharest, 1998, p. 56.
 - [2] Explanatory Dictionary of the Romanian Language, Ed. Univers Enciclopedic, Bucharest, 2016: 1251.
 - [3] P. Negulescu, Fundamental Principles of the Constitution of 27 February 1938, Atelierele Zanet Corlăţeanu, Bucharest, 1939, p. 21-33.
-