Autoritatea Electorală Permanentă

REVISTA ROMÂNĂ *de* STUDII ELECTORALE

Vol. VI, nr. 2, 2018

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Revista Română de Studii Electorale

Publicaţie bianuală editată de Autoritatea Electorală Permanentă
(continuă Revista Expert Electoral)

ISSN (print): 2601-8454
ISSN (L): 2601-8454

Realizat la
MONITORUL OFICIAL
Editură şi Tipografie

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CUPRINS

Regim şi scrutin. Cum au cristalizat alegerile din 2004 sistemul politic românesc

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Datorită felului în care a plecat din istoria românilor, socialismul de stat a lăsat pe seama alegerilor sarcina de a deveni metoda politică a schimbării de regim. Cu toate acestea, în România postcomunistă, guvernele nu sunt întotdeauna rezultatul democratic şi previzibil al alegerilor legislative. De multe ori, alegerile legislative au fost mai degrabă un instrument de legitimare *ex post* a guvernelor constituite din iniţiativă prezidenţială. Politica românească pare să se afle, încă din 1866, sub imperiul a ceea ce am putea numi, prin analogie, un *regim dualist*[1]. Ca şi în aranjamentele constituţionale ale celui de-al doilea Imperiu francez, ca în prima constituţie belgiană sau în Statutul Albertin, puterea executivă este exercitată în comun de Palat şi de Parlament. Din 1866 şi până în 1938, acest exerciţiu comporta următoarele mişcări: regele numea un prim-ministru, acesta organiza, mai precis manufactura, alegeri care, nefiind pe deplin *free and fair*, îi ofereau majoritatea parlamentară necesară validării proiectelor sale legislative până în momentul în care regele decidea, uneori discreţionar, rareori transparent, că a sosit timpul ca un alt politician, dintr-un partid diferit, să formeze un nou consiliu de miniştri care, la rândul său, convoca alegeri pe care avea grijă să le câştige fără drept de apel. Nici măcar socialismul de stat nu a aruncat dualismul la groapa de gunoi a istoriei, ci chiar s-a inspirat din mecanica acestuia, de vreme ce parlamentele socialismului de stat erau plebiscitate în cadrul unor alegeri desfăşurate la comanda unor guverne numite de conducerea supremă a Partidului Comunist.

În mod intuitiv şi oarecum spontan, practicile constituţionale ale postcomunismului au recurs fără prea mare ezitare la logica dualistă[2]. Hrănindu-se doctrinar atât din constituţionalismul precomunist, cât şi din cel socialist, Constituţia revizuită în 2003 dispune ca preşedintele să nu fie al republicii – ca în Italia, Franţa sau Polonia, de exemplu –, ci al României. Altfel spus, preşedintele nu reprezintă corpul politic al cetăţenilor, deşi este ales direct de aceştia, ci arhitectura instituţională a statului.

Modul popular de alegere a preşedintelui postcomunist induce impresia greşită că alesul ar fi un soi de tribun al poporului. Titlul pe care-l poartă şi prerogativele ce-i sunt încredinţate îl poziţionează însă pe preşedintele României într-o situaţie de separare faţă de societate. Recuzita autorităţii prezidenţiale este concepută în aşa fel încă să scoată în evidenţă atât alteritatea, cât şi caracterul monarhic al funcţiei. La lucrările Consiliului Suprem de Apărare a Ţării, preşedintele ocupă, singur, latura lungă a mesei în formă de trapez, în vreme ce toţi ceilalţi participanţi, inclusiv prim-ministrul, se înghesuie pe cele trei laturi scurte. Când participă la şedinţele parlamentului, preşedintelui i se oferă un jilţ somptuos, detaşat de băncile parlamentarilor, dar şi de cele ale guvernului ori ale invitaţilor oficiali. Preşedintele, odată ales, devine prin efectul Constituţiei neasemănător cu societatea, ocupând o poziţie exterioară, teoretic una de arbitru între aceasta şi autorităţile publice.

O lectură riguroasă a Constituţiei făcută cu bună-credinţă conduce la următorul portret instituţional al preşedintelui României, întru totul compatibil cu tradiţia dualismului. Potrivit

[1] V. Guglielmo Ferrero, *Pouvoir. Les Génies invisibles de la Cité*, Librairie Générale Française, Paris, 1988, p. 111 – 114.

[2] Daniel Barbu, *Republica absentă. Politică şi societate în România postcomunistă*, Nemira, Bucureşti, 2004, p. 175 – 177.

articolului 80 alin. (2), preşedintele este un mediator, pe de o parte între puterile statului, iar pe de altă parte între acesta şi societate. Preşedintele nu este doar o componentă instituţională a puterii executive, ce ar fi astfel bicefală, aşa cum îşi închipuie în unanimitate doctrina constituţională românească. Desigur, preşedintelui îi revin competenţe în domeniul politicii externe şi în cel al apărării, formulate clar de articolele 91 şi 92. În acelaşi timp însă, preşedintele are şi atribuţii legislative conferite de articolul 77, ce îi permite să intervină în procesul de legiferare solicitând parlamentului reexaminarea legilor. În plus, preşedintele este un factor constitutiv al autorităţii judecătoreşti: potrivit articolului 125 alin. (1), de pildă, judecătorii devin inamovibili numai după numirea lor de către preşedinte, care în conformitate cu articolul 133 alin. (6) prezidează şi lucrările Consiliului Superior al Magistraturii la care participă, aşa cum, din încredinţarea articolului 87 alin. (2), prezidează şedinţele guvernului ori de câte ori este prezent, fie la cerere, fie prin invitaţie.

Altfel spus, preşedintele este într-o relaţie perfect simetrică cu toate cele trei ramuri ale guvernământului, fiindu-le în acelaşi timp exterior. El este în fapt cheia de boltă a arhitecturii constituţionale româneşti. El nu se poate substitui niciunei autorităţi, dar are vocaţia de a le ţine împreună şi de a veghea la buna lor funcţionare, în termenii articolului 80 alin. (2). El are un drept de control, dar nu şi o capacitate de intervenţie. Cu o formulă a dreptului constituţional francez, magisteriul preşedintelui este unul de influenţă. Suficientă influenţă pentru a-l dota cu mijloacele necesare menţinerii în viaţă a caracterului dualist al regimului politic românesc.

Caracterul structural dualist al regimului politic românesc a fost confirmat exemplar de alegerile parlamentare şi prezidenţiale ce au avut loc simultan în anul 2004.

Alegerile democratice constituie, în principiu, acea instanţă în faţa căreia partidele politice sunt chemate să-şi decline până la capăt adevărata identitate. Când se află la guvernare, circumstanţele obligă adesea un partid să-şi adapteze principiile, să recurgă la personalităţi din afara rândurilor sale, să adopte politici care nu corespund întocmai programului său. Un partid instalat la guvernare este de regulă nevoit să cadă la compromis cu propria majoritate parlamentară, cu partenerii de coaliţie, cu opoziţia, cu principalii actori sociali, cu instituţiile internaţionale. Pe băncile opoziţiei, acelaşi partid este încă o dată condamnat să nu fie pe deplin el însuşi. Şi în acest caz partidul are ca sarcină să caute aliaţi în parlament şi în afara acestuia, să negocieze cu guvernul în chestiuni majore, să se abţină de la critici sau să colaboreze cu majoritatea în situaţii date, pe scurt, să se dovedească – chiar şi atunci când poartă o mască retorică intransigentă partizanul unei politici constructive. Aşadar, numai în faţa urnelor un partid are cu adevărat prilejul să-şi facă cunoscute valorile, proiectul de societate, programul, politicile şi echipa în ceea ce au mai propriu şi mai distinctiv.

Cu toate că o astfel de constatare are de partea sa nu doar experienţa comună a tuturor regimurilor democratice vechi şi consolidate, dar şi bunul-simţ, în *partidocraţia* românească – pentru a folosi un termen croit iniţial pe măsura politicii italiene[3]– partidele dominante nu numai că trec, de regulă, pragul campaniilor electorale fără să se grăbească să spună cine sunt şi să rostească tot adevărul despre ele însele, dar sunt constrânse să investească muncă, timp şi energie în identificarea şi căutarea propriilor candidaţi. Cu doar câteva zile înainte de începerea campaniei electorale din toamna anului 2004, partidele parlamentare nu aveau niciun fel de idee despre cine le va reprezenta în parlament după 28 noiembrie. Partidul Social Democrat (PSD) s-a dovedit

[3] Mauro Calise, „The Italian Particracy: Beyond President and Parliament", în *Political Science Quarterly*, vol. 109, nr. 3, 1994, p. 442 – 444 şi Gianfranco Pasquino, *Il sistema politico italiano. Autorità, istituzioni, società*, Bononia University Press, Bologna, 2002, p. 15 – 21.

cel mai confuz dintre ele. Pentru a-şi alege candidaţii, cel mai mare partid din România a recurs atunci la trei metode de recrutare, în teorie incompatibile între ele şi, ca atare, niciodată folosite împreună. A început prin a organiza, după modelul american, alegeri primare. Rostul acestei tehnologii nu este însă unul democratic. De regulă, primarele americane sunt o modalitate pentru reţelele locale de interese de a identifica şi finanţa candidaţii cei mai apţi să întrupeze respectivele interese. PSD a utilizat ulterior principiul discriminării pozitive, urmărind un fel de promovare, în spirit scandinav, a reprezentării femeilor (şi tinerilor). În final, a apelat la rezerva de cadre de tip comunist, lăsând conducerea partidului şi statului să stabilească ordinea finală a candidaţilor de pe liste şi să introducă pe acestea noi nume. În schimb, Partidul Democrat (PD) s-a arătat, cu privire la viitorii săi parlamentari, cel mai ignorant dintre partide. Traian Băsescu a compus o listă, invitând societatea civilă „să dea cu pietre" în persoanele reţinute acolo, adică să-i identifice pe candidaţii cu o proastă reputaţie locală sau naţională[4]. În acest fel, preşedintele PD a recunoscut că nu avea nici cea mai vagă noţiune despre militanţii de frunte ai partidului său, despre materialul uman din care era făcut un partid pe care avea ambiţia să-l ducă la guvernare. Partidele politice româneşti s-au prezentat deci în faţa alegătorilor fără să cunoască lucruri elementare despre ele însele, despre cadrele de care dispun şi despre programele pe care au de gând să le transforme în politici publice. În preajma congresului PSD din 15 aprilie 2005, doi senatori ai acestui partid au admis public că nu s-au întâlnit niciodată faţă în faţă, nici înainte de alegeri şi nici măcar în reuniunile propriului grup parlamentar[5].

Tocmai de aceea, spre deosebire de regimurile prezidenţiale sau parlamentare, într-o *partidocraţie* – şi cea românească nu face excepţie – capul guvernului este cel mai adesea ales independent de procesul electoral, dacă nu împotriva acestuia[6]. Theodor Stolojan în 1991, Nicolae Văcăroiu un an mai târziu, Victor Ciorbea în 1996, Mugur Isărescu în 1999, Emil Boc în 2009, Mihai Răzvan Ungureanu în 2012, Dacian Cioloş în 2015, Sorin Grindeanu în 2016 şi Viorica Dăncilă după un an au fost prim-miniştrii aduşi din afara parlamentului, care nu avuseseră ca atare prilejul să se confrunte, înainte de a fi numiţi, cu electoratul naţional. Ei au ajuns să conducă executivul exclusiv prin voinţa preşedintelui sau prin voinţa combinată a preşedintelui şi a partidului majoritar. În schimb, în decembrie 2000, în 2004 şi în mai 2012, prim-miniştrii desemnaţi se aflau la comanda unor coaliţii parlamentare majore, chiar dacă nu propriu-zis majoritare. S-a întâmplat ca, în primele două împrejurări, Adrian Năstase să fie şeful coaliţiei ce obţinuse la alegerile generale cele mai multe voturi şi, cu acest titlu, deţinea cel mai consistent număr de mandate parlamentare. În 2000, Polul Social Democrat [incluzând Partidul Democraţiei Sociale din România (PDSR), Partidul Social Democrat Român (PSDR) şi Partidul Umanist din România (PUR)] a colectat, pentru Camera Deputaţilor, 3.968.464 de voturi, reprezentând 36,61% din sufragiile valabil exprimate şi 44,92% din mandate, *i.e.* 155 de deputaţi. Proporţii similare au fost realizate şi la Senat. Pe 28 noiembrie 2004, Uniunea Naţională dintre social-democraţi şi umanişti, condusă de acelaşi Năstase, a rezistat cu succes la eroziunea pe care o presupun de regulă patru ani de guvernare şi a câştigat 3.730.532 voturi pentru Cameră, adică 36,8 procente, ce i-au adus 132 de locuri (39,75% din mandate). Mai mult, în ambele ocazii Adrian Năstase putea conta pe sprijinul Uniunii Democrate Maghiare din România (UDMR), de care în 2004 era legat printr-un acord electoral şi de guvernare explicit. Ceea

[4] Daniel Barbu, „Pentru ce şi din cine sunt făcute partidele?", în *Ziarul Financiar* VI, nr. 1483, 18 octombrie 2004, p. 8.
[5] Idem, „Intifada PSD", în *Ziarul Financiar* VII, nr. 1615, 25 aprilie 2005, p. 16.
[6] Mauro Calise, *Dopo la partitocrazia. L'Italia tra modelli e realtà*, Einaudi, Torino, 1994, p. 42.

ce înseamnă că, pentru a-şi consolida majoritatea, el mai avea la dispoziţie, în 2000, încă 27 de deputaţi (7,82% din mandate), iar în 2004 un bonus de 22 de aleşi maghiari (6,62% din locuri).

Cu toate acestea, Adrian Năstase a fost chemat să formeze guvernul numai în anul 2000, nu şi în 2004. El s-a recomandat însă, de fiecare dată, ca fiind cel în drept să alcătuiască executivul, în calitate de şef al pluralităţii parlamentare. Acest lucru nu pare să fi contat în decembrie 2004. Deşi Alianţa dintre liberali şi democraţi se afla cu jumătate de milion de voturi şi cinci puncte procentuale în urma Uniunii lui Năstase, Călin Popescu Tăriceanu a fost însărcinat de noul preşedinte să constituie un guvern de coaliţie. Nu numai că a reuşit fără dificultăţi să îşi întocmească echipa, dar a izbutit chiar să o recruteze din sânul unei majorităţi parlamentare înfiripate ad-hoc şi diferite de oricare dintre formulele de alianţă electorală între care alegătorii fuseseră chemaţi să discearnă. Cum de a fost posibil?

Să precizăm, înainte de toate, că cererea lui Năstase de a deveni formator al noului guvern nu a fost mai mult decât un omagiu verbal adus votului popular. Ca un experimentat veteran al *partidocraţiei* româneşti, ierarhul social-democrat ştia că nu are cum să-i revină sarcina de a face guvernul după ce pierduse, cu mai puţin de 250.000 de sufragii, alegerile prezidenţiale în favoarea lui Traian Băsescu. De aceea s-a grăbit să candideze pentru preşedinţia Camerei Deputaţilor, poziţie pe care a obţinut-o fără dificultăţi, cu titlu de şef al celei mai largi pluralităţi parlamentare votate de cetăţeni şi întărite de acorduri politice şi electorale. În acest mod, Năstase a indicat limpede că, în ciuda a ceea ce depun alegătorii în urne şi semnează partidele în protocoale, privilegiul de a desemna prim-ministrul îi aparţine în chip discreţionar preşedintelui.

Ce fel de voinţă generală ar fi trebuit să citească Traian Băsescu în rezultatul alegerilor de la 28 noiembrie 2004? Pragul electoral fusese trecut de partide şi alianţe care adunau împreună 8.866.764 de voturi, reprezentând 87,47% dintre alegătorii ale căror buletine au fost validate (10.136.460) şi 48,06% dintre cei 18.449.344 de cetăţeni cu drept de vot. Acest procent este comparabil cu cel al alegerilor din 2000, dar se deosebeşte dramatic de graficul participării la consultările electorale din 1992 şi 1996, când suma voturilor realizate de partidele parlamentare era egală cu 60% din corpul electoral. În noiembrie 2004, cu excepţia Partidului România Mare (PRM), toate celelalte partide erau legate de angajamente electorale şi politice. Familia politică a noului preşedinte, Alianţa dintre Partidul Naţional Liberal şi Partidul Democrat, convinsese 31,48% din alegători, adică 17,29% din cetăţenii înscrişi pe listele electorale. Ea fusese devansată semnificativ de coaliţia de guvernământ, formată din Uniunea Naţională dintre PSD şi PUR şi din UDMR. Împreună, aceste trei partide atinseseră 43% din voturile exprimate, echivalând cu 23,62% din numărul cetăţenilor îndreptăţiţi să voteze.

Aritmetica ne arată că victoria lui Băsescu şi performanţa Alianţei au fost cel puţin mediocre faţă de triumful din 1996 al lui Emil Constantinescu şi al Convenţiei Democrate Române. În plus, Băsescu nu conducea o coaliţie capabilă să formeze guvernul în temeiul exclusiv al votului popular, aşa cum izbutise şi se angajase să o facă Convenţia Democrată cu opt ani mai înainte. Pentru a-şi aduce Alianţa la guvernare, Băsescu a recurs la practicile politice inaugurate în 1992 – 1996 de PDSR şi consolidate în 2001 – 2004 de PSD. Aceste practici se bizuie pe trăsăturile comune ale celor mai mulţi politicieni români, maghiari şi de alte naţionalităţi: lipsa de loialitate, absenţa convingerilor, oportunismul, capacitatea de se lăsa cooptaţi şi cointeresaţi. UDMR şi PUR, partide legate formal de PSD prin acorduri explicite de guvernare, au trecut imediat de partea învingătorului. Numeroşi parlamentari au fost şi ei pregătiţi, cu titlu individual, să sprijine guvernul şi să-şi părăsească listele pe care au fost aleşi. Alianţa a dus astfel la îndeplinire, sub comanda lui Traian Băsescu, exact ceea ce PSD se pregătea să facă sub conducerea lui Ion Iliescu şi Octav Cozmâncă. Se poate

spune deci că, deşi guvernul şi candidatul PSD au pierdut alegerile din 2004, filosofia politică a PSD a ieşit învingătoare.

Preşedintele a trecut imediat, după exemplul predecesorilor săi, la confecţionarea unei *majorităţi prezidenţiale* diferite de pluralitatea parlamentară degajată de votul popular. Şi a făcut acest lucru pe socoteala înţelegerilor electorale şi politice încheiate înainte de alegeri. Iar principalul său aliat a fost *partidocraţia* însăşi, care s-a pus fără ezitare în serviciul Palatului. Alianţa liberalilor şi democraţilor, cu 3.191.546 de voturi, UDMR, cu 628.125, şi umaniştii cu o cotă virtuală de 630.000 de voturi (estimată regresiv, pe baza numărului de mandate atribuite) au reuşit să alcătuiască un guvern susţinut de 24% din corpul electoral şi de 44% din alegătorii ale căror voturi au fost validate. Băsescu a recompus astfel o *coaliţie fictivă,* calificată de el însuşi drept „imorală", ce nu a depăşit, în final, procentele înregistrate de *coaliţia efectivă* care se impusese iniţial în preferinţele cetăţenilor. Simplu spus, urnele nu au reprezentat mai mult decât un depozit de materiale politice colectate aleatoriu şi periodic, din care preşedintele şi-a construit o majoritate potrivit propriilor sale planuri de sistematizare electorală. Iar astfel de planuri sunt rareori supuse în prealabil avizului alegătorilor şi, cel mai adesea, contrazic aşteptările acestora. Aşa, de pildă, Traian Băsescu îşi datorează victoria în cel de-al doilea tur al alegerilor prezidenţiale din 2004 electoratului PRM, care l-a răsplătit în acest fel pentru atitudinea sa hotărât naţionalistă, penalizându-l în acelaşi timp pe Adrian Năstase pentru alianţa sa cu UDMR. Imediat după victorie, Băsescu a chemat însă UDMR la guvernare şi a respins orice fel de cooperare politică cu PRM.

Spre deosebire de semiprezidenţialismul celei de-a cincea Republici franceze, a cărui flexibilitate este oneroasă, elasticitatea regimului dualist românesc, alimentat şi sprijinit de *partidocraţie*, este ambiţioasă. Să precizăm că adjectivele de origine latină *oneros* şi *ambiţios* sunt animate aici de o raţionalitate etimologică. Dacă primul termen sugerează că, în Franţa, preşedintele trebuie să poarte povara votului popular, acceptând coabitarea cu un guvern parlamentar, atunci când aceasta îi este impusă de rezultatul alegerilor, cel de-al doilea aminteşte de obiceiul unor candidaţi la magistraturile Romei antice de a lua voturi cu ambele mâini şi de la oricine este dispus să le ofere, fără a se simţi îndatorat faţă de un electorat anume. Într-un limbaj mai juridic, semiprezidenţialismul *à la française* este tot atât de oneros cât poate fi un contract: preşedintele şi actorii partizani se socotesc legaţi de electorat prin obligaţii ce atârnă întotdeauna mai greu decât avantajele politice oferite de orice fel de aranjament făcut după ce s-au numărat voturile şi s-au repartizat mandatele. În schimb, dualismul românesc poate fi considerat ambiţios pentru că, indiferent de ce spun urnele, are înclinaţia de a îşi produce singur majorităţile prin proceduri postelectorale ce urmează o logică politică indiferentă la orice alt criteriu, cu excepţia voinţei prezidenţiale. Caracterul ambiţios al practicilor constituţionale româneşti este ilustrat, în plus, de influenţa politică semnificativă pe care PUR a exercitat-o din 2000 şi până în 2008. Un partid fără alegători, ce reprezintă în exclusivitate interesele economice ale fondatorului său şi ale mediului de afaceri din jurul acestuia, a reuşit să se impună – prin mobilitatea transversală a oligarhiilor partizane, prin dinamica înţelegerilor dintre partide şi, mai ales, prin vrerea Palatului – drept un actor indispensabil pentru formarea majorităţilor parlamentare şi a coaliţiilor guvernamentale.

S-ar putea ca PUR să fie chiar cel mai tipic produs al sistemului românesc de partide. De la fondarea sa în 1991 şi până la dispariţia ultimului său avatar în 2015, acest partid nu a participat niciodată la alegerile legislative sub propriul său nume. Cu toate acestea, a izbutit în decembrie 2000 să obţină un număr însemnat de locuri în parlament, în coaliţie cu social-democraţii, şi a intrat chiar episodic la guvernare. Deşi, refuzând să se confrunte direct cu electoratul, nu au avut întotdeauna dreptul de a constitui grupuri parlamentare proprii, umaniştii au primit

toate privilegiile pe care partidele parlamentare şi le-au acordat reciproc şi care s-au dovedit a fi extrem de preţioase în organizarea alegerilor locale şi generale din 2004, în care partidele extraparlamentare au fost discriminate şi penalizate prin lege. După 28 noiembrie 2004, PUR i-a revenit un număr suficient de mare de mandate pentru a deveni pivotul funcţionării regimului. Liderul umanist s-a angajat explicit, a doua zi după alegeri, în ceea ce ar putea fi descris, cu un termen al lui Arend Lijphard, o politică *consociaţională*[7]: pe de o parte, i-a sprijinit pe aliaţii social-democraţi în cursa pentru obţinerea posturilor de comandă ale celor două Camere, iar, pe de altă parte, la cererea preşedintelui României, s-a lăsat simultan inclus în majoritatea prezidenţială şi în coaliţia guvernamentală condusă de Alianţa Dreptate şi Adevăr.

Pentru prima oară în politica postcomunistă, Dan Voiculescu a formulat – prin acţiunile şi intervenţiile sale publice – o definiţie explicită şi definitivă a soiului românesc de *partidocraţie:* mai întâi, niciunui partid (dintre cele parlamentare, se înţelege) nu trebuie să i se refuze accesul la repartizarea poziţiilor de comandă în instituţiile şi agenţiile publice, operaţiune cu caracter atât indiviz, cât şi ponderat; apoi, niciunui partid anume nu-i este îngăduit să aspire, prin excluderea celorlalte partide, la exploatarea statului în regim de monopol. Cu alte cuvinte, oricare ar fi rezultatul alegerilor, într-o *partidocraţie* nimeni nu pierde totul şi nimeni nu câştigă definitiv. Mai degrabă, pierderile şi câştigurile se distribuie proporţional şi echilibrat între partidele parlamentare. Tocmai de aceea îi este recunoscut preşedintelui privilegiul de a confecţiona, după calcule pentru care nu are a da seama, o majoritate prezidenţială. Incertitudinea politică generată de rezultatul neaşteptat (şi neanunţat de primul tur al alegerilor prezidenţiale din 2004) nu a fost decât aparentă, pentru că partidele, la guvernare sau în opoziţie, fac parte din aceeaşi societate pe acţiuni care este *partidocraţia*. Ca în orice regim dualist clasic, de tipul celor descrise de Guglielmo Ferrero, rezidentul Palatului este atât garantul, cât şi administratorul delegat al unui sistem de partide nu doar stabil, dar şi instituţionalizat pe baza unor criterii exclusive. Şi cum, spre deosebire de perioadele anterioare lui 1989, locatarul Palatului este desemnat prin vot popular, rezultă că singurele alegeri care au cu adevărat o însemnătate politică sunt cele prezidenţiale. Sufragiul universal a înlocuit monarhia constituţională şi centralismul democratic al epocii comuniste ca metodă de a stabili cine este nu numai depozitarul ultim al suveranităţii naţionale, dar şi cel mai autorizat exeget al voinţei generale.

Din această perspectivă, pare indiscutabil că, în *partidocraţia* românească guvernată de preşedinte, executivul nu este o soluţie democratică prin intermediul căreia cetăţenii convin, în cadrul consultărilor electorale, să-şi rezolve conflictele şi să traducă într-un idiom politic comun aspiraţiile şi interesele lor particulare de ordin social, economic şi cultural, ci un aparat birocratic care gestionează, în nume propriu şi din însărcinarea preşedintelui, afacerile curente ale unei populaţii ce nu se reprezintă încă pe sine sub trăsăturile unei comunităţi politice[8]. Politicianul român este în cele mai multe cazuri un întreprinzător a cărui treabă este să administreze treburile cetăţenilor, între care se numără desigur el însuşi, pentru a evoca candida deviză cu care Traian Băsescu a câştigat primăria Bucureştilor în anul 2000. Spre deosebire de ideal-tipul politicianului democrat, aşa cum a fost stabilit de Max Weber[9], el nu trăieşte nici *pentru* politică şi nici *din*

[7] Arend Lijphart, *Democracy in Plural Societies. A Comparative Exploration*, Yale University Press, New Haven and London, 1977, p. 25 – 47.

[8] Conform Jean Blondel, „Introduction", în Jean Blondel, Maurizio Cotta (editori), *The Nature of Party Government. A Comparative European Perspective*, Palgrave, Basingstoke, 2000, p. 8.

[9] *From Max Weber: Essays in Sociology*, traduse, editate şi cu introducere de H. H. Gerth, C. Wright Mills, Oxford University Press, New York, 1958, p. 77 – 128.

politică. El se foloseşte de politică pentru a-şi vedea de propriile treburi şi pentru a-şi promova afacerile private cu ajutorul unor dispozitive publice. Managerii de succes sunt, la rândul lor, priviţi drept cei mai apţi candidaţi pentru ocuparea funcţiilor ministeriale. Executivul este de aceea comparabil cu un holding din domeniul serviciilor ori, şi mai precis, asemănător cu o Cameră de comerţ şi industrie. Treaba guvernului este să acorde scutiri de taxe, amnistii fiscale, compensări şi rambursări unor companii atent selecţionate, să reglementeze domenii economice şi sociale pe care politicienii să le controleze corespunzător cu ponderea lor în *partidocraţie*, să cumpănească şi să încrucişeze interesele comerciale ale importatorilor şi exportatorilor, să extragă cât mai multe impozite şi taxe din muncă şi consum, să ocrotească profitul şi să încurajeze acumularea şi circulaţia capitalului privat. Mâna vizibilă a statului operează în numele unui capitalism încă lipsit de suficienţi capitalişti[10], dar care este consolidat de întreprinzătorii politici în propriul lor avantaj.

În mod absolut firesc, pe agenda guvernului format în decembrie 2004 nu se afla decât un singur punct demn de a fi menţionat: cota unică de impozitare de 16%, destinată să asigure izbânda finală a capitalului asupra muncii, triumf la care au visat în diverse forme toate guvernele postcomuniste. Într-adevăr, ideea nu are un caracter partizan, ci aparţine listei scurte de concepte a *partidocraţiei* româneşti. A fost răspicat formulată în primăvara anului 2004 de către ministrul de finanţe al guvernului PSD, Mihai Tănăsescu, şi a fost imediat salutată cu entuziasm de către prim-ministrul Adrian Năstase. A fost în schimb respinsă imediat şi vehement, ca o idee străină de spiritul social-democraţiei, de către preşedintele de atunci, Ion Iliescu. Cum regimul politic românesc are o natură dualistă, preşedintele a avut ultimul cuvânt şi această treabă interpartizană a trebuit să aştepte să se schimbe locatarul Palatului pentru a deveni o politică publică.

Este destul de improbabil că Traian Băsescu a câştigat alegerile prezidenţiale din 2004 datorită sprijinului necondiţionat pe care s-a angajat să îl dea cotei unice de impozitare. S-ar putea însă ca Adrian Năstase să fi pierdut aceleaşi alegeri tocmai pentru că s-a manifestat ca un suporter al acestei idei. El a fost învins de declinul accelerat al reţelelor sociale legate de munca industrială care au generat, în ultimele decenii ale socialismului de stat, modalităţi de participare politică informală pe care social-democraţii au reuşit să le gestioneze atâta timp cât nu a fost limpede că succesivele reîntrupări ale Partidului Comunist devin din ce în ce mai favorabile capitalului şi mai indiferente faţă de muncă.

Votul rural pe care au contat neîntrerupt agenţiile politice succesoare ale Partidului Comunist [Frontul Salvării Naţionale (FSN), Frontul Democrat al Salvării Naţionale (FDSN), PDSR, PSD] nu a fost rezultatul cumulat al unei particulare simpatii, de factură nostalgică, colectivistă şi iraţională, pe care satele ar avea-o pentru acest unic partid cu mai multe nume, ci efectul pervers al unei încrederi în democraţie obligate să se exprime electoral în cadrul unor relaţii de dependenţă a ţărănimii faţă de fuziunea dintre birocraţia de stat, interesele *corporate* din agricultură şi patronajul partizan. Agricultorii fac, constant, o alegere contingentă, dar profund raţională şi individuală. După 1989, social-democraţii, cu precădere cei din orizontul local, în ciuda delegitimării etico-politice de care sunt afectaţi, rămân pentru ei singurul interlocutor cu care îşi pot negocia îmbunătăţirea statutului economic şi social.

În orizontul rural, delegitimarea actorilor politici succesori ai Partidului Comunist nu s-a manifestat ca o pierdere a încrederii în regimul politic ca atare. Nu numai că, în mod de acum

[10] Conform Gil Eyal, Iván Szelenyi şi Eleanor Townsley, *Making Capitalism without Capitalists. The New Ruling Elites in Eastern Europe*, Verso, London and New York, 1998.

clasic, participarea la vot, adică voinţa de a fi inclus în funcţionarea regimului democratic, este mai mare în mediul rural decât în cel urban, dar unul din trei ţărani se arăta chiar mulţumit de calitatea democraţiei româneşti (34%), în timp ce doar un sfert din populaţia oraşelor nutrea acelaşi sentiment (24 – 26%). Aceasta este concluzia – răsturnată faţă de situaţia din Uniunea Europeană, unde oraşele mari sunt de regulă mai satisfăcute de performanţele regimului politic (61%) decât satele (57%) – a raportului naţional pentru România al Eurobarometrului 62, ale cărui date au fost culese în toamna anului 2004 de Dumitru Sandu[11]. Corespunzător, cetăţenii din zonele urbane mizau mai mult (66%) decât locuitorii de la ţară (52%) pe sporul de democratizare pe care urma să-l aducă integrarea europeană a României. În rest, dinamica calităţii vieţii era percepută la fel în spaţiul rural şi în cel urban, pe toată stratigrafia socială, iar speranţa în schimbările ce vor veni după aderare era întru totul comparabilă pe tranşele de vârstă 15 – 34 şi peste 55 de ani atât la ţară, cât şi la oraşe. Sătenii nu erau nici măcar cu mult în urma orăşenilor cu privire la informaţiile pe care le strânseseră despre structura instituţională a viitorului lor european: ei ştiau să numească în medie 3,6 instituţii europene, faţă de 4,6 de câte aveau cunoştinţă locuitorii oraşelor. Raportul era întru totul similar cu distribuţia cunoaşterii Uniunii Europene în cele zece ţări ale ultimului val de aderare. Din punctul de vedere al valorilor şi speranţelor sociale, România de la oraşe şi sate se dovedea în 2004 optimistă şi relativ încrezătoare în propriile şanse.

Locuitorii de la ţară votează aşadar PSD nu pentru că acesta ar fi un partid rural şi nici pentru că ar fi mai democratic decât altele. Votul pentru PSD nu este nici spontan şi nici captiv. După cum au dovedit referendumul constituţional din octombrie 2003, alegerile locale din iunie şi primul tur al alegerilor prezidenţiale din noiembrie 2004, el este un vot care se cere mobilizat şi a cărui utilitate trebuie argumentată circumstanţiat în fiecare localitate rurală, dacă nu chiar în pragul fiecărei gospodării. O singură dată, în noiembrie 1996, aceste argumente nu au fost convingătoare şi partidul a coborât sub 3.000.000 de voturi. Guvernarea Convenţiei Democratice, a Democraţilor şi a Uniunii Maghiare nu a adus însă, pentru lumea rurală, politici care să merite să fie ulterior susţinute la urne şi a eşuat în încercarea de a deşira ţesătura dintre administraţia publică, clientelismul local şi marile afaceri agricole. Cum nu s-au simţit chemaţi să facă în sfârşit experienţa cetăţeniei, ţăranii au decis să exploateze din nou posibilităţile de emancipare individuală oferite de social-democraţi. Deşi, după 2001, aceştia nu le-au propus decât revalorizarea pământului prin rentă şi înstrăinare în schimbul valorificării lui directe prin muncă, PSD s-a ridicat în 2004, datorită votului rural, cu încă un prag electoral peste ceea ce obţinuse FDSN în 1992.

Reţelele de patronaj întreţesute din obligaţiile mutuale acumulate înainte de 1989 în agricultura socialistă – întărite şi amplificate apoi în procesul de descompunere şi transformare a acesteia[12] – par să funcţioneze în zonele rurale cu un randament electoral mulţumitor pentru PSD. În schimb, muncitorii activi şi pensionaţi, pentru care industria socialistă era singura posibilitate de acumulare a unui capital social relativ prestigios, se simt din ce în ce mai puţin reprezentaţi politic de către PSD sau de către oricine altcineva. Comparativ, mai slabele performanţe urbane înregistrate în 2000 şi 2004 de Adrian Năstase şi de PSD sunt în mod precis şi oarecum inevitabil rezultatul dezafectării electorale a segmentelor sociale legate direct sau indirect de munca industrială. Privatizările şi lichidările masive întreprinse de guvern din 2001 până în 2004 au dezlegat aceste populaţii urbane de patronajul PSD, incapabil să mai pună statul şi resursele sale la dispoziţia

[11] www.infoeuropa.ro/docs/EB62.

[12] Katherine Verdery, *The Vanishing Hectare. Property and Value in Postsocialist Transylvania*, Cornell University Press, Ithaca and London, 2003, p. 60 – 63.

intereselor *corporate* ale foştilor sau actualilor salariaţi din sectorul secundar al economiei, aşa cum o făcuse Partidul Comunist[13].

La două zile după alegerile generale din 2004, administraţia statului român, prin glasul celor mai înalţi magistraţi ai săi, şi-a recunoscut deschis precaritatea, manifestată atât de ignoranţa cu privire la numărul alegătorilor, cât şi de incapacitatea de a număra voturile. Pe 30 noiembrie, statul român şi-a dezvăluit public cecitatea şi neştiinţa. Evoluţia statului modern din secolul al XVIII-lea până în cel de-al XX-lea este inseparabilă de apariţia unei ştiinţe a statului, de dezvoltarea statisticii. Cu ajutorul acestei ştiinţe, statul „vede" mai întâi societatea, o ia în evidenţă, o măsoară şi o clasifică. Apoi, încearcă să o „cunoască", adică să elaboreze, interpretând datele statistice, acele politici publice capabile să transforme un ansamblu divers, variat şi indisciplinat de unităţi demografice într-o comunitate de cetăţeni predispuşi la loialitate faţă de stat şi la civilitate unii faţă de ceilalţi.

În primul rând, statul român nu a fost, după alegerile de la 28 noiembrie 2004, în stare să numere voturile, să stabilească în termeni statistici câţi alegători s-au prezentat la urne, câţi au votat valid şi câţi au invalidat scrutinul. Institutul Naţional de Statistică, care s-ar cuveni să fie privirea statului asupra societăţii, nu a făcut faţă unor operaţiuni aritmetice elementare. În al doilea rând, judecătorii Înaltei Curţi de Casaţie şi Justiţie care au supravegheat scrutinul şi-au manifestat public neputinţa de a formula într-o limba română fluentă constatările empirice cele mai simple. Cecitatea statului român a fost deci însoţită de lipsa completă a oricăror urme de inteligenţă din intervenţiile magistraţilor chemaţi să traducă pe înţelesul cetăţenilor limbajul juridic prin care statul modern obişnuieşte să se exprime. În sfârşit, în seara de 30 noiembrie, una dintre autorităţile publice ale statului, preşedintele României, a ţinut un discurs festiv în care şi-a afirmat involuntar, dar explicit ataşamentul faţă de prostia statului român. Pentru Ion Iliescu, acest stat se caracterizează, de 200 de ani, prin două atribute: el este unitar şi naţional. Altfel spus, statul nu ar fi forma juridică a voinţei cetăţenilor români de a trăi împreună sub autoritatea unor legi juste, ci un fel de realitate etnico-metafizică întrupată de graniţe şi drapel, nu de cetăţenii săi. Astfel descris, statul se defineşte în afara dreptului, deci a raţionamentelor şi limbajului juridic prin care gândeşte şi vorbeşte un corp politic democratic. Statul român nu ar avea prin urmare nevoie de adeziunea inteligentă a unor cetăţeni responsabili, convinşi de echitatea legilor ce guvernează comunitatea, ci de fidelitatea lor iraţională şi organică faţă de idealul unităţii naţionale[14].

În 1946, Partidul Comunist a procedat în mod deliberat la o primă şi radicală dezafectare electorală a cetăţenilor României. Chiar în ziua în care sufragiul a devenit, în sfârşit, universal, alegătorii, bărbaţi şi femei, au fost privaţi printr-o fraudă săvârşită în chip demonstrativ şi cu rost educativ, de rezultatul votului lor. Vreme de cinci decenii, românii au fost chemaţi periodic să participe la festivaluri electorale al căror deznodământ era dinainte cunoscut. Acest drept de vot contrafăcut a fost într-o oarecare măsură compensat de multiplicarea – discretă, difuză şi în formă de reţea – a instanţelor şi modalităţilor de participare a constructorilor socialismului de la oraşe şi sate la interpretarea şi aplicarea deciziilor publice[15]. În plus, Partidul Comunist şi statul socialist,

[13] Aceasta este concluzia unui număr semnificativ de interviuri realizate cu muncitoare din Cluj, Denisa Florentina Boteanu, „Infern sau paradis pierdut? Aspecte din viaţa muncitoarelor din Cluj-Napoca", în *Anuarul Institutului de Istorie Orală*, vol. V, 2004, p. 306 – 336.

[14] Daniel Barbu, *Republica absentă. Politică şi societate în România postcomunistă*, Nemira, Bucureşti, 2004, p. 11 – 12 şi *passim*.

[15] Idem, „Participation politique et clivages politiques en Roumanie. Du communisme au post-communisme", în Jean-Michel de Waele (editor), *Les clivages politiques en Europe centrale et orientale*, Éditions de l'Université de Bruxelles, Bruxelles, 2004, p. 137 – 165.

cu întreaga sa arhitectură instituţională, trebuiau să-şi întrepătrundă funcţiile până la fuziune. Să recunoaştem că principala contribuţie românească la teoria politică marxist-leninistă a fost conceptul de *împletire*, formulat şi „transpus în viaţă" în anii '70[16]. Metoda *împletirii* dintre partid şi stat a fost *rotaţia cadrelor*: personalul politic comunist era sistematic permutat între aparatul de partid, instituţiile guvernamentale, administraţia publică, gestiunea economiei, îndrumarea culturii sau a ştiinţei. Cum cei mai mulţi dintre conducătorii PSD de la începutul anilor 2000 au fost nu doar membri ai Partidului Comunist, ci şi cursanţi, dacă nu chiar profesori ai Academiei Ştefan Gheorghiu, *rotaţia cadrelor* ca metodă de *împletire* între partid şi stat a rămas pentru ei, după 1989, principiul de bază al politicii. De-a lungul guvernărilor FSN/FDSN/PDSR/PSD, întrupări succesive ale aceleiaşi linii de succesiune a Partidului Comunist, între responsabilităţile de partid, poziţiile ministeriale, funcţiile din administraţie ori din lumea afacerilor, fie ele publice sau private, circulaţia cadrelor a fost constantă şi productivă: sub diversele sale nume, partidul şi-a consolidat poziţia conducătoare în stat şi economie, iar elita sa centrală şi locală a acumulat constant resurse materiale şi simbolice.

Din această pricină, postcomunismul românesc nu s-a putut defini ca loc de întâlnire între un stat reconstruit, bazat pe reprezentare, şi o comunitate politică democratică preocupată de domnia legii, ci s-a manifestat ca un regim politic care are pretenţia să fie clasificat în rubrica democraţiilor numai pentru că ţine regulat alegeri aproape libere şi destul de corecte, în care au obiceiul să se confrunte mai multe partide. Aceste incidente electorale periodice nu consultă însă pe nimeni şi nu au darul de a trimite într-un corp deliberativ şi legislativ voinţele contrastate şi valorile concurente ale societăţii politice. Ele au doar menirea să măsoare, la răstimpuri, ponderea cu care partidele instituţionalizate în stat intră în negocierile conduse de preşedinte pentru alcătuirea executivului. Alegerile româneşti postcomuniste se aseamănă cu un concurs de frumuseţe ce îi permite unui preşedinte constituţional ambiţios să producă un guvern de partide şi să reproducă statul. Cum nu-şi propun să reprezinte societatea, ci să distribuie între partide cote proporţionale de exploatare a statului, aceste alegeri sunt mai degrabă *partidocratice* decât democratice. În acest fel, democraţia procedurală, de esenţă electorală, este pur şi simplu asmuţită împotriva democraţiei deliberative şi participative. În postcomunism, alegerile par să fie un instrument al democraţiei folosit de partide pentru a induce o a doua dezafectare politică a cetăţenilor României.

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[16] Alexandra Ionescu, „Le Parti, où est-il parti?", în *Studia Politica. Romanian Political Science Review*, vol. IV, nr. 4, 2004, p. 801 – 802.

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Inegalităţi de reprezentare în sistemul electoral românesc. Studiu de caz: alegerile parlamentare din 2012

Alexandru RADU, Daniel BUTI

Demersul nostru analitic este o incursiune în domeniul larg al egalităţii sufragiului din perspectiva particulară a modului în care sistemul electoral românesc practicat în perioada 2008 – 2012 a asigurat egalitatea de reprezentare.

Aşa cum bine se ştie, principiul sufragiului egal, unul dintre cele cinci principii ale patrimoniului electoral european, se referă nu doar la egalitatea votului sau a şanselor, ci şi la faptul că mandatele trebuie repartizate în mod egal (echitabil) pentru toate circumscripţiile electorale. Concret, *această cerinţă impune repartizarea echitabilă şi clar delimitată a mandatelor pentru circumscripţiile electorale, bazându-se pe următoarele criterii de repartizare: numărul populaţiei, numărul cetăţenilor care domiciliază în circumscripţia respectivă (inclusiv minorii), numărul alegătorilor înregistraţi şi, posibil, numărul persoanelor care în realitate votează. Poate fi prevăzută o combinaţie adecvată a acestor criterii.*[1]

Analiza noastră se va concentra asupra formulei electorale, respectiv asupra mecanismului de repartizare a mandatelor. Vom particulariza aplicarea procedurii impuse de legea electorală prin intermediul exemplelor a trei circumscripţii electorale pentru alegerea primei Camere în anul electoral 2012. Urmărim astfel să argumentăm în favoarea tezei că formula electorală românească din acea perioadă a condus la inegalităţi de reprezentare şi, în subsidiar, la creşterea riscului de delegitimare a încrederii populare în alegeri şi în rezultatul acestora.

Vom debuta însă, în mod firesc, cu o scurtă prezentare a sistemului electoral instituit prin Legea nr. 35 din 2008, cea care a guvernat alegerea parlamentului românesc şi în anul 2012.

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În istoria electorală a României postcomuniste[2], anul 2008 a reprezentat momentul celei de a doua reforme electorale. Alegerile fondatoare din mai 1990 au fost guvernate de Decretul-lege nr. 92 din 1990, care a instituit reprezentarea de tip proporţional pentru alegerea atât a deputaţilor, cât şi a senatorilor[3]. Scrutinul de tip proporţional a continuat să fie utilizat şi pentru alegerile parlamentare următoare, din anii 1992, 1996, 2004 şi 2008, reglementate de legea electorală adoptată în 1992, căreia, pe parcursul timpului, i s-au adus o serie de modificări, în general de natură tehnică[4].

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[1] Conform Codului bunelor practici în materie electorală, adoptat de Comisia Europeană pentru Democraţie prin Drept în cadrul celei de-a 52-a Sesiuni Plenare (Veneţia, 18 – 19 octombrie 2002).

[2] Pentru o analiză a alegerilor şi a sistemului electoral în România postcomunistă, a se vedea Alexandru Radu, *Politica între proporţionalism şi majoritarism. Alegeri şi sistem electoral în România postcomunistă*, Institutul European, Iaşi, 2012.

[3] Scrutinul utilizat era de tip plurinominal (cu liste blocate), mandatele de deputaţi fiind repartizate în două etape [la nivel de circumscripţie electorală (judeţele şi municipiul Bucureşti), prin utilizarea coeficientului electoral simplu, şi la nivel naţional, în baza resturilor electorale, prin metoda d'Hondt], iar cele de senatori la nivel local, prin metodele coeficientului electoral şi celor mai mari resturi.

[4] Una dintre cele mai importante dintre acestea a vizat introducerea pragului electoral. Dacă pentru alegerile din 1990 nu a existat o astfel de cerinţă, începând cu anul 1992, accederea în parlament a fost condiţionată de obţinerea unui număr minim de voturi. Pragul a fost fixat, iniţial, la 3%, fiind ridicat, ulterior (începând cu alegerile din 2000), la 5% din totalul voturilor valabil exprimate.

În anul 2008, într-un context politic conflictual[5], specific unei situaţii de tip *cohabitasion française*[6], centrată pe conflictul dintre preşedinte şi parlament, a fost adoptată o nouă lege electorală – Legea nr. 35 din 2008[7]. Cunoscută în mod popular sub numele de legea „votului uninominal", noua reglementare privind alegerea parlamentarilor şi-a propus să determine reformarea clasei politice, prin introducerea unui mecanism de alegere uninominală. Aceasta în condiţiile în care parlamentul înregistra un deficit istoric de încredere în rândul populaţiei. Potrivit sondajului Eurobarometru din martie 2008 (luna în care a fost adoptată Legea nr. 35), 21,59% dintre români aveau încredere în parlament. În mai 2012, acelaşi instrument – sondajul Eurobarometru realizat de Comisia Europeană – indica un scor al încrederii de 15,76 %.[8]

Construcţia noului mecanism electoral s-a bazat însă pe o dublă eroare de diagnostic. Pe de o parte, părinţii noii legi au pornit de la convingerea deterministă că schimbarea sistemului electoral va conduce, în mod direct, la reforma clasei politice. Dar, aşa cum o arată studiile de specialitate şi cum chiar experienţa românească avea să o demonstreze, sistemul electoral nu are forţa ca, acţionând independent de alţi factori, să conducă la atingerea unui obiectiv general, de tipul „reformarea clasei politice". În al doilea rând, alegerea uninominală a reprezentanţilor, noutatea introdusă de lege, a fost echivalată cu scrutinul majoritar, acesta fiind principalul mesaj al actorilor politici prezenţi în dezbaterea publică ce a precedat adoptarea legii. În realitate, alegerea uninominală a parlamentarilor nu este în mod necesar specifică scrutinului de tip majoritar. Şi chiar dacă alegerea majoritară nu a fost reglementată ca principiu al alegerilor, ci numai ca parte a procedurilor de alocare a mandatelor, după cum vom detalia imediat, cetăţenilor alegători le-a fost indusă ideea că îşi vor alege reprezentanţii în mod majoritar. Această inadvertenţă a făcut ca între aşteptările cetăţenilor şi realitatea postelectorală să existe o discrepanţă majoră, având ca efect reducerea gravă a gradului de transparenţă a procesului electoral şi, de aici, a legitimităţii acestuia. Ţinem să precizăm că transparenţa mecanismelor electorale, corecta şi buna informare a cetăţenilor în legătură cu procesul de revizuire a legislaţiei electorale, precum şi prezentarea în mod deschis a direcţiei, a obiectivelor şi a argumentelor care susţin acest proces conferă legitimitate sistemului electoral şi modului de scrutin şi, totodată, înlătură confuzia şi neîncrederea în rezultatele pe care acestea le produc la alegeri.

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Conform art. 5 al noii legi, *deputaţii şi senatorii se aleg în colegii uninominale, prin scrutin uninominal, potrivit principiului reprezentării proporţionale*.

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[5] Pentru o discuţie despre contextul adoptării noii legi electorale, a se vedea Alexandru Radu, *Un experiment politic românesc: Alianţa „Dreptate şi Adevăr PNL-PD"*, Institutul European, Iaşi, 2009, p. 152 – 158, 217 – 222 sau Sergiu Gherghina, George Jiglău, „Where Does the Mechanism Collapse? Understanding the New Romanian Electoral System", în *Representation*, vol. 48, nr. 4, 2012, 445 – 459.

[6] Conceptul defineşte acea situaţie politică al cărei model este semiprezidenţialismul francez, în care structura dual şi flexibilă a puterii executive facilitează, în baza unui acord politic bicefal, rocada între preşedinte şi premier în poziţia de „prim cap" al executivului, „după cum se schimbă combinaţiile majorităţii". Concret, în situaţia unei „majorităţi unificate", adică atunci când majoritatea care alege preşedintele este aceeaşi cu majoritatea parlamentară care controlează guvernul, preşedintele este „primul cap", pentru ca în situaţia inversă, a majorităţii divizate, premierul să devină „primul cap" (a se vedea G. Sartori).

[7] A se vedea Legea nr. 35 din 13 martie 2008 pentru alegerea Camerei Deputaţilor şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităţilor administraţiei publice locale, a Legii administraţiei publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali, publicată în Monitorul Oficial al României, Partea I, nr. 196 din 13 martie 2008.

[8] Datele disponibile la: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/chartType/gridChart//themeKy/18/groupKy/89/savFile/201.

Să remarcăm aici, fie și în treacăt, o definiție deficitară (neclară) a modului de scrutin, în sensul favorizării confuziei dintre regula ce determină cine sunt aleșii și modul particular de exprimare a votului. Important este însă că scrutinul se încadrează în familia celor proporționale, nefiind deci de tip majoritar, așa cum a fost prezentat publicului votant.

Pe de altă parte, principala noutate introdusă de legislație se referă la alegerea deputaților și senatorilor în colegii uninominale. Colegiile uninominale sunt trasate prin împărțirea circumscripțiilor electorale, 43 la număr (cele 41 de județe, municipiul București și circumscripția pentru românii cu domiciliul în străinătate), în unități relativ egale ca populație, cu câte un singur mandat, separat pentru Camera Deputaților și Senat. Condiția egalității colegiilor uninominale nu a fost pe deplin respectată. OUG nr. 66/2008 a modificat prevederile Legii 35/2008 vizând delimitarea colegiilor uninominale, relativizând regula. Concret, în textul articolului au fost introduse două cuvinte: „de regulă". Astfel, în cadrul unei circumscripții electorale, delimitarea colegiilor uninominale „se face astfel încât mărimea acestora, calculată în număr de locuitori, să fie de așa natură încât cel mai mare colegiu uninominal să fie, de regulă, cu cel mult 30% mai mare decât cel mai mic colegiu uninominal". În acest fel, s-a deschis poarta pentru operațiuni de tip *gerrymandering* și *malapportionment* menite nu atât să maximizeze șansele electorale ale unui competitor în detrimentul celorlalți, ci, mai ales, să conserve capitalul politic și electoral al principalilor actori (PSD, PDL și PNL), care au colaborat la elaborarea noii legi electorale[9]. Oricum, candidaturile sunt individuale, spre deosebire de alegerile anterioare, la care candidaturile erau depuse pe liste de partid.

Normele de reprezentare pentru alegerea Camerei Deputaților și Senatului au rămas nemodificate – un deputat la 70.000 de locuitori, respectiv un senator la 160.000 de locuitori. Din aplicarea acestor norme a reieșit un număr total de 312 deputați și 137 de senatori[10]. Totuși, după cum vom vedea, în urma alegerilor din 2012 a rezultat un număr de 588 de parlamentari, cu 118 mai mulți (respectiv, cu 24%) decât cel stabilit de lege. Numărul suplimentar de parlamentari a provenit strict din aplicarea mecanismului de atribuire a mandatelor, cu componenta lui majoritară.

Pentru a explicita acest mecanism vom începe prin a preciza că legea distinge între procesul de repartizare a mandatelor pe competitor electoral și cel de atribuire a mandatelor candidaților.

Procedura de repartizare a mandatelor presupune alocarea de mandate competitorilor electorali (partide politice, alianțe politice, alianțe electorale, organizații ale cetățenilor aparținând unei minorități naționale, candidați independenți), care satisfac condiția pragului electoral, în baza voturilor obținute de aceștia, conform principiului proporționalității. În acest sens, se folosesc două metode proporționale – cea a coeficientului electoral simplu (Q), la nivel local, al circumscripțiilor electorale, și metoda d'Hondt, la nivel național (o unică circumscripție fictivă), pe baza resturilor electorale.

Acest proces de repartizare stabilește, de fapt, în baza unei proceduri proporționale, configurația politică a viitorului Parlament. Altfel spus, în urma acestui proces rezultă numărul de mandate la care fiecare partid politic are dreptul, proporțional cu numărul de voturi obținut de fiecare în parte. De aici și **finalitatea proporțională** a sistemului electoral[11], ca și opțiunea noastră privind

[9] Aurelian Giugăl, Ron Johnston, Mihail Chiru, Ionuț Ciobanu, Alexandru Gavriș, „Gerrymandering and Malapportionment, Romanian Style: The 2008 Electoral System", în *East European Politics and Societies and Cultures*, vol. 31, nr. 4, 2017, p. 683 – 703.

[10] Fără locurile rezervate reprezentării organizațiilor minorităților naționale din România, legal constituite, în număr de 18.

[11] Acest tip de finalitate poate fi alterată de factori exteriori sistemului electoral, precum dinamica sistemului de partide. Astfel, în contextul apariției unui actor politic dominant, capabil să atragă majoritatea absolută a voturilor, sistemul electoral tinde să-și accentueze dimensiunea de tip majoritar, antrenând o creștere a disproporționalității electorale.

tipul sistemului electoral românesc. Deşi, din punct de vedere formal, el are caracteristicile unui sistem mixt – prin combinarea principiului proporţionalităţii cu un element de tip majoritar –, din perspectivă funcţională, acesta este unul proporţional – mai exact un scrutin proporţional complex, de compensare[12].

După repartizarea mandatelor pe competitori electorali, să vedem cum se atribuie acestea candidaţilor, mai exact persoanelor care au concurat în colegiile uninominale. Acest proces se desfăşoară în două etape.

În prima etapă, mandatele se atribuie la nivelul colegiilor uninominale acelor candidaţi care au obţinut majoritatea absolută a voturilor valabil exprimate, cu condiţia ca aceştia să facă parte din partide care au depăşit pragul electoral. Aşadar, regula majorităţii este utilizată strict în prima etapă a atribuirii mandatelor la nivelul colegiilor uninominale.

În cea de a doua etapă, candidaţii care fac parte din partide ce au depăşit pragul electoral, dar care nu au obţinut majoritatea absolută a voturilor sunt ierarhizaţi, la nivel de circumscripţie, în ordine descrescătoare a voturilor. Acestora li se atribuie mandate până la epuizarea locurilor repartizate fiecărui partid. Referenţialul este, aşadar, numărul de mandate la care fiecare competitor are dreptul conform procedurilor proporţionale de repartizare.

Important de reţinut este faptul că mandatele alocate în prima etapă, în baza regulii majorităţii absolute, **pot depăşi** numărul total al mandatelor la care competitorul electoral are dreptul, conform procedurilor de repartizare, mai exact, conform principiului proporţionalităţii. În acest caz, legea prevede suplimentarea numărului de mandate din circumscripţia respectivă. Această suplimentare permite competitorilor electorali care au dreptul la mandate în colegii uninominale închise în urma aplicării regulii majorităţii să beneficieze totuşi de acest drept. Rolul acestei suplimentări este acela de a asigura respectarea şi materializarea principiului proporţionalităţii care stă la baza sistemului electoral.

Alocarea acestor mandate pe colegii se face prin excepţie de la art. 48 alin. (9), care precizează că în fiecare colegiu uninominal pentru Camera Deputaţilor, respectiv Senat, se atribuie un singur mandat de deputat, respectiv de senator. Conform alin. (15) al art. 48, mandatele se alocă suplimentar candidaţilor competitorilor electorali respectivi cel mai bine plasaţi în lista ordonată prevăzută la alin. (12),[13] cărora nu li s-a alocat mandat, în colegiul uninominal în care au candidat, prin creşterea corespunzătoare a numărului de mandate din circumscripţia electorală respectivă.

Alocarea suplimentară a mandatelor, peste nivelul rezultat din aplicarea normei legale de reprezentare, a asigurat menţinerea finalităţii proporţionale a scrutinului sau, mai exact, compensarea disproporţiilor induse de introducerea procedurii de atribuire majoritară a mandatelor, sursa creşterii numărului total de parlamentari aleşi. Costul l-a reprezentat generarea

[12] Pentru o discuţie mai largă privind tipologia modurilor de scrutin, a se vedea Pierre Martin, *Sistemele electorale şi modurile de scrutin*, trad. M. N. Singer, R.A. Monitorul Oficial, Bucureşti, 1999; Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-seven Democracies, 1945-1990*, Oxford University Press, New York, 1994; Pippa Norris, *Electoral Engineering: Voting Rules and Political Behavior*, Cambridge University Press, Cambridge, 2004; Giovanni Sartori, *Ingineria constituţională comparată: structuri, stimulente şi rezultate*, trad. G. Tănăsescu, I. M. Stoica, Institutul European, Iaşi, 2008, C. Nica, A. Cioabă, B.-M. Popescu (coord.), *Sisteme electorale şi sisteme democratice,* ISPRI, Bucureşti, 2009 etc.

[13] În cea de a doua etapă, de alocare pe colegii şi atribuire de mandate competitorilor electorali care au întrunit pragul electoral, biroul electoral de circumscripţie va întocmi, separat pentru Camera Deputaţilor şi Senat, o listă ordonată cu toţi candidaţii cărora nu li s-au atribuit mandate în prima etapă, dispuşi în ordinea descrescătoare a raporturilor dintre voturile valabil exprimate obţinute în colegiile uninominale în care au candidat şi coeficientul electoral al circumscripţiei electorale respective, calculate până la a opta zecimală inclusiv.

inegalităţilor de reprezentare pentru locuitorii celor 43 de circumscripţii electorale, dar şi a unui efect de delegitimare a parlamentului astfel ales.

Vom exemplifica acest proces prin prezentarea rezultatelor din trei circumscripţii electorale pentru alegerea Camerei Deputaţilor, cu magnitudini diferite, dar şi cu rezultate diferite.

Primul exemplu îl reprezintă circumscripţia electorală nr. 23 – Ialomiţa, cu patru locuri, în conformitate cu aplicarea normei de reprezentare. Conform procedurilor legale, celor patru formaţiuni politice care au îndeplinit condiţia pragului electoral legal, de 5% din voturile valabil exprimate, le-au fost repartizate mandate potrivit principiului reprezentării proporţionale. Astfel, USL a avut dreptul de a ocupa 2 locuri, ARD şi PPDD câte un loc, iar UDMR niciunul. Totuşi, procesul de atribuire a mandatelor a condus la suplimentarea numărului de deputaţi din circumscripţie. Mai întâi, cum fiecare dintre candidaţii USL a obţinut majoritatea absolută a voturilor în cele patru colegii din circumscripţie, toate cele patru mandate au fost atribuite candidaţilor USL. Apoi, mandatele cuvenite celorlalţi doi competitori electorali au fost atribuite candidaţilor acestora cel mai bine plasaţi în colegiile în care au candidat. A rezultat un total de şase mandate de deputaţi în Ialomiţa.

Circumscripţia electorală 23 – Ialomiţa

Magnitudinea circumscripţiei: 4

Total mandate atribuite: 6

Mandate excedentare: 2 (50%)

Competitori: 4

Competitor	**Candidat**	**Nr. colegiu uninominal**	**Voturi (%)**	**Mandate repartizate pe competitor**	**Mandate alocate candidaţilor**		**Total mandate**
					Etapa I – alocare majoritară	Etapa a II-a – alocare proporţională	
USL	Pocora Cristiana-Ancuţa	1	14,240 (>50%)	**2**	1	0	4
	Neacşu Marian	2	16,859 (>50%)		1	0	
	Găină Mihăiţă	3	13,147 (>50%)		1	0	
	Ionescu Aurelian	4	12,163 (>50%)		1	0	
ARD	Barcari Rodica-Luminiţa	1	3,675	**1**	0	0	1
	Malama Daniel-Dumitru	2	3,438		0	0	
	Began Niculae	3	3,899		0	0	
	Gheorghe Tinel	4	4,477		0	1	
PP-DD	Caloianu Mario-Ernest	1	5,853	**1**	0	1	1
	Muşat Gabriel	2	4,350		0	0	
	Ceanu Mariana	3	4,082		0	0	
	Badea Nelu	4	5,180		0	0	

UDMR	Deák Edith-Erzsebet	1	35	**0**	0	0	0
	Fugel Edina	2	42		0	0	
	Gyenge Zoltán Balázs	3	34		0	0	
	Szalma Gyöngyvér-Tünde	4	38		0	0	
Total		4	95,506	**4**	4	2	**6**

Avem astfel explicaţia tehnică pentru supradimensionarea parlamentului, datorată, în principal, mecanismului de compensare menit să păstreze proporţionalitatea generală a alegerilor, în condiţiile în care unul dintre competitori a câştigat majoritar mandatele din toate colegiile uninominale. Asupra acestui aspect vom reveni de îndată.

Avem şi explicaţia pentru deformarea percepţiei publice asupra parlamentului: vorbim despre imaginea unui parlament cu două categorii de aleşi, cei îndreptăţiţi să ocupe fotoliile de deputat şi senator (cei care au câştigat majoritar colegiile) şi cei care nu merită pe deplin acest lucru (candidaţii care, într-o logică majoritaristă, au pierdut competiţia în colegiul uninominal). Despre aceştia din urmă s-a spus în spaţiul mediatic că ar fi intrat în parlament „pe uşa din dos a redistribuirii". În realitate, toţi aleşii au obţinut mandatul în baza prevederilor legale, aşa-zisa „redistribuire" fiind de fapt procedura complexă a compensării regulii majorităţii cu principiul proporţionalităţii care stă la baza sistemului electoral.

În acelaşi timp, trebuie lămurit faptul că suplimentarea mandatelor parlamentare nu s-a datorat aleşilor care au intrat în parlament fără a câştiga majoritatea absolută a voturilor în colegiile în care au candidat. Aceştia au ocupat locurile la care aveau dreptul formaţiunile din care proveneau, asigurând astfel proporţionalitatea alegerilor. În fapt, mandatele suplimentare au aparţinut acelor candidaţi care au câştigat colegiile uninominale cu majoritatea absolută a voturilor într-un număr mai mare decât cel al mandatelor la care partidul din care proveneau avea dreptul conform principiului proporţionalităţii. Ca atare, acestea sunt mandatele suplimentare, pe care le vom numi excedentare sau *overhang seats* (pentru a nu exista confuzie în raport cu prevederile legii, care foloseşte conceptul de „mandate alocate suplimentar" în asociere cu candidaţii competitorilor electorali cărora nu li s-a alocat mandat în colegiul uninominal în care au candidat, dar au acest drept). Celelalte mandate, acordate candidaţilor care nu au atins nivelul majorităţii absolute, pe care legea le numeşte suplimentare, sunt locuri compensatorii, menite să menţină proporţionalitatea alegerilor, adică *balance seats*. Confuzia pe care a creat-o prezenţa în legislativ a unor persoane care au obţinut poziţia a doua sau a treia în colegiul de candidatură, precum şi suplimentarea numărului de mandate au avut la bază disonanţa dintre caracterul proporţional al mecanismului de transformare a voturilor în locuri şi ceea ce se credea că reprezintă „votul uninominal", adică un veritabil scrutin majoritar.

Costul principal al aplicării acestui mecanism electoral l-a reprezentat afectarea relaţiei de reprezentare, în sensul instituirii inegalităţilor de reprezentare, ca urmare a alocării unui număr de mandate excedentare (*overhang seats*). În cazul exemplului de mai sus, avem două *overhang seats*, repartizate în colegiile uninominale nr. 1 şi nr. 4, astfel încât cetăţenii din aceste două colegii au fost reprezentaţi de câte doi deputaţi, faţă de cetăţenii arondaţi celorlalte două colegii, cu câte un singur deputat ales. Totodată, în ansamblul circumscripţiei electorale Ialomiţa, creşterea numărului parlamentarilor aleşi a condus la suprareprezentarea cetăţenilor acestei circumscripţii, norma de reprezentare reală fiind de circa 47.000 de locuitori la un deputat, în raport cu norma legală de 70.000 de locuitori la un deputat.

Să urmărim și exemplul unei circumscripții cu magnitudinea medie a alegerilor, respectiv circumscripția nr. 14 – Dâmbovița, cu 8 mandate de deputat. Aici a fost ales un total de 11 deputați, reprezentând o creștere de 37,50% față de numărul stabilit de lege. Iată datele:

Circumscripția electorală 14 – Dâmbovița

Magnitudinea circumscripției: 8

Total mandate atribuite: 11

Mandate excedentare: 3 (37,5%)

Competitori: 4

Competitor	**Candidat**	**Nr. colegiu uninominal**	**Voturi (%)**	**Mandate repartizate pe competitor**	**Mandate atribuite candidaților**		**Total mandate**
					Etapa I – alocare majoritară	Etapa a II-a – alocare proporțională	
USL	Horga Vasile	1	10.092 (>50%)	5	1	0	8
	Plumb Rovana	2	16.846 (>50%)		1	0	
	Stan Ion	3	16.880 (>50%)		1	0	
	Pârgaru Ion	4	17.475 (>50%)		1	0	
	Stanciu Zisu	5	13.881 (>50%)		1	0	
	Dumitru Georgică	6	13.181 (>50%)		1	0	
	Săvoiu Ionuț-Cristian	7	16.071 (>50%)		1	0	
	Moldovan Carmen-Ileana	8	14.061 (>50%)		1	0	
ARD	Cârstea Silviu Alexandru	1	3.758	2	0	0	2
	Ion Sorin	2	3.693		0	0	
	Davidescu Sorin	3	3.017		0	0	
	Popescu Florin Aurelian	4	8.602		0	1	
	Ivan Gheorghe	5	3.246		0	0	
	Caracota Iancu	6	4.656		0	0	
	Dinu Ilie	7	3.421		0	0	
	Vladu Iulian	8	7.189		0	1	
PP-DD	Dumitru Adrian	1	2.374	1	0	0	1
	Duță Marian	2	3.970		0	0	
	Onea Valentin	3	3.552		0	0	
	Popa Radu Mihai	4	6.096		0	1	
	Stănescu Mihai	5	5.121		0	0	
	Burcea Florin	6	3.710		0	0	
	Antoniu Florin-Silviu	7	3.440		0	0	
	Neagu Ilie	8	2.505		0	0	

UDMR	Bányai István	1	17	0	0	0	0
	Gal Sandor	2	26		0	0	
	Kedei Pál-Elöd	3	23		0	0	
	Kovács Mihaly-Levente	4	67		0	0	
	Soós Zoltán	5	27		0	0	
	Toth Tivadar	6	30		0	0	
	Kolcsar Anquetil-Karoly	7	17		0	0	
	Barabási Attila-Csaba	8	25		0	0	
Total		8	193.587	8	8	3	11

Aici, elementul specific îl reprezintă maniera alocării celor 3 mandate suplimentare: două în colegiul uninominal nr. 4 şi unul în colegiul uninominal nr. 8. Cu consecinţa instituirii unei inegalităţi de reprezentare în trei trepte, corespunzătoare colegiului uninominal 4, cu trei deputaţi aleşi, colegiului uninominal nr. 8, cu doi deputaţi aleşi şi celorlalte colegii uninominale, fiecare cu câte un reprezentant. În ansamblu, norma de reprezentare s-a situat la nivelul de circa 51.000 de locuitori la un deputat.

În fine, cel de al treilea exemplu ne arată o situaţie cu două colegii uninominale cu câte doi parlamentari aleşi, ca şi în primul exemplu, dar cu un surplus de mandate mai mic, de 40%, în condiţiile unei magnitudini a circumscripţiei de 5 locuri.

Circumscripţia electorală 9 – Brăila

Magnitudinea circumscripţiei: 5

Total mandate atribuite: 7

Mandate excedentare: 2 (40%)

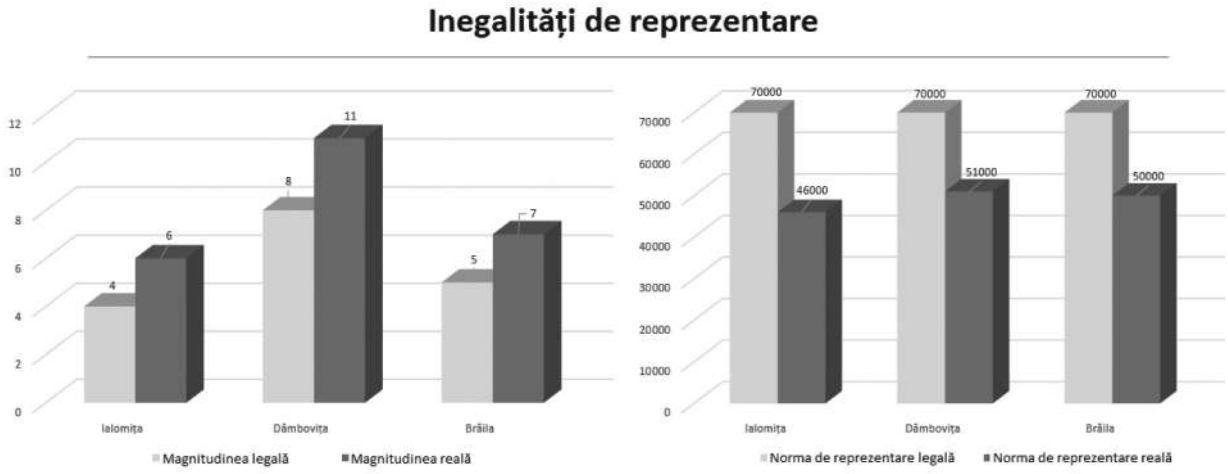
Competitori: 4

Competitor	**Candidat**	**Nr. colegiu uninominal**	**Voturi (%)**	**Mandate repartizate pe competitor**	**Mandate atribuite candidaţilor**		**Total mandate**
					Etapa I – alocare majoritară	Etapa a II-a – alocare proporţională	
USL	Petrea Dorin Silviu	1	11.897 (>50%)	3	1	0	5
	Varga Vasile	2	17.051		1	0	
	Dragomir Viorel Marian	3	20.705		1	0	
	Tudose Mihai	4	14.559		1	0	
	Rizea Cristian	5	16.546		1	0	
ARD	Fusea Marian Paul	1	2.615	1	0	0	1
	Nazare Alexandru	2	5.771		0	1	
	Mitrofan Daniel	3	3.204		0	0	
	Bulgaru Silviu Florin	4	1.439		0	0	
	Terzea Marius	5	1.467		0	0	

PP-DD	Musceleanu Gabriel-Monu	1	2.918	1	0	0	1
	Bălan Sorin-Ovidiu	2	4.486		0	0	
	Nistor Marioara	3	6.111		0	1	
	Cadar George-Gabriel	4	4.508		0	0	
	Cojea Busuioc Costică	5	5.960		0	0	
UDMR	Bálint Ottilia	1	61	0	0	0	0
	Balogh Levente	2	80		0	0	
	Seres-Matolcsy Anna	3	101		0	0	
	Csobanka Istvan-Arpad	4	36		0	0	
	Bálint Emöke	5	62		0	0	
Total		5	125.684	5	5	2	7

Exemplele pun în evidenţă diferenţele de reprezentare generate de introducerea mecanismului alegerii uninominale, atât la nivelul colegiilor uninominale componente, cât şi între cele trei circumscripţii analizate. În Ialomiţa s-a înregistrat un excedent de 50%, în Dâmboviţa de 37,5%, iar în Brăila de 40%, ceea ce înseamnă diferite niveluri ale reprezentării. În cazul circumscripţiei 23 – Ialomiţa, norma reală a fost de un deputat la cca 46.000 de locuitori, în Dâmboviţa, de un deputat la cca 51.000 de locuitori, iar în circumscripţia Brăila de un deputat la cca 50.000.

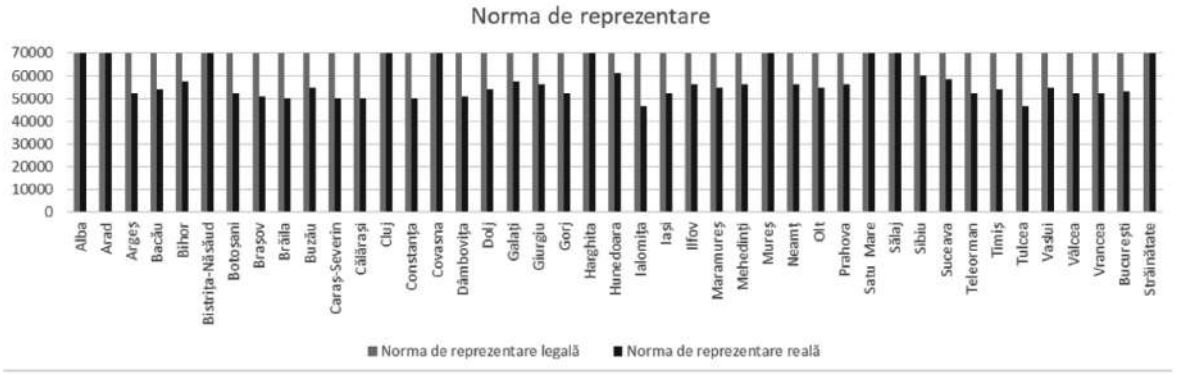
La limită, ca soluţie pentru menţinerea egalităţii de reprezentare, mandatele excedentare (*overhang seats*), cele dublate sau triplate ar fi trebuit tratate, atât sub aspect politic, cât şi sub cel financiar-organizatoric, ca un singur mandat, deţinut în comun de doi sau trei parlamentari sau, invers spus, partajat de aceştia.



Dar cele trei circumscripţii exemplificate nu sunt cazuri singulare. Dimpotrivă, excepţiile au fost circumscripţiile în care nu s-au alocat mandate suplimentare. Din totalul de 379 de deputaţi aleşi, 279 şi-au obţinut mandatele în baza regulii majorităţii, iar 79 dintre aceştia au „mandate excedentare", adică alocate peste norma de reprezentare. Aceste 79 de astfel de mandate au

fost distribuite în 33 dintre cele 43 de circumscripţii electorale[14]. Avem, aşadar, 33 de cazuri de inegalitate a reprezentării, 33 de cazuri de suprareprezentare, faţă de cele 10 circumscripţii electorale în care norma de reprezentare a rămas cea stabilită de lege (un deputat la 70.000 de locuitori). În plus, cele 33 de cazuri de suprareprezentare sunt inegale între ele.

Graficele următoare ne arată situaţia la nivelul întregii ţări, evidenţiind nu doar inegalităţile de reprezentare, dar şi caracterul fluctuant al normei de reprezentare de la o circumscripţie la alta.



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Aşadar, mecanismul electoral instituit prin Legea nr. 35/2008 a menţinut principiul proporţionalităţii, dar nu şi alegerea plurinominală a parlamentarilor, înlocuită cu alegerea acestora în colegii uninominale. Dubla condiţionare de atribuire a mandatelor, de tip majoritar la nivelul colegiilor uninominale şi, în acelaşi timp, de respectare a principiului proporţionalităţii la nivel general, a condus la alocarea unor „mandate suplimentare" şi, în ansamblu, la creşterea numărului parlamentarilor cu circa 25%. Tehnic, mecanismul electoral de compensare setat de Legea nr. 35/2008 a funcţionat foarte bine, în sensul asigurării proporţionalităţii rezultatelor alegerilor. Totuşi, prin alocarea „mandatelor suplimentare", a generat inegalităţi de reprezentare.

Un astfel de sistem electoral trebuie definit ca fiind unul de tip proporţional complex, de compensare. Practic, el nu are echivalent în UE. Totuşi, dacă ar fi să ne raportăm la un alt mecanism electoral apropiat, acela ar fi cel din Germania, pentru alegerea Bundestag, cu precizarea că acolo avem de-a face cu un sistem mixt în formă şi proporţional ca finalitate. Dimensiunea sa proporţională a fost întărită de decizia Tribunalului Federal Constituţional din 2013, care a impus un mecanism de compensare bazat pe raportul dintre *overhang seats* şi *balance seats.* Prin comparaţie, pentru România, *overhang seats* sunt mandatele câştigate majoritar de USL peste

[14] Acestea au revenit unui singur competitor – Uniunea Social Liberală (USL).

nivelul proporţionalităţii, iar *balance seats* sunt cele câştigate de celelalte formaţiuni politice, care nu au obţinut majoritatea în colegiile uninominale, dar care erau îndreptăţite să ocupe o anumită proporţie a locurilor parlamentare.

Important de subliniat este şi faptul că sistemul electoral nu a produs două categorii de parlamentari, aşa cum s-a spus popular, „unii intraţi pe uşa din faţă a Parlamentului", iar ceilalţi „pe uşa din dos", astfel că nu există diferenţe de legitimitate între *overhang seats* şi *balance seats*.

Putem însă vorbi de grade diferite de reprezentativitate. Aşa cum am arătat, aplicarea aşa-numitului vot uninominal a dus la instituirea unor inegalităţi de reprezentare, prin transformarea normei de reprezentare într-un criteriu aproximativ, cu mari variaţii de la o circumscripţie electorală la alta. Altfel spus, alegerile au generat situaţii de supra şi subreprezentare, aleatoriu produse.

Totodată, în condiţiile politice specifice anului 2012, mecanismul electoral a condus la creşterea masivă a numărului parlamentarilor aleşi, consecinţă greu de acceptat de către electori şi, ca atare, dezavuată la nivel public. În acest fel, alegerile din 2012 s-au dovedit a fi avut un grad redus de transparenţă şi înţelegere.

În plus, legea electorală adoptată în 2008 a eşuat în ceea ce priveşte obiectivul asumat prin adoptarea ei, respectiv producerea reformei clasei politice.

Nu în ultimul rând, costurile generate de „votul uninominal" au impus regândirea legislaţiei electorale pentru alegerea parlamentarilor. Totuşi, noua legislaţie (adoptată în 2015) a reprezentat un pas înapoi, în sensul abandonării totale a alegerii personalizate (tratată în legea din 2008 în mod fetişizat prin intermediul aşa-zisului vot uninominal). Astfel, noua lege electorală actuală a reeditat scrutinul electoral proporţional de tip complex, cu două niveluri geografice de repartizare a mandatelor, cu metoda coeficientului electoral simplu, respectiv cu metoda d'Hondt, un mecanism care şi-a dovedit eficienţa în timp, dar a păstrat şi votul pe liste blocate. Soluţia progresistă ar fi fost asocierea reprezentării proporţionale cu listele deschise, respectiv cu votul preferenţial. Însă, lucru important, inegalităţile de reprezentare au fost eliminate.

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On the Limits of the Parliamentary Immunity: A Legal and Conceptual Response to the Critics

Ciprian NEGOIȚĂ

Present Challenges

The public perception identifies *the parliamentary immunity* with an excessive privilege that enables the parliamentarians "to pursue their personal and political interest over and above that which is made possible simply by their position of influence"[1] or, without giving much thought, associate immunity with a higher status that transforms the representatives into privileged citizens[2] that are *supra leges*. In my view, *the parliamentary immunity*, the concept or the institution, should not be mistaken with the idea that members of Parliament are *above the law*[3]. Nobody has ever wanted this to happen. This assumption could be highlighted depending on particular variables like space, political regime and epoch, which favoured the development of the concept. *Parliamentary immunity*'s association with some sort of privileges creates a negative consideration of its limits, and, due to the lack of understanding of its use, citizens seem to perceive it as a negative concept. Without a doubt, legislative immunity does not imply the *above the law* principle, since it protects Parliament and not the parliamentary elites. Furthermore, the media seems to have a considerable impact on the present meanings of immunity. By exaggerating the use of the concept in the headlines, they create a separation between the correct usage and the imprecise one. To my mind, we are witnessing a shift towards imprecision and vagueness, which could be the sign of a new historical development of this concept. These confusions along with other theoretical misinterpretations invite to clarification, making the concept of *parliamentary immunity* worth investigating.

The parliamentary immunity throughout its history, as will later be shown, was part of many historical confrontations at a given time and lots of expectations were attached to it in a way that it became essential for any debates regarding parliamentary customs, practices and procedures[4].

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[1] Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption?", in *The Journal of Political Philosophy*, 1 (2003), p. 23.

[2] For a more detailed overview about how the legislative privilege of the Members of Parliament facilitates the legislative duties see: Josh Chafetz, *Democracy's Privileged Few. Legislative Privilege and Democratic Norms in British and American Constitutions*, Yale University Press, New Haven and London, 2007.

[3] As far as our research goes, the recent criticisms regarding the idea that members of Parliament *are above the law* are mostly present in countries that have a two-layer model of *parliamentary immunity*, namely non-accountability and inviolability, different from countries with an Anglo-Saxon tradition, where immunity covers only the voting behaviour and freedom of speech in Parliament. However, only the inviolability or immunity from legal action, prosecution and investigation of members of Parliament, without the prior authorization of Parliament, developed firstly in the French constitutional system is subject to criticism. Even though parliamentary inviolability was designed to guarantee the independence of the representatives and to protect them from any arbitrary arrests, the fact that this immunity also covers actions that have no connection with the parliamentary mandate hence made possible the association of inviolability with *above the law* principle. For a detailed study about the concept of inviolability as unjustifiable in recent times see J. P. Joseph Maingot and David Dehler, *Politicians above the Law: A Case for the Abolition of Parliamentary Inviolability,* Baico Publishing Inc., Ottawa, 2010.

[4] As Reinhart Koselleck argued, a concept, in order to obtain this status, combines a collection of experiences and expectations that become indispensable for any formulation. That is why many basic concepts are highly complicated and contested. For this reason a concept, as it is in our case *parliamentary immunity*, become historically significant. For more

Whether we look closely at the fiery confrontations that arose in England in the fourteenth century between the representatives of the House of Commons and the Monarch and House of Lords on the one hand or just have a short glance at the legal outcomes of the French Revolution of 1789 on the other hand, one could observe how these internal political contradictions shaped dramatically the modern meanings of the concept of *parliamentary immunity*. Additionally, as we get closer to present times, *the parliamentary immunity*, through its nature, becomes closely linked to the ideas of *liberty*, *freedom of speech, sovereignty, human rights, representation* and *separation of powers*.

It is interesting to see how exactly the concept was adapted to national realities. From the beginning, we could easily agree that Romania, like other countries in Eastern Europe, tried to catch up with the process of modernization initiated by advanced societies, making them, in Reinhart Bendix's terms, what could be called *follower societies*[5]. We could observe a mimetic process related to the translation of the Western political methods into the Romanian political and constitutional realities at that time. Unlike in France, the concept of *parliamentary immunity* did not appear in Romania in a revolutionary context or as a reaction to the authoritarian rule of the Monarch[6]. The theory of "forms without content", coined by Titu Maiorescu, literary critic and politician, was very influential at the end of the nineteenth century in Romania and according to this approach the imitation of western institutions was not a solution for Romanian political reality. In fact, from this instance we can assume, by parity of reasoning, the motivation behind the adoption of the institution of *parliamentary immunity*. Since a great revolutionary moment that could have shaped the entire political reality had not arisen in Romania as it did in France, *the parliamentary immunity* as well as the other institutions or legal systems (for example, governmental responsibility) had not been translated from the French or English models. Instead they had been only influenced by the development of these models. Therefore, even though there are similarities regarding *the parliamentary immunity* in both countries, the way in which the concept was adapted to political realities is different. In Romania, the form of *parliamentary immunity* gave birth to political content – the constitutional practice previously established in England and France, accepted by the Romanian political and judicial leaders and finally acknowledged as a constitutional custom – and not vice versa as in France.

The years 1864 and 1866 represent the historic moment when *immunity* stopped being used as a feudal institution and started to be introduced in politics, especially in domestic constitutional life.

details about how a basic concept acquires its meanings and why it is controversial see Reinhart Koselleck, "A Response to Comments on the Geschichtliche Grundbegriffe", in Hartmut Lehmann and Melvin Richter (eds), The Meanings of Historical Terms and Concepts. New Studies Begriffsgeschichte, German Historical Institute, Washington, 1996, pp. 59-70.

[5] Reinhart Bendix, *Nation-Building and Citizenship*, New Enlarged Edition, University of California Press, Berkley and Los Angeles, 1969, pp. 404-419.

[6] There are two main models or traditions of portraying *parliamentary immunity*. *Primo*, there are a large number of states, especially those with a British colonial history, which scholars name the Westminster type of *parliamentary immunity* or privileges, which define immunity only limited to non-accountability. This particular type of immunity appeared as a reaction to the King and House of Lords high authoritarian rule over Parliament and the representatives of the House of Commons. *Secundo,* inspired from the Westminster model, the continental model, as it was named by legal scholars and practitioners, was constructed along with the French Revolution of 1789. This tradition is employed by many of the European continental countries and also by other states in the world where France exercised legal, cultural and political influence. Within their legal and constitutional systems, inviolability represents a second layer of protection for the members of Parliament besides the non-accountability. For a good explanation regarding the two traditions of immunity see: Hélène Ponceau, "Privileges and Immunities in Parliament", *Discourse at the meeting of the Association of Secretaries General of Parliament,* Geneva, 16-18 October 2005, pp. 55-80.

Immunity from a Constitutional Perspective

The evolution of the concept of *parliamentary immunity* coincides with the development of constitutional life in general and the evolution of the parliamentary mandate in particular. In Romania, the concept also seems to partially respect this path, which is why not many things could be said about *the parliamentary immunity* before the first constitution was enforced in 1866. Looking at the historical evolution of parliamentary mandate in Romania, one could be tempted to consider that *the parliamentary immunity* also appeared and subsequently developed in that time frame. However, historical studies point to the contrary.

The Constitutional Regulations (*Regulamentele Organice*) from 1831 in Wallachia and 1832 in Moldova, which seem to have set perhaps the first legal foundation for the idea of parliamentary mandate in Romania, contain no provisions regarding the protection of the members of the assemblies (*Adunările Obștești*)[7]. Even though they were elected (the bishop and the metropolitan bishop were deputies by right) to exercise the legislative activity, their mandate was only to a small extent representative since the boyars could be both electors and elected. Moreover, the separation of powers (a recent concept for that time) and the institutional relations between them were barely visible. It is true that the text of the constitutional regulations suggests a separation of power between the Hospodar and his ministers as the executive power, the assemblies with legislative functions and the judiciary. However, the decisions taken by the assemblies had no legal effects because, even though the members could deliberate on a particular issue (*chibzuire*) and later on draft a report on it, only the Hospodar was entitled to take the final decision[8]. It is obvious that constitutional regulations had a different character than the French, German and Polish constitutions, either for their regulations concerning the state institutions or for the abundance of administrative and financial provisions[9]. Thus, if in France and Germany *the parliamentary immunity* was deeply rooted in the parliamentary tradition, in Romania the concept was not yet introduced into the legal vernacular, still being used until 1864 with its feudal meanings.

The parliamentary mandate becomes to a certain extent reality with the Convention of Paris of 1858[10] when an assembly, also known as *Adunarea Electivă,* consisting of deputies elected for a mandate of seven years, was established (Art. 17). Art. 4, 5 and 6 stipulate the separation of powers between the executive consisting of the Hospodar, elected for life (Art. 7), and its close cooperation with the Elective Assembly and the Central Committee with its headquarters at Focșani and finally the judiciary power exercised by the High Court of Cassation and Justice. Still, the members of the assembly did not enjoy any parliamentary protection whatsoever. The establishment of the national unitary state one year later in 1859 and the reforms regulating the modernization of the state organisation and the development of state institutions brought by Alexandru Ioan Cuza (1820-1873), seem to have improved the on-going consolidation of the parliamentary system in Romania[11]. However, when the assembly (with a conservative parliamentary majority) refused to vote the agrarian reform and Kogălniceanu's government received a vote of no confidence,

[7] Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar,* vol. I, Lumina Lex, Cluj-Napoca, 1998, pp. 359-360.

[8] *Ibidem,* p. 359.

[9] Tudor Drăganu, *Începuturile și dezvoltarea regimului parlamentar în România până în 1916,* Dacia, Cluj-Napoca, 1991, pp. 39-40.

[10] The Convention signed between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey for organising the Romanian Principalities, Paris, 7/19 August 1858.

[11] Marian Enache, Mihai Constantinescu, *Renașterea parlamentarismului în România*, Polirom, Iași, 2001, p. 37.

Alexandru Ioan Cuza dissolved the assembly and drafted – in the spirit of the French Constitution of 1852[12] – a new constitutional act, also known as "The Statute Expanding the Paris Convention" (*Statutul Dezvoltător al Convenției de la Paris*) from 1864 and a new electoral law[13]. Between 1864 and 1865, a great body of laws inspired by the *Napoleonic Code* was drafted and voted. The Judicial Organization Act (July 1864), the new Civil (December 1865) and Penal codes, and the Fiscal Code set up a political and legal framework that will later consolidate the state institutions[14].

The Statute Expanding the Paris Convention enacted on the 2nd of May and enforced two months later represents a turning point both for the transformation of Parliament and for the evolution of the concept of *parliamentary immunity*. Some historians consider it as the first Romanian Constitution[15]; others, however[16], while recognizing its value and importance for the national constitutionalism, perceive it only as a constitutional act, recognising as the first constitution the fundamental act of 1866. Nonetheless, in some parts this statute brings important legal and conceptual changes, while in other sections the provisions remain intact. The legislative becomes bicameral with the Senate, called *Corpul Ponderator,* and the Elective Assembly, called *Adunarea Electivă*, not unicameral as it was previously established by the Paris Convention of 1858. Furthermore, a visible but not functional separation of powers is also established. The legislative power was exercised by the Hospodar and the National Representative Assembly *(Reprezentațiunea națională),* the executive consisted of the Hospodar and his ministers and the judicial powers exerted by the courts of justice. It is true that behind this formal separation of powers, one could see that the rights of the Hospodar increased, while weakening the attributions of the other two institutions. However, what seems to be new within its constitutional provisions is the protection of the members of both the Senate (*Adunarea Ponderatrice*) and the Elective Assembly *(Adunarea Electivă).*

This moment marks the first occurrence of *the parliamentary immunity* in a constitutional document. Art. 7 clearly states that the members of the Senate and of the Elective Assembly were inviolable *(neviolabili)*. Still, the general description, the legal limits and practices of immunity is to be found in Art. 36 of the Electoral Law of 1864 which was attached to the *Statutul dezvoltător al convenției de la Paris* and enforced at the same time. Thus, as the article states, the members of the legislative body could not be arrested or prosecuted during the parliamentary session, except in those situations when they were "caught in the act" (*afară numai în casu de vină veghiată*), but not without the prior authorization of the assembly. Both of the articles read as follows:

> "Art. VII. The Ponderatory Body consists of: the Metropolitans of the Territory, the Bishops of the Dioceses, the President of the Court of Cassation, the oldest of the army generals in activity, and another 64 members, appointed by the Lord: half of the people commanded by their merit and experience, and the other half of the members of the General Councils of the districts, namely one of each county. Members of the

[12] Angela Banciu, *Istoria vieții constituționale în România (1866 – 1991),* Șansa, București, 1996, p. 32.

[13] Tudor Drăganu, *Începuturile și dezvoltarea…, op. cit.,* pp. 157-165.

[14] Angela Banciu, *Istoria vieții…, op. cit.,* p. 30.

[15] Angela Banciu, *Istoria Constituțională a României: deziderate naționale și realități sociale*, Lumina Lex, București, 2001, pp. 30-35.

[16] See Manuel Guțan, *Transplant constituțional și constituționalism în România modernă, 1802 – 1866,* Hamangiu, București, 2013; Tudor Drăganu, *Începuturile…, op. cit.*

> Ponderatory Assembly enjoy the same inviolability guaranteed to deputies through Art. 36 of the hereinafter Electoral Law."[17]
>
> "Art. 36. No member of the elected Assembly may, as long as the session is held, be arrested or prosecuted, except when obviously guilty, only after the Assembly approved the persecution."[18]

As in France, in this constitutional regulation the word used to describe *the parliamentary immunity* is inviolability (*neviolabilitate*) and reveals a rather vague interpretation. As far as our research goes, there were no parliamentary debates regarding the adoption of this provision and its regulations. As I see it, in this case "inviolability" could also refer to non-accountability, however, no specific wording is used to describe it. Furthermore, we could see that the temporal protection was limited to a parliamentary session only, which, according to Art. 17 from the Convention of Paris, is summoned by the Hospodar and lasts for 3 months, starting each year in the first Sunday of December[19]. Still, this technical interpretation of immunity seems to be revealing only partially its genuine interpretation.

Tudor Drăganu in *Începuturile și dezvoltarea regimului parlamentar în România până în 1916* provides, at least indirectly, an account of how immunity was understood by the members of the legislative body. As in France, immunity seems to be linked also to the idea of the representative mandate and, in this regard, the speech of C. Boerescu, the brother of Vasile Boerescu, in front of the Elective Assembly remains noteworthy. In the parliamentary session from 3-15 January 1866, after intensely criticising the decisions of the Nicolae Crețulescu's government regarding the mismanagement country's heritage, C. Boerescu suggested that the members of the assembly represent the most important power of the state because they represent the entire nation and the origin of sovereignty lies with them. Furthermore, he considers that the inviolability of the members of the Elective Assembly is the same with the inviolability and the sacredness of the Hospodar, because they represent the nation. The original speech is the following:

> "Who are we? Who is the Assembly? We are the most important power of the state because we represent here the whole nation, in its collectivity, and because in us resides the origin of sovereignty. Our action, certainly, is exercised through His Majesty the Lord and his Majesty the Lord entrusts it, in his turn, to his ministers. But His Majesty is chosen by us, and in our name he exercises the prerogatives with whom we have invested him for life.
>
> But His Majesty is an inviolable, sacred, unrresponsible person, as inviolable, sacred, and unrresponsible, as we, the representatives of the nation, are. His Majesty reigns but does not rule; the action is entrusted to other people, the ministers. Only against them and against no one else we have the right to execise our control."[20].

The speech of C. Boerescu, deputy in the Elective Assembly, reveals at least three possible interpretations of *the parliamentary immunity*, which could not be seen in Art. VII of the Statute Expanding the Paris Convention. First, in contrast with the French experience, this occurrence of

[17] *Statutul Dezvoltător al Convenției de la Paris*, Art. VII, published in the Official Gazette of the Romanian Principalities, no 99 from 4/16 May 1864.

[18] Electoral law of 1864, Art. 36, published in the Official Gazette of the Romanian Principalities, no 146, the 3rd of July 1864.

[19] The Convention signed between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey for organising the Romanian Principalities, Paris 7/19 August 1858, Art. 17.

[20] The speech of C. Boerescu published in the Official Gazette no 9/1866, p. 36, apud Tudor Drăganu, *Începuturile și dezvoltarea..., op. cit.,* pp. 176-177.

the parliamentary immunity did not appear in a revolutionary moment, but it was rather imported indirectly. Since the representatives could criticize the government from the official tribune of the parliament, we could agree that the freedom of speech or non-accountability existed as a tradition, despite the fact that the specific wording was yet to be used and it was not codified in the constitutional settings. Secondly, the conflict which gave birth to *the parliamentary immunity*, namely the fight for independence between the legislative and the executive, is also present here in Boerescu's speech, however with other implications. The conflict here is rather between the opposition and the government.

Tudor Drăganu in *Drept constituțional și instituții politice. Tratat elementar*[21] suggests that the opposition, even when it had few representatives in parliament, could influence the political and governmental decisions because of the real (we may add not institutionalized yet) liberty in which the debates could be held, making possible the political interventions of the deputies to criticize governmental decisions or even to change governments. Thirdly, C. Boerescu's speech also reveals the nature and the philosophical implications of *the parliamentary immunity*. One could see that the source of immunity derived from the particularities of the representative mandate. Immunity was not a privilege owned by the representative, but it was a right that belonged to the assembly, the most influential power of the state, more powerful than the Hospodar himself. The representatives of the nation were just as sacred and inviolable as it was the Hospodar. Thus, from a legal point of view, *the parliamentary immunity* in 1864 represented just a mere reflection of how it was perceived at that time in the Western part of Europe, especially in France and Germany. However, the idea that the Members of Parliament are inviolable because they represent the nation was already in debate. Following the Romanian constitutional history, one could observe that after these events, the concept of *parliamentary immunity* entered almost without interruption political life in general and legal terminology in particular.

Shortly after Alexandru Ioan Cuza abdicated in February 1866, a new constitution was drafted – hastily written in order to cope with the unexpected event that could come[22] – and enforced on the 1st of July 1866. If the Statute Expanding the Paris Convention, which modified several provisions of the Paris Convention from 1858, represents the constitutional document written by a Romanian Hospodar, the Constitution of 1866 is considered to be the first fundamental act *per se* drafted by the collective will of the Members of the National Assembly and the sovereign[23], Carol Ludovic de Hohenzolern-Sigmaringen (1839-1914). Thus, the Constitution of 1866 was designed both as a political and economic compromise between the conservative landlords and the liberal bourgeoisie[24] and as an agreement between the Ruling Prince, Carol I, and the Parliament[25]. Inspired by the Belgian Constitution of 1831 and adapted to the political and legal realities of Romania, this new Romanian fundamental act came to be known as the most liberal constitution of Europe. It embedded democratic aspirations such as the national sovereignty (Art. 31), according to which all powers are derived from the nation[26], the hereditary monarchy, the ministerial responsibility, the representative government and the separation of powers[27]. The principle of separation of powers was well entrenched in the Constitution. According to Art. 32, the legislative power was exerted by

[21] Tudor Drăganu, *Drept constituțional..., op. cit.,* p. 367.

[22] Mihai T. Oroveanu, *Istoria dreptului românesc și evoluția instituțiilor constituționale,* Cerma, București, 1992, p. 264.

[23] Ioan Scurtu, Ion Bulei, *Democrația la români 1866-1938,* Humanitas, București, 1990, p. 10.

[24] Tudor Drăganu, *Începuturile și..., op. cit.,* p. 187.

[25] Angela Banciu, *Istoria vieții..., op. cit.,* p. 33.

[26] Ioan Scurtu, Ion Bulei, *op. cit.,* p. 11.

[27] *Ibidem*, p. 34.

Carol and a bicameral Parliament (the Senate and the Deputies Assembly), the executive consisted of the Ruling Prince (*Domn*) and his ministers (Art. 35), and the judiciary power was exercised by independent tribunals and courts (Art. 36).

As for the protection of the members of the legislative body, this Constitution offered a broad and clear understanding[28]. The concept of *parliamentary immunity* (*imunitate parlamentară*), borrowing the same meanings from the French, *immunité parlementaire*, was regulated in Title III, Art. 51 and 52.[29] The fact that the members of Parliament could express themselves freely, both in and out of the parliament, sets the basis for a functional system of privileges. Furthermore, both the deputies and the senators could not be arrested and prosecuted during the parliamentary session without the authorisation of the chamber they belonged to, except if they were caught red-handed. The state of accusation was suspended during the session only if the assembly requested. The articles reads as follows:

> "Art. 51. None of the members of one or the other Assembly shall be prosecuted or persecuted for his opinions and votes cast during his mandate.
>
> Art. 52. No member of one or the other Assembly shall during the session, be prosecuted or arrested, as repression, only with consent from the Assembly he is a member of, except in case of proven guilt. The detention or prosecution of a member of one or the other Assembly shall be suspended throughout the session unless the Assembly so requests."[30]

In contrast to the Statute of Cuza of 1864, one could see that the concept of *parliamentary immunity* has evolved both in meanings and in provisions. Even though the wording seems to be missing, the two-layer system of immunity presented within the articles resembles considerably with the modern use of the French *immunité parlementaire*. Thus, in less than two years, immunity seems to acquire a certain degree of legal maturity. The tense relations between the executive and the legislative or between the government and the opposition (either liberal or conservative) have not influenced the still fragile system of separation of powers. Nonetheless, there are several parliamentary debates when at least one of the Chambers of the Parliament had to decide and regulate the legal limits of *the parliamentary immunity*.

Tudor Drăganu in his seminal study on the birth of the parliamentary regime in Romania, *Începuturile şi dezvoltarea regimului parlamentar în România până în 1916,* suggests that, between 1866 and 1888, parliamentary debates were characterized by an extensive liberty of speech, both in and out of the parliament. Art. 51 which regulated, as we have seen, the non-accountability of the members of Parliament was entirely respected without any restriction[31]. However, on the 14th of March 1888, two deputies, Nicolae Filipescu and Nicolae Fleva, members of the Conservative Party were searched for and later in the afternoon arrested by the authorities, on the grounds that they organised and took part in the street riots from Orfeu Hall demanding Carol I to remove Brătianu from the office[32]. Nonetheless, the Deputies Assembly in the public session from the 17th of March, after analyzing the two motions of the deputies, has decided that their arrest was abusive because it violated Art. 51 from the Constitution, and demanded their immediate release[33].

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[28] Constanța Călinoiu, Victor Duculescu, *Drept parlamentar,* Second Edition, Lumina Lex, București, 2009, p. 125.
[29] Marian Enache, Mihai Constantinescu, *Renașterea parlamentarismului în România*, Polirom, Iași, 2001, p. 37
[30] The Romanian Constitution of 1866, Chap. I, Art. 51 and Art. 52.
[31] Tudor Drăganu, *Începuturile şi dezvoltarea..., op. cit.,* p. 291.
[32] Constantin Bacalbașa, *Bucureștii de altădată, 1885-1888,* Humanitas, București, 2014, pp. 135-137.
[33] Tudor Drăganu, *Începuturile şi dezvoltarea..., op. cit.,* p. 292.

In *Drept constituțional și instituții politice. Tratat elementar*, Tudor Drăganu considers that what really kept in balance the separation of powers – an important characteristic for a parliamentary regime – was the fact that the members of Parliament from the opposition (liberals or conservatives) enjoyed a real free speech inside the Parliament, but also the freedom of the press and the freedom of demonstrations. Nonetheless, the freedom of speech made possible the crucial interventions of both deputies and senators in order to convince or criticise the ministers on a particular issue and their debates to also be heard by Carol I[34]. The same idea is also supported by Marian Enache and Mihai Constantinescu in *Renașterea parlamentarismului în România.* They suggest that the parliamentary life was not disturbed by external influence that could come either from Carol I or from his ministers. That is why in relation to the executive, the debates could not influence or intimidate the government, which encouraged lawmakers to express their views through speeches in both chambers concerning the draft response for the throne's message, inquiries, and amendment proposals on draft laws. Regarding the relationship with the Monarch as the head of the state, his involvement was moderate, "being careful not to disturb the delicate balance between the two Chambers and the Government."[35]

Following the constitutional evolution, one could observe that after the Great Union of 1918, drafting a new constitution was on the political agenda of every political party in Romania[36]. However, it took them almost five years to reach a consensus. Nonetheless, by the end of 1922, all the political forces agreed on issuing a new constitution[37], thus, in the following year, on the 23rd of March, the second fundamental law in Romanian history was promulgated. Elaborated by the National Liberal Party and voted by the Chamber of Deputies on the 26th of March, this Constitution was appreciated even outside the borders of Romania.[38] The constitutional regime of *the parliamentary immunity* (non-accountability and inviolability) was likewise continued in the 1923 Constitution. The new historical realities promoted by this Constitution strengthened the democratic principles by introducing for the first time universal male suffrage, equal, direct, obligatory and secret. At the same time, the relation between the legislative and the executive is modified as a consequence of the increase in the executive's powers, noticeable especially in the manner in which the upper house of the Parliament was formed, which included elected senators, as well as senators by right (*senatori de drept*) (Art. 73), whose number is increased compared to the previous settings. This feature also meant that a section of this legislative Chamber escaped the control and the will of the voters[39].

As the previous one, the Constitution of 1923 was also established as a compromise between the Monarch and the Representative Assembly. Still, in contrast to the Constitution of 1866 it formulates more clearly the principle of national sovereignty, it gives a better interpretation of the right to social needs (Art. 21) and of the right to property (Art. 17)[40] and the universal suffrage (Art. 108). However, many of the provisions remain similar, if not even identical (76 out of 128 have not been modified) to the previous ones[41]. It reaffirms the representative mandate and the democratic principle of separation of powers: a legislative consisting of two Chambers, the Senate

[34] Tudor Drăganu, *Drept constituțional..., op. cit.*, p. 367.
[35] Marian Enache, Mihai Constantinescu, *op. cit.,* p. 37.
[36] Ioan Scurtu, Ion Bulei, *op. cit.,* p. 23.
[37] *Ibidem.*
[38] Eugen Plugaru, "Evoluția dreptului românesc în perioada 1700–1923", in *Revista Noema* 1 (2003), pp. 159-167.
[39] Marian Enache, Mihai Constantinescu, *op. cit.,* p. 42.
[40] Angela Banciu, *Istoria vieții..., op. cit.,* p. 87.
[41] Ioan Scurtu, Ion Bulei, *op. cit.,* p. 23.

and the Assembly of Deputies, the executive power represented by the King and his ministers and finally, the judiciary power composed of independent courts and tribunals.

Concentrating our attention on the immunity provisions, one can observe that the 1923 Constitution did not bring any significant changes[42]. Art. 54 and 55 stipulate the two-layer system of immunity of the members of both of the Chambers of Parliament, composed of non-accountability for the speeches and votes cast during the entire mandate and inviolability for their acts committed outside their parliamentary functions during parliamentary sessions. Therefore, the constitutional heritage concerning *the parliamentary immunity* remained, with several exceptions, almost similar within the framework of the new constitution. The articles read as follows:

> "Art. 54. None of the members of one or the other Assembly shall be prosecuted or persecuted for his opinions and votes cast during his mandate.
> Art. 55. No member of one or the other Assembly shall, during the session, be prosecuted or arrested, as repression, only with consent from the Assembly he is a member of, except in case of proven guilt. If preventively arrested or prosecuted when the Assembly is out of session, the prosecution or arrest must be subjected to the approval of the Assembly to which he belongs, immediately after the opening of the session of the Legislative bodies. The arrest or prosecution of a member of one or the other Assembly is suspended if the Assembly so requires."[43]

The first article which enforces the freedom of speech seems to be identical with the one from the Constitution of 1866 (the numbering is different); however, Art. 54 seems to contain a new provision regarding the arrest of a member when the Parliament was not in session.

Ioan Scurtu and Ion Bulei in their study, *Democrația la români 1866-1938,* indirectly suggest that the functional protection of the members of Parliament regarding the freedom of speech was slightly extensive than what the constitutional provisions stipulated[44]. They considered that deputies and senators were enjoying the benefits of non-accountability, having no constraints to criticize the government or to bring accuses – to high ranking officials or to other members of the legislative body which were not present at the parliamentary debates – from the parliamentary tribune. For their speeches they could not be sued or abusively arrested[45]. Thus, as the authors consider, the freedom of speech was absolute, "a general and perpetual right which determined that a parliamentarian was not accountable not even after his mandate ended"[46]. Still, this interpretation contradicts Art. 54, which clearly articulates the freedom of opinions and of the cast votes, only during the parliamentary mandate. It is true that this irresponsibility of their speeches could have determined abuses, however, as far as our research goes, and both of the authors confirm[47], in the parliamentary life from 1923-1938 no abuses of this kind were recorded. If members would have been arrested, the press of that time would have criticised both the prosecutor and the accused member of Parliament[48]. Thus we can relate that the general public opinion related to *the parliamentary immunity* was consciously aware about the necessity and limits of this particular form of protection. That is why, as Ioan Scurtu and Ion Bulei conclude, a member of Parliament must have enjoyed "all the freedom of action in order to enforce the control

[42] Constanța Călinoiu, Victor Duculescu, *op. cit.,* p. 126.
[43] The Romanian Constitution of 1923, Chap. I, Art. 54 and Art. 55.
[44] Ioan Scurtu, Ion Bulei, *op. cit.,* p. 122.
[45] *Ibidem,* p. 123.
[46] *Ibidem.*
[47] *Ibidem.*
[48] *Ibidem.*

of the parliamentary power over all the social and political expressions, that is why the non-accountability right protected the speeches, the observations, the vote, the debates and committees and reports"[49]. Finally, regarding inviolability, both the deputies and the senators could not have been sued or arrested for their actions outside the parliamentary functions without the decision of the Chamber they belonged to, except in *flagrante delicto* cases. For the first time, in contrast with previous constitutional arrangements, it is mentioned that if a deputy or a senator is under preventive arrest when the parliamentary session is closed, the assembly has to give its consent shortly after the opening of the session.

Thus, one could observe the tendency towards a more comprehensive clarification of *the parliamentary immunity* in case of an abusive arrest after the session has ended. From a vague interpretation which occurred for the first time in the Statute Expanding the Paris Convention, in less than a century *the parliamentary immunity* seems to clarify and to extend its two-layer protection and its temporal scope. The wording seems to be missing, despite the fact that this indirectly import could have also catch up with the word inviolability. Still, either inviolability or non-accountability is not used, which signals us an on-going development of the legal vocabulary. Nonetheless, in contrast with the other two fundamental acts of 1864 and 1866, the legal wording used in the Constitution of 1923 seems to be modern trying to match the western constitutions (for example the term *flagrante delicto* is used for the first time).

The new constitutional order that was established after O. Goga's government was dismissed instituted the royal dictatorship of Carol II (1893-1953). In contrast with the Constitution of 1923, the new fundamental act enforced on the 21st of February 1938 could not be described as a political compromise between the King and the Parliament, rather it was seen as a personal statute[50]. Perhaps the most obvious distinction between the previous constitutions is embedded not in the manner or in the political manoeuvres with which Carol II imposed his personal rule, but in its content and the ideological style in which it was written. The principle of separation of powers seems to be missing since the King had all the political powers in his hand[51]. According to this Constitution, Carol II becomes *the head of state* (Art. 30), exercising at the same time both the legislative power (Art. 31) jointly with the bicameral Parliament – Senate and Deputies Assembly – and the executive power together with his ministers (Art. 32). Consequently, the judicial power was also under the King's authority (Art. 33). The 1938 constitutional draft was meant to instate the personal political regime of King Carol II,[52] who limited and controlled all institutions. Thus, the parliamentary regime is abolished and the legislative assembly became a personal tool subservient to the king[53].

Despite all the radical changes this new Constitution imposed, it seems that Art. 56 and 57 create a legal framework for the parliamentary protection of the members of Parliament. The two-layer system composed of non-accountability for opinions and votes and the inviolability is maintained[54]. In contrast with the previous constitutions, this protection is similar, if not identical to the Constitution of 1866; however, the wording seems to be slightly different. The articles read as follows:

> "Art. 56. None of the members of one or the other Assembly shall be prosecuted for his opinions and votes cast during his mandate.

[49] *Ibidem.*

[50] Angela Banciu, *Istoria vieții..., op. cit.*, p. 160.

[51] Tudor Drăganu, *Drept constituțional..., op. cit.,* p. 381.

[52] Paul Negulescu, "Constituțiile României", in *Enciclopedia României*, vol. 1, chap. 3, 17–201.

[53] Tudor Drăganu, *Drept constituțional..., op. cit.,* pp. 381-382.

[54] Constanța Călinoiu, Victor Duculescu, *op. cit.,* p. 126.

> Art. 57. No member of one or the other Assembly shall, during the session, be prosecuted or arrested for criminal liability, only with the consent of the Assembly he is part of, except for the case he is caught committing the act. The arrest or prosecution of a member of one or the other Assembly is suspended if the Assembly so requires."[55]

Substantial changes to *the parliamentary immunity* were not made, but the excessive domination of King Carol II was visible in all political spheres. There is not much to say about the way in which *the parliamentary immunity* was perceived by the political actors. As far as the research goes, no significant parliamentary debates or episodes related to immunity are to be found. It is true that the short time of Carol II's reign within this Constitution (21st of February 1938-5th September 1940[56]) could be one of the reasons why any kind of immunity is left out from the parliamentary debates. The royal dictatorship of Carol II began on the 11th of February 1938 and heralded a long period of significant political change: from authoritarian political, civil, and military systems (1938-1944) to a totalitarian regime (1947-1989). Thus, the political parliamentary mechanisms stopped working and *the parliamentary immunity* became nothing more than a decoration. Even if *the parliamentary immunity* kept its form, its substance was cancelled by the de facto abolition of the freedom of speech. A dark period in the constitutional evolution of immunity is marked by the Communist dictatorship, which broke any connection with previous political realities. The evolution of the parliamentary regime was interrupted by the new political and constitutional realities of the Communist regime. These realities show that Romanian society between 1947 and 1989 was pushed into an atrophied political space, led by Communist ideology, not permitting the freedom of expression, rule of law, or separation of powers. Taking into account these variables that could characterize *the parliamentary immunity* in a democratic regime and not doing a biased analysis, it is interesting to see, briefly, the real meanings of the *immunity* during this period.

The 1948 Constitution adopted by the Great National Assembly on the 13th of April 1948 was designed to reinforce the Communist regime. Regarding *the parliamentary immunity*, Art. 59 mentions that all deputies were excluded from arrest or prosecution without the prior authorization of the Great National Assembly during and in between sessions in any case of criminal act, apart from in *flagrante delicto*. Even though there were provisions protecting deputies, one could observe that the word "immunity" or "inviolability/non-accountability" inspired by the French model still was not mentioned. Thus, if we extract this provision out of the constitutional context, one could see that there are similarities with the previous democratic constitutions in what concerns its limits and parliamentary procedures. As I see it, this slight similarity in meanings reveals that the core definition of immunity remains unchanged even in a regime that is not democratic. The article reads as follows:

> "Art. 59. No deputy shall be detained, arrested or prosecuted, without the consent of the Great National Assembly of the Popular Republic of Romania, during the sessions, or the Presidency of the Great National Assembly of the Popular Republic of Romania, between sessions, for any criminal acts, except if caught committing the act, in which case, the approval of the Great National Assembly of the Popular Republic of Romania or the Presidency of the Great National Assembly of the Popular Republic of Romania will be required."[57]

[55] The Romanian Constitution of 1938, Chap. II, Art. 56 and Art. 57.

[56] The Royal Decree no 3052 signed by Carol II on the 5th of September 1940 regarding the suspension of the constitution. See Constanța Călinoiu, Victor Duculescu, *op. cit.,* p. 126.

[57] The Romanian Constitution of 1948, Title IV, Art. 59.

The Art. 34 in the 1952 Constitution, the second Communist Constitution, contains a nearly identical provision regarding the protection of parliamentarians, except in those situations when deputies were "caught in the act", a phrase not appearing in the final form published in the *Official Gazette*. Consequently, this Constitution provided the deputies with greater protection, even in cases in *flagrante delicto*, which was a principle already found and respected in France in that period. This article stipulates that

> "Art. 34. No deputy of the Great National Assembly shall be prosecuted and arrested, without the consent of the Great National Assembly, during the sessions and, between sessions, without the consent of the Presidency of the Great National Assembly."[58]

Finally, the 1965 Constitution, which legitimised the authority of Nicolae Ceaușescu, the ruler of the Communist Romania until the Revolution of 1989, regulated some particular provisions regarding the protection of the members of the Great National Assembly. Art. 61 (Title III) is a clear replica of the similar legal provisions previously mentioned in the 1948 Constitution.

> "Art. 61. No deputy of the Great National Assembly shall be detained, arrested or criminaly trialed, without the previous consent of the Great National Assembly expressed during the session and, between sessions, without the consent of the State Council. Only in the case in which is caught committing the act, the deputy can be detained without consent."[59]

The necessity of developing *the parliamentary immunity* appears in the political context of the 1864-1866 and 1923 constitutions, during which the members of Parliament representing *the entire nation*, in order to fulfill the needs of the public office, have identified the importance of establishing certain suitable institutional mechanisms. The proper development of the institution of immunity is accomplished in the inter-war period, together with the French influence existing in the Romanian case, regarding the dual character of *the parliamentary immunity*: non-accountability and inviolability. Immunity's evolution enters a deadlock after Communism was installed in Romania, because the Communist ideology organized the whole society, as well as the trajectory of the main institutions, oppressing freedom of speech in the legislative arena. Thus, *the parliamentary immunity* during the Communist period encountered a stage of exceptional circumstances. The absence of the rule of law, the theoretical freedom of speech, and the make-believe separation of powers made *the parliamentary immunity* a legal decoration without any clear relevance. This statement confirms the hypothesis that *the parliamentary immunity* is, generally speaking, an instrument of any democratic regime. The re-emergence of the debates around the parliamentary privileges takes shape in the post-Communist period. Nonetheless, the new 1991 Constitution, together with the Constitutional Court's advisory opinions, the regulations of the Senate and the Chamber of Deputies, as well as the Law No 96/2006 regarding the status of the members of the Parliament, seem to have defined the current interpretation of *the parliamentary immunity.*

Continuing our historical constitutional journey, it was the Romanian Revolution of 1989 that allowed the return to a democratic regime with free and representative institutions[60]. The new political order brought major changes, both in the institutional architecture of the state and in sociopolitical life. It creates the prerequisite conditions for a constitutional democracy after almost half a century of a Communist dictatorship (1947-1989) and enforces a pluralist political system

[58] The Romanian Constitution of 1952, Chap. III, Art. 34.
[59] The Romanian Constitution of 1965, Title III, Art. 61.
[60] Constanța Călinoiu, Victor Duculescu, *op. cit.,* p. 127.

and an intense parliamentary life[61]. With the 1991 Constitution, the Parliament became "the supreme representative body of the Romanian people and the sole law-maker of the country"[62]. *The parliamentary immunity* was included in Art. 69 and Art. 70, in the sense of non-accountability and inviolability of the members of Parliament. Both of the two constitutional guaranties mentioned in the article of the Constitution of 1991 compose the general background for the modern understanding of the concept of *parliamentary immunity*. Even this Constitution seems to continue to deviate from the traditional wording used by the Western constitutions to describe immunity that is inviolability and non-accountability[63]. Art. 69 states that a deputy or a senator could not be searched, arrested or prosecuted without the prior approval of the Chamber he belongs to, except if he/she is caught in *flagrante delicto*. As the article states, if a deputy or senator is caught red-handed, the Minister of Justice has to inform the Chamber of Parliament which the member belongs to without any delay as soon as the member was arrested. Nonetheless, if the Chamber considers that the accusations brought have no legal support or evidence, it could ask for his immediate release. Art. 70 establishes the guarantee of freedom of political opinions and votes cast by a member of Parliament. Thus, a deputy or a senator could not be held accountable for what they have said or how they have voted in the exercise of their parliamentary mandate. These two provisions are similar with the French interpretation of *the parliamentary immunity*. They enforce and clarify at the same time the two-layer system of protection. Thus, after a long constitutional evolution, when considerable changes have been brought to this concept, within the limits of these two articles, *the parliamentary immunity* is close to its modern use. Art. 69 and Art. 70 state as follows:

> "Art. 69 (1) No deputy or senator shall be detained, arrested, searched or prosecuted for a criminal or minor offence without authorization of the Chamber he is a member of, after being given a hearing. The case shall be in the competence of the Supreme Court of Justice.
> (2) In the case of a deputy or senator being caught in the act, he may be detained and searched. The Minister of Justice shall promptly inform the President of the respective Chamber about the detention and search. In case the Chamber thus notified finds no grounds for his detention, it shall immediately order that this detainment be repealed.
> Art. 70 No deputy or senator shall be liable to judicial proceedings for the votes cast, or political opinions expressed in the exercice of his mandate."[64]

In the Romanian legal thought, the generalized understanding of the limits and functions of the concept of *parliamentary immunity* seem to have reached a compromise regarding its necessity and usage. Tudor Drăganu, in *Drept constituțional și instituții politice, Tratat elementar,* vol. II*,* considers that Art. 69 of the Constitution of 1991 created what he calls a special guarantee[65] granted to the deputies and senators and not allowing any authority to search, prosecute or arrest them without a previous hearing, before the Chamber they belong to could decide whether or not to lift *the parliamentary immunity*. The author moves further and concludes that the reason why the Constitution of 1991 created such a clear interpretation (in contrast to the previous constitutions) was to strengthen the status of the parliamentarians and to give them the legal instruments to accomplish their parliamentary functions freely and independently, without any

[61] Angela Banciu, *Istoria vieții..., op. cit.,* p. 264.
[62] The Romanian Constitution of 1991 published in the *Official Gazette*, no 233, 21 November 1991, Art. 58.
[63] Tudor Drăganu, *Drept constituțional și instituții politice, Tratat elementar,* vol. II, Lumina Lex, București, 1998, p. 216.
[64] The Romanian Constitution of 1991, Title III, Art. 69, 70.
[65] Tudor Drăganu, *Drept constituțional...,* vol. II, *op. cit.*, p. 217.

external influence that could have come either from the public authorities or from other high civil servants or private entities[66]. Thus, what this Constitution and also the previous democratic ones intended when they assumed the inviolability of the parliamentarians, was to give to the legislative body through its members a greater independence in relation to the other authorities, be they the Monarch, the government, the judiciary institutions, to carry on its activity without any obstruction and not to create a personal/particular privilege or advantage.

The authorisation that a Chamber of Parliament gives by secret ballot for either lifting or not *the parliamentary immunity* or requesting the immediate cancelation of any judiciary measure applied to the representative if there is no evidence, mentioned in Art. 69, par. 1 and 2, was also a reassurance that the independence and integrity of the legislative body are not affected. However, this does not mean that the Parliament substitutes the court of justice, as many contemporary critics are arguing in this mater. In fact, what a Chamber of the Parliament does when lifting *the parliamentary immunity* is to determine if the nature of judiciary measure applied to a member of Parliament could harm or influence in any way the freedom of decision of a parliamentarian. Furthermore, the Chamber of Parliament could also reject the request of the authorities if it considers that there are no legal grounds for lifting *the parliamentary immunity*, but, as Tudor Drăganu and other legal scholars suggest,[67] this does not mean that a representative is not guilty. It represents that the decision took by the Chamber is just a procedural action that suspends any further judicial measures against the representative during his entire mandate. Art. 69 reveals also the procedural limits of inviolability. The cases of *flagrante delicto* make parliamentary inviolability limited and not absolute[68] as it is non-accountability. That is why if a deputy is caught red-handed, he could be searched, arrested and prosecuted and the Ministry of Justice has the duty to inform the Parliament immediately. Art. 70 of the Constitution of 1991 affirms the non-accountability of each member of Parliament. In contrast with inviolability, this constitutional guarantee has an absolute and indefinite character for at least two reasons. Firstly, non-accountability or irresponsibility protects a member of Parliament not only from criminal and contraventional liability, but also operates on the grounds of civil liability[69]. Secondly, if inviolability has a limited character and – as previously explained – protects a representative during his parliamentary mandate, non-accountability is unlimited, protecting the parliamentarian also after his mandate has ended[70]. Mihai Constantinescu and Mihai Amzulescu, in the second edition of their study *Drept parlamentar,* aside from the two features previously mentioned by Tudor Drăganu, complete the functions of non-accountability with five new definitions.

They consider that irresponsibility "(1) is a functional immunity because it concerns the well-functioning of the parliamentary mandate, (2) it is a substantive immunity since it protects the basic activities of the mandate, that is the cast votes, law amendments, speeches both in the plenary sessions and in committees, reports and advisory opinions, (3) the lack of legal liability does not exclude also the disciplinary liability that concerns the standing orders of the Parliament, (4) it does not offer protection for the insults that a parliamentary brings either from the parliamentary tribune or in the press articles, media, radio and, finally, (5) it protects two fundamental rights of

[66] *Ibidem.*

[67] Mihai Constantinescu, Marius Amzulescu, *Drept parlamentar,* Second Edition, Fundația România de Mâine, București, 2004, pp. 45-47; Constanța Călinoiu, Victor Duculescu, *op. cit.,* pp. 127-136.

[68] Tudor Drăganu, *Drept constituțional..., op. cit.*, vol. II, pp. 217-218.

[69] *Ibidem,* p. 220.

[70] *Ibidem.*

the Parliament, the right to vote and the freedom of speech"[71]. As for inviolability, in contrast to the interpretation offered by Tudor Drăganu, the two authors consider that "(1) it refers only to the prohibition of arrest, prosecution, search without the authorisation of the Chamber he belongs to, (2) it is a procedural immunity since it protects the parliamentarian only during his mandate, thereafter he will not be protected anymore, (3) it safeguards only from criminal liability, not also from civil or contraventional liability, (4) has the function to allow the parliamentarian to exercise his parliamentary function without interference and, finally, (5) inviolability does not cancel the act of justice, but delays the judicial procedures regarding his arrest, search and prosecution"[72]. As it was characteristic also to the Western countries, the constitutional provisions of *the parliamentary immunity* were adjusted to a functional and procedural framework through the Regulations of the Parliament and through the law regarding the status of senators and deputies.

The Regulations of the Parliament[73] adopted in the first Romanian legislature after the collapse of the Communist regime (1992-1996) shed some light on the procedural instructions of *the parliamentary immunity*. The Regulations of the Senate adopted in 1993 and the Regulations of the Chamber of Deputies, authorised in the following year in conformity with Art. 69 and Art. 70 of the Constitution of 1991, created the procedures and the legal steps that had to be taken for lifting *the parliamentary immunity*. Both in content and procedures, the two regulations were similar, except one provision from the Regulation of the Senate regarding the majority of the members present when lifting the immunity. According to these regulations, *the parliamentary immunity,* with its two-layer system, was recognized, deputies and senators could not have been held accountable for their opinions and cast votes, and inviolable for search, arrest and prosecution, except *flagrante delicto* cases. When a request for arresting, searching, prosecuting or detaining a member of Parliament was made by the judicial authorities, the President of the Chamber the parliamentarian belongs to informed in public sitting the members about this request and sent it to the Legal, Discipline and Immunities Committee for examining the request with all the legal documents attached to it. If the Committee considered necessary, it could have asked for other relevant information or documents in order to take a final decision. In a written report, the members of the Committee decided whether or not there was enough evidence or legal grounds for approving the request. After deliberations, the members, through secret ballot, adopted the decision of the Committee. Finally, according to these regulations, the Committee report was submitted to the Chamber for debate and later approval. By secret ballot, the members of the Chamber voted either in favour or against the judicial authorities' request.

These procedures seem to be similar in both regulations; however, the majority of members asked for approving or rejecting the request is different. If the Chamber of Deputies could decide whether or not lifting *the parliamentary immunity* could be achieved with a two-third majority of its members, in the Senate this provision seems less clear. Art. 169, par. 8 states that the majority of the senators could give the authorisation for lifting *the parliamentary immunity*. Nonetheless, until they were re-adapted to the legal realities in 2005, both of the regulations suffered major changes. By the end of the 20th century, the Constitutional Court played an important role in shaping the present meaning of *the parliamentary immunity*, adjudicating on the constitutionality of laws and regulations of Parliament. From the beginning of 1991 and until the constitutional revision of

[71] Mihai Constantinescu, Marius Amzulescu, *Drept parlamentar..., op. cit.*, p. 46.

[72] *Ibidem,* pp. 46-47.

[73] See the Regulation of the Senate of 1993, Art. 169-171, and the Regulations of the Chambers of Deputies of 1994, Art. 168-173.

2003, the Constitutional Court, through its advisory opinions,[74] made a significant contribution to the clarification of the theoretical and practical aspects of *the parliamentary immunity*.

The law regarding the Status of senators and deputies,[75] specific to all western countries with a functioning system of immunity, was finally adopted in 2006[76]. It seems that the first attempt to draft this piece of legislation began in the first legislature from 1992-1996; however, because of some procedural breaches, it could not enter into force. As in the case of the regulations of the Senate and the Chamber of Deputies, the Constitutional Court brought substantial changes to this law through its advisory opinions of 1996[77] and 2006[78]. Nonetheless, this document brought an important contribution for clarifying the nature, the temporal limits and the scope of *the parliamentary immunity*. Inspired by other western laws regarding the status of the members of Parliament,[79] this piece of legislation states that *the parliamentary immunity* is an exception from the common law in relation to the judiciary authorities and having the purpose to maintain the independence of the mandate (Art. 21, par. 1, 2). Furthermore, under Art. 21 the law enforces the imperative character of immunity since no authority could suspend or cancel the immunity. Only the Chamber of the Parliament a member belongs to could authorise lifting this protection.

Finally, the constitutional revision of 2003 seems to bring some new changes to the functional character of *the parliamentary immunity* in Romania. Ioan Muraru in *Constituția României. Comentariu pe articole* suggests that the new article regarding *the parliamentary immunity* (slightly different from the ones stipulated in the Constitution of 1991) was designed to clarify better the situations in which *the parliamentary immunity* had to be lifted[80]. As far as the author implies, it seems that a high number of cases when the request for lifting *the parliamentary immunity* was rejected determined this new rearrangement of the immunity. The article states as follows:

> "Art. 72 – (1) No deputy or senator shall be held legally responsible for any vote cast or political opinion expressed in the exercise of his office.

[74] Decision No 45/1994 regarding the constitutionality of the Standing Orders of the Chamber of Deputies; Decision No 46/1994 regarding the Standing Orders of the Senate. The Constitutional Court gave its advisory opinions and objections as to the unconstitutionality, firstly concerning Art. 149, par. (2), regarding the prosecution of the senators, which did not meet the same criteria as Art. 69 from the Constitution stipulating only the abusive prosecution and contravention. Secondly, par. (5) and (8) of the same article were declared unconstitutional because they were stipulating a new method of suspension of the immunity. Decision No 63/1997 regarding the effects of lifting the immunity was once again subject of debate for the Constitutional Court. Judges of the Court gave their opinion concerning the fact that the end of immunity must coincide with the end of the parliamentary term, and therefore, a member of Parliament will benefit again from this guarantee only if/after he/she will gain a new mandate. The last aspect regarding *the parliamentary immunity* referred to its lifting by secret ballot with two thirds of the senators or deputies participating in the session. The decision of the competent committiees was based on the argument that there aren't any national laws, in none of the countries, which would stipulate the fact that *the parliamentary immunity* should be lifted with such a great majority. Consequently, the Constitutional Court gave its opinion, through Decision No 6/1999, that *the parliamentary immunity* should be lifted by a simple majority of the senators and the deputies participating in the session. For an extensive explanation of the decisions of the Constitutional Court regarding the Regulations of the Senate and the Chamber of Deputies see Ioan Muraru, "Statutul deputaților și senatorilor", in Ioan Muraru, Simina Tănăsescu, Dana Tofan, Flavius Baias, Viorel Ciobabu, Valerian Cioclei and others, *Constituția României. Comentariu pe articole,* C. H. Beck, București, 2008, pp. 684-686, and Curtea Constituțională, *Decizii de constatare a neconstituționalității, 1992-1998,* Editura Militară, București, 1999, pp. 190-191.

[75] Legea nr. 96 din 21 aprilie 2006 privind Statutul deputaților și al senatorilor, Art. 20-26.

[76] Constanța Călinoiu, Victor Duculescu, *op. cit.,* pp. 127-128.

[77] See the Decision No 122/1996 on the Constitutionality of the Law regarding the Status of the Deputies and the Senators.

[78] See the Decision No 279/2006 on the Constitutionality of art. 22, 23, 28, 35, 38, 40, 41, 49, 50 of the Law regarding the Status of the Deputies and the Senators.

[79] Constanța Călinoiu, Victor Duculescu, *op. cit.,* p. 130.

[80] Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.,* p. 679.

> (2) Deputies and senators may be subject to criminal prosecution or sent to trial for actions which are not related with votes or political opinions expressed in the exercise of their office, but they shall not be searched, detained or arrested without consent from the Chamber whose members they are, after being duly heard. Prosecution and indictment may only be carried out by the Prosecution Office attached to the High Court of Cassation and Justice. Jurisdiction shall rest in the High Court of Cassation and Justice.
>
> (3) In case of a crime committed in flagrante delicto, a deputy or a senator may be taken into custody and searched. The Minister of Justice shall forthwith inform the President of the Chamber on such custody and search. Where the Chamber concerned finds no reason for detainment, it shall order that the measure be cancelled out at once."[81]

The constitutional revision seems to have compacted both non-accountability and inviolability in one article. Par. 1 maintains the freedom of opinions and the cast votes as it was in 1991; however, in par. 2 one could see that a member of Parliament could be prosecuted and sent to trial for acts that have no connection with the cast votes or with the opinions he expressed in exercising his mandate. Nonetheless, as the article states, a member could not be detained, searched or arrested without the authorisation of the Chamber he belongs to. Thus, as Ioan Muraru explained in his analysis, *the parliamentary immunity* in this constitutional provision established a rule after "which the members of Parliament could be prosecuted, that is called in for questioning, to be confronted with other persons or for eyewitness identification, and sent to trial if the Prosecutors' Office attached to the High Court of Cassation and Justice considered that the parliamentarian committed acts that were not related with his opinion and the votes cast in the exercise of his parliamentary mandate"[82]. As in the previous constitutional text, he too mentions the right of the parliamentarian to be heard before the Chamber votes the request for his arrest, search, prosecution or detention.[83] Par. 3 is similar with the initial text from the Constitution of 1991. In case of *flagrante delicto,* a member of Parliament could be detained or searched and the Ministry of Justice has to inform the Chamber the parliamentarian belongs to shortly after his punitive measures were applied. Nonetheless, the Chamber still has the authority[84] to cancel the punitive measures if it considers that no legal grounds support this action. Therefore, this provision strengthens the "principle of separation and the balance between powers. That is why, if the representatives of the judiciary power commit abuses by inventing flagrant crimes in order to arrest a deputy or a senator, Parliament has the constitutional advantage to restore the balance of power in the state mechanism."[85]

The contemporary functional character of *the parliamentary immunity* is embedded in Art. 72 from the constitutional revision of 2003 along with the Law No 96/2006 regarding the Status of senators and deputies and the revised regulations of Parliament adopted in 2005. Even so, in the interest of clarity and for legal precision one could see that minor changes have been brought. For example, the revised Regulation of the Senate from 2005, in contrast with the text from 1993, adds

[81] The Constitution of Romania of 1991 with subsequent amendments and completions by the Law No 429/2003 on the revision of the Constitution of Romania, published in the *Official Gazette of Romania*, Part I, No 758 of 29 October 2003, Art. 72, par. 1, 2, 3.

[82] Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.,* p. 680.

[83] *Ibidem.*

[84] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Simina Tănăsescu, *Constituția României revizuită. Comentarii și explicații,* C. H. Beck, București, 2004, pp. 129-130.

[85] Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.,* p. 680.

the following changes: (1) the temporal limit of immunity, that is, a senator enjoys immunity during his mandate, (2) the disposition from Art. 72 or the constitutional revision of 2003 that a senator could be prosecuted and sent to trial for the acts that have no connection with the cast votes or with the opinions he expressed in exercising his mandate and finally, (3) the Senate could authorize the prosecutor's request for arresting, searching, prosecuting or detaining a fellow senator (by secret ballot) with the majority of the senators present in the public sitting, this latter provision being recently added by the Senate Decision No 28/2015[86]. As for the Regulation of the Chamber of Deputies, the following provisions differ from the previous text from 1994: (1) the disposition from Art. 72 or the constitutional revision of 2003 that a deputy could be prosecuted and sent to trial for the acts that have no connection with the cast votes or with the opinions he expressed in exercising his mandate, (2) the Legal, Discipline and Immunities Committee has to submit its report and decision within five days from its notification, (3) the request along with the Committee's report is forwarded to the parliamentary group to which the deputy belongs to and within five days from its notification, it has to submit its point of view, (4) in the case where a deputy does not belong to a parliamentary group he/she can submit his point of view to the Standing Bureau of the Chamber of Deputies, (5) the Committee's report with the parliamentary group's viewpoint in then forwarded to the Standing Bureau of the Chamber of Deputies and finally, (6) within 20 days from its notification, the Chamber of Deputies could authorize the prosecutor's request for arresting, searching, prosecuting or detaining a fellow deputy (by secret ballot) with the majority of the deputies present in the public sitting.

The Parliamentary Immunity in the Romanian Legal and Political Thought

As we have seen, the Romanian legal and political thought seems to have reached a consensus regarding the importance of *the parliamentary immunity*. Both in the legal text (the constitutions, laws and regulations of the Senate and the Chamber of Deputies) and in the scholarly literature, the concept of *the parliamentary immunity* is regarded by specialists as a necessary tool which protects the adequate functioning of the parliamentary mandate. Tudor Drăganu, renowned legal expert and scholar defines immunity as an exception from the common law which allows the representatives to act, express and vote freely without being influenced or forced by either political and private entities during their mandate. As he clearly describes it, "*parliamentary immunity* is not a personal advantage owned by the parliamentarians"[87], rather, it is a legal instrument specific also to all the democratic and pluralist countries designed to ensure the most favourable conditions for the functioning of the Parliament. Not far from Tudor Drăganu's interpretation is the definition provided by Ioan Muraru – Romanian expert in constitutional law – in *Drept constituțional și instituții politice,* he defines immunity as a legal guarantee of the parliamentary mandate within which the deputies and the senators could exercise their parliamentary functions without any inconvenient. The authors imperatively suggest that *the parliamentary immunity* should not be understood as a removal of liability, which gives the deputies and senators the possibility to break the law, but is rather a protection against potential abuses or political actions[88]. Furthermore, the author cogently implies that "*parliamentary immunity* is neither a privilege of the representatives, nor an exemption from liability, but is a feature of the parliamentary mandate and that is why it has

[86] Senate Decision No 28/2015 amending Art. 173 from the Regulation of the Senate.
[87] Tudor Drăganu, *Drept constituțional..., op. cit.,* vol. II, p. 217.
[88] Ioan Muraru, *Drept constituțional și instituții politice,* Seventh Edition, Actami, București, 1997, p. 404.

an objective character"[89]. Consequently, *the parliamentary immunity* does not establish a privilege contrary to the principle of equality before the law. It is a guarantee of the parliamentary mandate and not just a right of each parliamentarian in part[90]. Therefore, *the parliamentary immunity* seems to be understood as the "legal outcome of the imperative status of Parliament and of the principle according to which the parliamentarians are in the service of the people"[91].

Along the same line of thinking is the interpretation of *the parliamentary immunity* provided by Mihai Constantinescu, former judge of the Constitutional Court, and Mihai Amzulescu, legal scholar, in their study *Drept parlamentar.* As Ioan Muraru, they considered that immunity is an instrument of protecting the parliamentary mandate from external pressures and abuses and has the role of protecting the freedom of speech of the members of Parliament and to safeguard them from repressive or abusive prosecution[92]. They consider that since immunity protects the parliamentary mandate it could no longer be understood as a particular right or personal privilege contrary to the principle of equality before the law[93]. A more recent perspective on *the parliamentary immunity* is given by Ștefan Diaconu in his study, *Instituții politice.* Besides the ideas previously mentioned, the author puts an emphasis on the importance and utility of the immunity in a democratic state. He suggests that a pluralist democracy could not exist if the independence and dignity of the members of Parliament are not protected. For this reason, the author considers that "*parliamentary immunity* has an imperative character and ought not to be associated with a personal right of the parliamentarians"[94]. Even though it is an exemption from the common law, immunity strengthens the parliamentarian mandate and not the personal actions of the members of Parliament. Despite the fact that a great body of scientific literature advocates in favour of this concept and attached it to the heart of every pluralist democracy, still nowadays *the parliamentary immunity* seems to have lost its initial meanings and functions. As far as our research goes, no piece of scholarly literature national or international, suggested and advocated in favour of radical or opposite interpretation, others than the one already presented. Thus, in the light of these observations, one could ask himself why and what really caused this corruption of the true meaning of *the parliamentary immunity*. The public perception associates this instrument of protecting the parliamentary mandate with a personal advantage enjoyed only by the deputies and senators, even though, as we have already observed, the legal scholars suggested and advised the contrary. How is that the immunity, meaning the protection of the independence and integrity of the members of the Parliament, has transformed in the eyes of the public perception into an instrument which protects the private interests of the parliamentarians?

This misinterpretation of the concept of *parliamentary immunity* is not an insular case specific only to Romania. France, as Cecile Guérin-Bargues suggested in her study, encounters the same problem[95]. The same deviations from the original meanings and functions are obvious in Germany and Poland. Yet, no one seems to have given any good explanation for this phenomenon. As I see it, this deliberate misconception of *the parliamentary immunity* is specific to all of the states which imported, directly or indirectly, the two-layer system of *the parliamentary immunity*; however, only the inviolability of the members of Parliament seems to be questioned. In Romania, from our

[89] Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.,* pp. 680-681.
[90] *Ibidem,* p. 682.
[91] *Ibidem.*
[92] Mihai Constantinescu, Marius Amzulescu, *Drept parlamentar..., op. cit.,* p. 45.
[93] *Ibidem.*
[94] Ștefan Diaconu, *Instituții politice,* Second Edition, C. H. Beck, București, 2015, p. 177.
[95] Cecile Guérin-Bargues, *op. cit.,* p. 361.

observations, it seems that the cause of this misguided interpretation is to be found in the high number of requests for arresting, searching, prosecuting or detaining a member of Parliament which were denied by the Senate or by the Chamber of Deputies due to some parliamentary procedures[96]. As Ioan Muraru suggested, this was also the reason why the constitutional revision from 2003 clarified also some procedural aspects regarding the limits and the method of lifting *the parliamentary immunity*. Inviolability, designed to protect the representatives from the potential political actions or threats of the executive and from abusive prosecution of the judiciary institutions, its application, laid in the decision of the Chamber a member of Parliament belonged to. If we look closely at the Romanian constitutional history we could see how the procedural limits of inviolability have changed from its first occurrence in 1864 to the recent decision of the Senate to authorise a request for arresting, searching, prosecuting or detaining a senator with the majority of the members present in the parliamentary sitting. It is also true that the Chambers of Parliament attempted to give an extensive interpretation of inviolability, especially when Parliament was not in session, but nonetheless, its present understanding, its legal and constitutional functions, which, in the present case have been carefully clarified in order to not leave room for misinterpretation, are still under siege from critics. If we agree that rejecting the requests for arresting, searching, prosecuting or detaining a member of Parliament is the theoretical and functional cause of contemporary misconception of immunity, one must put this assumption to the test. In order to do so, we will take into consideration the following variables: the number of requests for each legislature in part, both in the Senate and in the Chamber of Deputies, the number of requests approved and rejected and finally the process of lifting *the parliamentary immunity*. By doing so, we will be able to confirm whether or not rejecting the requests for lifting the immunity could be a reason for contemporary criticism regarding the limits of the inviolability. From 1992 until July 2015 one could see a surprising evolution in the number of requests for arresting, searching, prosecuting or detaining a senator. In less than 25 years there were 18 registered requests submitted by the judiciary institutions for lifting *the parliamentary immunity* of a senator in order to be arrested, detained or prosecuted. For each separate request filled by the public Prosecutor, the Romanian Senate issued a decision motivating whether or not a senator could be arrested, searched or prosecuted. However, as the following tables reveal, there were cases when the public prosecutor filled more than one request of lifting *the parliamentary immunity* for a senator. For example, for Corneliu Vadim Tudor, a former Romanian senator, within the first three parliamentary mandates (1992-2004), the Senate had to vote on three requests for the lifting of his immunity. In all three of these requests, the Senate voted in favour of lifting his immunity[97]. In fact, this was the first case recorded after the collapse of the Communism when lifting *the parliamentary immunity* was asked by the public Prosecutor. The case of senator Sereș Ioan Codruț is also an interesting moment when the lifting of his immunity was asked – in two separate requests – and later authorised by the Romanian Senate (2004-2008). In contrast with the previous requests, surprising is the gravity of the accusations brought against him by the public prosecutor. Similar to the previous cases in what concerns the number of requests of lifting the immunity are the cases of Șerban Mihăilescu and Varujan Vosganian with two and Darius Vâlcov with three requests.

[96] Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.*, p. 680.

[97] See Senate Decision No 13 dated April 24th, 1996 on waiving parliamentary immunity for the senator Corneliu Vadim Tudor; Senate Decision No 7 dated March 23rd, 1999 on the approval of filing a criminal action against the senator Corneliu Vadim Tudor; Senate Decision No 36 dated November 29th, 2001 on the approval of filing a criminal action against the senator Corneliu Vadim Tudor.

Requests for Arresting, Searching, Prosecuting or Detaining a Senator in Each Parliamentary Legislature[98]

PARLIAMENTARY MANDATES	REQUESTS FOR LIFTING *THE PARLIAMENTARY IMMUNITY*	GROUNDS FOR REQUEST
1992-1996	1	Offences against public authorities.
1996-2000	1	Delivery of false information, insult, slander and offence against authority.
2000-2004	1	Delivery of false information.
2004-2008	3	Supporting an international organised crime group and treason by disclosure of secrets, confidential data and information to an organised crime group.
		Undermining of the national economy and supporting a criminal organisation.
		Bribery.
2008-2012	2	Reception of undue benefits and incompliance with guns and ammo regulations.
		Influence peddling, continuous malfeasance in office, forged documents under private signature and indirect participation to forgery of public documents according to the Accounting Law's provisions.
2012-July 2015	10	Continuous malfeasance in office and solicitation to forge documents under private signature.
		Malfeasance in office, influence peddling and money laundering.
		Plotting against and undermining of national economy.
		Plotting against and undermining of national economy.
		Malfeasance in office, reception of bribery, influence peddling and money laundering.
		Indirect participation to malfeasance in office, and use of influence to acquire undue benefits.
		Accessory to malfeasance in office.
		Malfeasance in office, influence peddling and money laundering.
		Malfeasance in office.
		While holding chair as Minister, for performing financial operations as trade actions that were inconsistent with his job, attributions or tasks, or conclusion of financial transaction based on information acquired on the job.
Total number of requests		**18**

Looking closely at the two tables it seems that four requests for arresting, searching, prosecuting or detaining a senator out of 18 were rejected by the Senate from the first parliamentary legislature until the end of July 2015. Three out of these four requests were rejected due to the failure to achieve

[98] All of the information presented in the following tables was graciously provided by the Legislative Directorate of the Romanian Senate and the Secretary General of the Chamber of Deputies.

the voting majority necessary to lift *the parliamentary immunity*. However, the last request which was not approved by the Senate gave birth to a great controversy in what concerns the Art. 173 from the Regulations of the Senate and also to a precedent in the postcommunist history of *the parliamentary immunity*. According to Art. 173,[99] before being amended, the Senate could have approved the requests for arresting, searching, prosecuting or detaining a senator through secret ballot cast by the majority of senators. After it was amended by the Senate Decision No 25/2015,[100] the article established that the Senate decided on a request through secret ballot cast by the majority of the members present in the parliamentary sitting. Thus, on the one hand, this precedent changed the quorum needed from approving a request, from a majority of two-thirds to a simple majority and, on the other hand, has established a legal coherence between the Regulations of the Senate, the Romanian Constitution and the law which regulated the Statute of the Senators and Deputies.

Requests Rejected by the Romanian Senate, 1992-July 2015

Decisions of the Romanian Senate 1992-July 2015	
Requests approved by the Senate	**14**
Requests rejected by the Senate due to the failure to achieve voting majority	**3**
Requests rejected by the Senate	**1**

Another important piece of information is that the numbers of requests provided is also the functional character of inviolability. Also known as procedural immunity, the inviolability of the members of Parliament also raised a number of criticisms regarding its temporal limit, its legal background and extension and the actions that are protected. In theory, as far as the legal scholars suggested, inviolability is not absolute as non-accountability. However, a better way to test if its theoretical framework corresponds with its functional reality is to analyze how immunity is lifted and for what reasons. Thus, we will take into consideration the first case of lifting *the parliamentary immunity* registered in the first Romanian legislature (1992-1996) and the last one which, as we have seen, ended with a legal and political precedent. So, comparing these two cases, similar in procedures, but entirely distinct in what concerns the legal text used and the outcome, we will have a clear account of the evolution of immunity. In 1996, for the first time in the postcommunist history of parliament, Corneliu Vadim Tudor, a Romanian senator accused of defamation by Rodica Chelaru, a Romanian journalist, and of offences brought to the authorities loses his immunity. In accordance with Art. 69 from the Romanian Constitution and Art. 149 from the Senate Regulations, as well as the Decision of the Constitutional Court No 46 from the 17th of May 1994, the Senate approved the request for lifting *the parliamentary immunity* of senator Tudor and authorised his prosecution by the judiciary institutions. Since his acts had no connection with the political statements and the cast votes, the Committee on Legal Affairs, Appointments, Discipline, Immunities and Validations, as well as two-thirds of the members present in the parliamentary sitting, agreed that *parliamentary immunity* does not also protect the offences brought to other persons or to the public authorities. Nonetheless, two more requests, almost similar with this one, were filed against him in the second and third legislature. In contrast with Vadim Tudor's case is the episode involving the senator Dan Șova. Briefly, accused of malfeasance in office, the Senate rejects the request for lifting his *parliamentary immunity*, despite the fact that

[99] Regulations of the Senate, Art. 173.

[100] See the Decision of the Senate No 25/2015 regarding the amendment of Art. 173 from the Regulations of the Senate.

many criticisms were addressed to both the senators, who supposedly voted against the lifting of the immunity (even though the vote is secret), and against the quorum needed for authorising such requests. Consequently, Art. 173 from the Regulations of the Senate was altered and, from this point on, the Senate could decide on lifting *the parliamentary immunity* of a fellow member with a simple majority. The difference between these two cases is not just in its outcome. In Vadim Tudor's case, his acts were obvious and since *the parliamentary immunity* did not also protect against accusations of defamation, slander and offences brought to the authorities (act that will be abolished later in 1999-2000), authorising the request for prosecuting a senator was just a matter or parliamentary procedure, that is why inviolability in the scholarly literature is also known as procedural immunity. However, in Șova's case, things got more complicated. When the request for lifting his immunity was not authorised, the Senate had not decided whether or not the senator was innocent and substituted the act of justice, in fact it just delayed the preventive arrest since, in the legislative's view, no clear evidence was linked to his case.

Finally, the accusations for which the public prosecutor requests the arrest, search, prosecution or detaining of a senator are not so different. For example, in most of the requests, the senators are accused of malfeasance in office, influence peddling and money laundering, other requests involve offences regarding bribery and receiving undue benefits. Nonetheless, there are also some serious accusations as plotting against and undermining the national economy, disclosing confidential information and supporting transnational criminal organisations. Still, these accusations are not very common.

Common Accusations in the Requests for Lifting *the Parliamentary Immunity* in the Senate

Accusations written in the request for lifting *the parliamentary immunity*	
Malfeasance in office, influence peddling, money laundering, receiving undue benefits, bribery	**10**
Insult, providing false information, slander and offence against authority	**3**
Plotting against and undermining national economy	**3**
Supporting organised crime, performing illegal financial operations	**2**

In the Chamber of Deputies, the growing number of requests for arresting, searching, prosecuting or detaining a deputy seems to have a more dynamic and controversial evolution than in the Romanian Senate. From 1992 until July 2015 not more than 38 requests for lifting *the parliamentary immunity* of a deputy were registered, double than in the Senate. Perhaps the only similarity that could exist between the two Chambers of Parliament is the high number of requests registered from 2012 to July 2015. In both the Senate and the Chamber of Deputies, the requests filled in this period are more than double than they were in the rest of the previous legislatures. To be more precise, in the Senate, from 1992 until 2012, there were submitted eight requests, while from 2012 until July 2015, not more than ten requests were voted by the members of the Senate. The same situation was also present in the Chamber of Deputies. From 1992 until 2012, 11 requests were submitted by the Ministry of Justice in order to be authorized by the deputies, while from 2012 until July 2015, 27 requests were voted by the deputies. Nonetheless, in the Chamber of Deputies, as it was also the case in the Senate, from the 38 requests, ten were issued for two deputies. That is why, before starting the analysis, one must have in mind that all of the requests do not correspond with only one deputy. Taking into consideration all the 38 requests for lifting *the parliamentary immunity* of a deputy we will be able to understand the evolution of inviolability, its temporal limits, its functions and its practices, as well as its present usage.

The first request for lifting *the parliamentary immunity* of a deputy was submitted by the Ministry of Justice to the President of the Chamber of Deputies in 1996. This episode is perhaps one of the most embarrassing moments in the postcommunist history of the Parliament in general and of *the parliamentary immunity* in particular. Accused of manslaughter, a Romanian deputy managed to exercise his parliamentary functions and to win a second mandate after the Chamber of Deputies rejected the request for lifting his immunity due to the lack of a voting majority necessary for validating a decision. As the scholarly literature suggest, since inviolability is considered also a procedural immunity,[101] this episode couldn't have happened if the regulations of the Parliament were set in line with the Constitution. It is true that in 1996 the Regulations of the Chamber of Deputies were in an on-going process of redesigning and the Constitutional Court, through its advisory opinions, played again an important role in creating the general framework of *the parliamentary immunity*. Nonetheless, it was not the will of the deputies who rejected the request of lifting *the parliamentary immunity*, but it was rather a precedent caused by a procedural vacuum.

The following table shows a high increase in the number of requests registered in the last parliamentary legislature, situation that is also present in the Romanian Senate. This could be the reason why *the parliamentary immunity* is in the spotlight of recent debates and criticisms. Though, in order to draw a conclusion whether or not the high number of requests represents a cause for the present misconceptions regarding the limits of immunity, it is essential to have a clear situation of the outcomes of the requests.

Requests for Arresting, Searching, Prosecuting or Detaining a Deputy in Each Parliamentary Legislature (1992-July 2015)

PARLIAMENTARY MANDATES	REQUESTS FOR LIFTING *THE PARLIAMENTARY IMMUNITY*	GROUNDS CLAIMED
1992-1996	1	Manslaughter.
1996-2000	2	Influence peddling, forgery and use of forgery.
		Forgery, use of forgery, forgery of money and other bonds, deception, accessory to willful misuse of company goods and credits.
2000-2004	2	Misrepresentation and attempted deception.
		Dissemination of false information.
2004-2008	1	Acceptance of bribe, solicitation of material misrepresentations in official documents in direct relation to corruption.
2008-2012	5	Acceptance of bribe, influence peddling, indirect participation in misrepresentations in documents under private signature related to influence peddling, offering bribe and blackmail.
		Malfeasance in office contrary to public interest, forgery related to corruption, use of forgery related to corruption and indirect participation in forgery against the Accounting Law.

[101] Mihai Constantinescu, Marius Amzulescu, *Drept parlamentar..., op. cit.,* p. 46.

		Malfeasance in office contrary to public interest, forgery related to corruption, use of forgery related to corruption and indirect participation in forgery against the Accounting Law.
		Blackmail, performance of financial operation as trading actions, inconsistent with his position, attributions or duties, in order to acquire undue benefits for himself or for anyone else.
		Influence peddling, solicitation to forge documents under private signature and solicitation to money laundering.
2012-July 2015	27	Influence peddling.
		Setup of organised crime group, deception, solicitation to forge public documents, solicitation to forge documents under private signature, solicitation to falsify one's identity, solicitation of perjury, abatement in crime, accessory to money laundering.
		Influence peddling, misrepresentations.
		Aggravated malfeasance in office against public interest.
		Influence peddling.
		Support of an organised crime group.
		Use of influence, by a member of a party's leadership, to acquire money, goods or other undue benefits for himself/herself or anyone else.
		Influence peddling.
		Use of influence, by a member of a party's leadership, to acquire money, goods or other undue benefits for himself/herself or anyone else.
		Accessory to malfeasance in office, if the public servant acquired undue benefits for himself/herself or anyone else, offering bribe, money laundering.
		Use of influence to acquire undue benefits and purchase of influence.
		Use of influence to acquire undue benefits and purchase of influence.
		Influence peddling.
		Malfeasance in office, setup of an organised crime group.
		Malfeasance in office.
		Malfeasance in office, if the public servant acquired undue benefits for himself/herself or anyone else.
		Malfeasance in office.

		Malfeasance in office, if the public servant acquired undue benefits for himself/herself or anyone else.
		Malfeasance in office.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
2012-July 2015	27	Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, attempted use of false, inaccurate or incomplete declarations to unduly acquire EU funds, use of influence to acquire undue benefits, acceptance of bribe, influence peddling, money laundry, false personal financial statements.
		Malfeasance in office, acceptance of bribe.
		Conflict of interest.
Total number of requests		**38**

Looking closely at Table 5 and Table 6 one could observe that 13 requests out of 38 were not authorised by the Chamber of Deputies. Still, 12 requests out of 13 were rejected due to the failure to achieve the voting majority necessary to waive *the parliamentary immunity* and only one request was rejected by the deputies[102]. At the same time, between 1992 and July 2015, three deputies resigned after the request for lifting their *parliamentary immunity* was submitted by the Ministry of Justice to the President of the Chamber of Deputies and, for this reason, the entire procedure for lifting the immunity was cancelled. Two important features of the character of inviolability could be seen in these two tables, which are also confirmed by the scholarly literature. On the one hand, inviolability has a temporally limited character and could protect a member of Parliament only during his mandate. If a deputy resigns, he could still be prosecuted, but, in this situation, the Chamber of Deputies would not be compelled to authorise his arrest, search or prosecution, and his actions would be brought in front of the ordinary Courts of Justice, rather than the High Court of Cassation and Justice. Nonetheless, judging by the limited number of deputies who resigned before the Chamber of Deputies authorised the request for lifting *the parliamentary immunity*, we may agree that this practice seems less used by the members of Parliament. On the other hand, one could easily see the procedural character of inviolability. In the Chamber of Deputies, as in the Senate, the immunity of members of Parliament could be lifted only if the Chamber the parliamentarian belongs to authorised the request of the judiciary authorities. Still, as we have previously stated, the Chamber has to respect the procedure, which can often lead to legal contradictions if the regulations of the Senate and Chamber of Deputies and the Law No 96/2006 regarding the Status of the Deputies and Senators are not set in line with the Constitution. That is why, when a Chamber of Parliament does not authorise the request for arresting, searching, prosecuting or detaining a parliamentarian due to the failure to achieve the voting majority necessary to waive *the parliamentary immunity*, this does not mean that the Chamber did not give its consent or that the deputy or the senator is innocent. As I see it, it means that the general framework of parliamentary procedures has to be modified in order to ease the authorisation of lifting the immunity with a simple majority. And it seems that both the regulations of the Senate and the Chamber of Deputies have reached a consensus in what concerns the majority needed when authorising the lifting of *the parliamentary immunity*[103].

Requests Approved by the Chamber of Deputies, 1992-July 2015

Decisions of the Romanian Chamber of Deputies, 1992-July 2015	
Requests approved by the Chamber of Deputies	**22**
Requests rejected due to the failure to achieve the voting majority necessary to lift *the parliamentary immunity*	**12**
Resignations before the Chamber authorised to approve the request for lifting *the parliamentary immunity*	**3**
Requests rejected by the Chamber of Deputies	**1**

[102] The Decision of Chamber of Deputies No 53/2015 regarding the Request for Prosecution of Victor-Viorel Ponta, Romanian Prime Minister and member of the Chamber of Deputies in File No 122/P/2012 available online at http://lege5.ro/Gratuit/gy4tcmrtge/hotararea-nr-53-2015-privind-cererea-de-urmarire-penala-a-domnului-victor-viorel-ponta-prim-ministru-al-guvernului-romaniei-si-actual-membru-al-camerei-deputatilor-in-dosarul-nr-122-p-2012 (accessed on 21.07.2015).

[103] See Art. 173 of the Regulations of the Senate and Art. 193, par. 8, of the Regulations of the Chamber of Deputies.

Finally, some of the most common accusations presented in the requests for arresting, searching, prosecuting or detaining a deputy are rather similar to the ones from the Romanian Senate. More than half of the requests submitted by the judiciary institutions to the President of the Chamber of Deputies for authorisation contain accusations like malfeasance in office, influence peddling, money laundering, receiving undue benefits, bribery and the use of influence to acquire undue benefits and purchase of influence. However, less common accusations were on the grounds of forgery, use of forgery, forgery of money and other bonds, conflict of interest and manslaughter. Nonetheless, there are also some other serious accusations.

Common Accusations in the Requests for Lifting *the Parliamentary Immunity* in the Chamber of Deputies

Accusations written in the request for lifting *the parliamentary immunity*	
Malfeasance in office, influence peddling, money laundering, receiving undue benefits, bribery, blackmail, performance of financial operation, as trading actions, inconsistent with his position, attributions or duties, disseminating false information	**29**
Use of influence to acquire undue benefits and purchase of influence	**4**
Set-up/Supporting organised crime	**2**
Forgery, use of forgery, forgery of money and other bonds	**1**
Conflict of interest	**1**
Manslaughter	**1**

In order to answer whether or not the high number of requests for arresting, searching, prosecuting or detaining a member of Parliament rejected by the Chambers is the cause for the contemporary corruption of the true meanings of *the parliamentary immunity*, one must take into consideration the results of the requests from both Chambers of Parliament. From 1992 until July 2015 56 requests for lifting the immunity of a member of Parliament were submitted by the judiciary authorities. Some of the grounds of accusation were similar in both Chambers, others were, to a certain extent, controversial. Nonetheless, 36 requests out of 56 were approved by the Parliament since the collapse of Communism up to July 2015, despite the fact that, in more than a decade, the Chamber of Deputies and the Senate, according to their regulations, the Law No 96/2006 and the Constitution, authorised the request, by secret ballot, with a qualified majority of two thirds of their members. Furthermore, 15 requests out of 56 were rejected due to the failure to achieve the voting majority necessary to pass the decision. From 1993 to 1994, the period when the regulations of the Parliament were established until July 2015, the article concerning the majority needed to authorise the request for lifting the immunity has changed its interpretations considerably. Thus, if in the first cases, immunity had to be lifted with a qualified majority, one could see that the Parliament could now authorise requests through secret ballot with the simple majority of the present members. Moving on, only two requests were rejected by the Parliament, despite the public pressure and the insistent political attacks on these decisions of the Parliament. Finally, if we take into consideration all of the requests for arresting, searching, prosecuting or detaining a member of Parliament, one can observe that 17 out of 56 were not authorised by the Parliament. Thus, it seems that less than half of the total number of the requests registered were rejected.

Number of Requests for Lifting *the Parliamentary Immunity* in the Chamber of Deputies and the Senate

REQUESTS (1992-JULY 2015)	CHAMBER OF DEPUTIES	SENATE	RESULTS
Total number of requests	**38**	**18**	**56**
Requests approved	**22**	**14**	**36**
Requests rejected due to the failure to achieve the voting majority	**12**	**3**	**15**
Resignations before the Chamber authorised to approve the request	**3**	**0**	**3**
Requests rejected	**1**	**1**	**2**
Total number of requests rejected by the Parliament			**17**

The parliamentary immunity in postcommunist Romania represented, and still represents, from the perspective of its normative rationality, as well as of the contemporary intellectual tradition, a sensitive issue of the parliamentary life and, hence, of the political regime. Regarded as an institution "with rules and organised practices,"[104] *the parliamentary immunity* manages to launch, in the Romanian public and academic space, after 1990, a series of debates on how this right is legitimised as an instrument meant to protect the members of the Parliament in the name of the citizens[105]. *De jure*, the immunity should not be regarded as a measure that contravenes democratic values, since the legal instruments grant it the legitimate status of an institution meant to assure the good functioning of the Parliament by offering rights and privileges to its members. *De facto*, by the manner in which it is revised, *the parliamentary immunity* can contribute to the formation of unfavourable appreciations towards the legislative institution, damaging democracy's quality in Romania.

So, what really caused the corruption of the present meaning of *the parliamentary immunity*? Is it the high number of requests rejected by the Parliament, as some of the legal scholars[106] suggest, or are there other legal, social and political aspects that we have to take into consideration? To answer these questions could be easy and difficult at the same time, depending on how someone understands the role and the necessity of *the parliamentary immunity*. Are 17 rejected requests out of a total of 56 too much? For those who consider that *the parliamentary immunity* is a personal advantage, it could be. However, for those who share the opinion that the immunity is a tool which protects the parliamentary mandate and the independence and integrity of the Parliament, it is not. 17 rejected requests in less than 25 years is not a high number of cases. That is why, as I see it, besides these requests, other aspects have to be considered. Great emotions were and still are attached to this concept, both in Romania and in France, Germany and Poland. It is true that when the Parliament does not authorise a request for lifting *the parliamentary immunity* of a deputy accused of manslaughter, defamation and for other obvious controversial grounds of accusations, many misconceptions could arise and media could very easily influence the public perception.

[104] R. A. W. Rhodes, Sarah Binder, Bert A. Rockman (ed.), *The Oxford Handbook of Political Institutions,* Oxford University Press, Oxford, 2006, pp. 3-5.

[105] Marc van der Hulst, *The Parliamentary Mandate. A Global Comparative Study*, Inter-Parliamentary Union Press, Geneva, 2000, p. 65.

[106] In Romania, see Ioan Muraru, "Statutul deputaților și senatorilor", in *op. cit.*, p. 680; in France, see Cecile Guérin-Bargues, *op. cit.*

Perhaps this might be the social aspect which feeds the contemporary misconceptions of *the parliamentary immunity* in Romania. Furthermore, as we have seen in the Romanian constitutional evolution, *the parliamentary immunity* was at the center of the political conflict between the government and the opposition or between different political parties. Not authorising the request for lifting *the parliamentary immunity* of a member of the governing majority is a great opportunity for the opposition to criticise the government. Seen the other way around, authorising a request for the lifting of immunity is also in the benefit of the opposition, if we discused the situation of minority governments. In other words, parliamentary majorities could be changed and new governments could be formed if the abuses of the judiciary authorities weare not limited by the requisite authorisation of the Parliament.

In an attempt to answer what is the cause of the present misunderstanding that surrounds *the parliamentary immunity*, the study has carefully analysed both the Romanian scholarly literature and the entire legislation which regulates the protection of the members of Parliament and, most importantly, all of the requests (petitions) for lifting the immunity of a deputy and senator from 1992 until July 2015. The scholarly literature, as well as public opinion, suggested that the high number of requests not authorised by the Parliament is the cause of the unfavourable connotations associated with *the parliamentary immunity*. While the results of this study do not adhere to that conclusion, they at least offer a clear image of how the practices of *the parliamentary immunity* developed from 1992 to the present day. Therefore, this conceptual history study invites every citizen to reconsider the often misunderstood or taken for granted values of *the parliamentary immunity* and to reassess this concept's importance in every democratic society.

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La réversibilité des votes et les biais électoraux à l'aune des élections législatives françaises de 2017

Guillaume FICHET

Les normes constitutionnelles encadrant la matière électorale imposent désormais classiquement que les élections au sein des démocraties représentatives reposent sur un suffrage universel, égal, libre et sincère, secret qui connaisse une périodicité régulière.

Mais, derrière la proclamation des principes, subsiste encore une certaine polyphonie s'agissant notamment des définitions de l'égalité.

C'est ainsi que la littérature électorale a vu fleurir les notions d'égalité de suffrage, d'égalité de décompte, d'égalité de force électorale, d'égalité de représentation ou encore d'égalité des chances qui se complètent autant qu'elles se chevauchent mais qui présentent toutes en commun le souci de mieux appréhender un aspect des systèmes électoraux.

C'est dans cette perspective que les auteurs associent désormais bien volontiers le caractère satisfaisant d'un système au respect de diverses exigences comme garantie d'une assise démocratique, pluraliste et libérale. À titre d'illustration, il ressort des travaux de Richard Ghévontian que la sincérité du scrutin suppose notamment une triple égalité : *l'égalité des conditions de la compétition, l'égalité de décompte et l'égalité de représentation*[1]. Dans une approche plus générale, il peut également être fait mention de la liste des conditions consacrées ou non par une règle de droit, permettant, selon Arend Lijphart, de définir une représentation équitable : l'égalité de suffrage entre les circonscriptions et, subséquemment, du pouvoir des citoyens sur l'issue des scrutins électoraux, le respect des divisions administratives ainsi que la contiguïté et la compacité des circonscriptions, la prise en considération des minorités ethniques, raciales ou encore politiques, la conformité au principe majoritaire et neutre, c'est-à-dire aucun biais en faveur d'un parti politique ou d'un groupe communautaire, la garantie de résultats comparables au fur et à mesure des alternances politiques, la compétitivité des circonscriptions électorales ou encore la limitation du nombre de « votes gâchés », c'est-à-dire inutiles ou surabondants[2].

Il va sans dire que ces différents critères ne présentent pas tous le même niveau d'opérabilité et que certains constituent bien plus des indicateurs permettant de mesurer, *a posteriori*, le caractère équitable de la représentation que des règles juridiques susceptibles d'être mises en pratique, *a priori*, lors d'une réforme électorale ou d'une révision des circonscriptions législatives.

Quand bien même la recherche d'un système non pas seulement égal mais parfaitement équitable, qui peut apparaître à de nombreux égards comme une ambition inaccessible, ne pourrait donc guère servir de norme juridique pour l'encadrement des systèmes électoraux, elle n'en reste pas moins un prisme stimulant dans l'appréhension et la connaissance des sujets électoraux.

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[1] Richard Ghévontian, « La notion de sincérité du scrutin », dans *Cahiers du Conseil constitutionnel*, n° 13, 2002, p. 63 s.

[2] Arend Lijphart, « Comparative Perspective on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements », dans Bernard Grofman, Arend Lijphart, Robert McKay, Howard Scarrow, *Representation and Redistricting Issues*, Lexington Books, Toronto, 1982, p. 145 s. ; Arend Lijphart, « Criteria of fair representation », dans J. Paul Johnston, Harvey E. Pasis (Dir.), *Representation and electoral systems. Canadian perspectives*, Prentice-Hall, Scarborough, 1990, p. 201 s. ; R. G. Niemi, J. Deegan, « A Theory of Political Districting », dans *American Political Science Review*, n° 72, 1978, p. 1304 s.

En ce sens, l'une des critiques les plus fréquemment adressées au système électoral français, qui repose pour l'élection des députés à l'Assemblée nationale sur un mode de scrutin uninominal majoritaire à deux tours, tient au caractère relativement déformé de la représentation au moment de la conversion des voix en sièges qui entraîne, traditionnellement, une surreprésentation de la formation politique arrivée en tête aux élections législatives.

En dépit du fait que les découpages électoraux à l'origine de ces distorsions aient pu faire l'objet d'un contrôle de constitutionnalité, de nombreux commentateurs viennent à voir dans l'accentuation du caractère déformant du scrutin la manifestation de manœuvres politiciennes visant à permettre la conversation du pouvoir.

Aussi, il importe de rappeler dès à présent que la différence de degrés que peut prendre l'effet déformant d'un scrutin majoritaire uninominal n'est pas problématique en soi tant que le système électoral traite de la même manière l'ensemble des partis politiques et ne réduit pas les chances d'une alternance politique.

C'est dans cette perspective que viennent faire sens toutes les études électorales et les instruments d'évaluation extra-juridiques, et plus précisément ceux portant sur l'analyse des biais électoraux ainsi que, incidemment, sur la réversibilité, la monotonie, la réciprocité et la sensibilité aux fluctuations des votes et, bien évidemment, sur les biais électoraux[3].

En substance, la notion de réversibilité des votes recouvre l'idée que les règles électorales – le mode de scrutin, la délimitation des circonscriptions législatives mais aussi le déroulement de la campagne électorale – ne doivent point constituer des obstacles à l'alternance politique. Ainsi, le parti politique obtenant la majorité des suffrages doit pouvoir être en mesure de disposer d'une majorité parlementaire et accéder ainsi à l'exercice du pouvoir gouvernemental.

Cette problématique est complétée par la question de la monotonie des résultats, c'est-à-dire la correspondance entre la hiérarchie des voix et la hiérarchie des sièges de sorte, en principe, que l'ordre d'arrivée aux élections se retrouve dans la composition des assemblées parlementaires. Les exemples d'asymétrie, dont regorge l'histoire constitutionnelle, engendrent évidemment autant d'inégalités de représentation et peuvent, ce faisant, participer de la défiance envers les institutions représentatives.

La parfaite réversibilité des résultats électoraux devrait idéalement induire une réciprocité des résultats et une même sensibilité aux fluctuations du vote, ce qui ne se vérifie jamais compte tenu des nombreux facteurs pouvant interférer dans la conversion des voix en sièges. Il s'agit donc bien davantage d'un idéal à atteindre que d'une réalité à reproduire. Ces deux notions rejoignent, en fait, assez largement la mesure des biais électoraux qui correspondent à la différence du nombre de sièges que deux partis obtiendraient dans l'éventualité où ils recueilleraient le même nombre de voix. À distinguer du bonus traditionnellement accordé au vainqueur dans les systèmes majoritaires, les biais électoraux constituent finalement davantage une forme d'invariance relative des effets déformants du mode de scrutin.

Dans cette perspective, la réciprocité commanderait que, lorsqu'un parti politique obtient avec un pourcentage donné un certain nombre de sièges, les autres partis obtiennent le même nombre de sièges dans toutes les éventualités où ils auraient le même pourcentage de voix. En complément, la sensibilité à la fluctuation des votes supposerait que la progression du nombre de sièges gagnés en fonction du nombre de suffrages recueillis soit la même pour l'ensemble des formations politiques. À titre d'illustration, il serait, en effet, paradoxal que cette réciprocité se

[3] G. Fichet, *L'encadrement constitutionnel de la révision des circonscriptions électorales – Étude de droit comparé*, Université Panthéon – Assas – Paris II, 2016, p. 161 et 460 s.

vérifie lorsque les candidats obtiennent un nombre élevé de votes mais pas lorsque leurs résultats se rapprochent d'un partage des voix, ce qui constitue en vérité les deux extrêmes d'un seul et même problème.

L'appréciation de la réversibilité des votes dans les systèmes électoraux suppose donc, en fin de compte, de s'intéresser à la méthode de calcul des biais électoraux. Il est à noter que cette thématique a connu un grand succès au Royaume-Uni, et aussi aux États-Unis, mais demeure très peu étudiée en France avec pour conséquence une production doctrinale extrêmement limitée.

Il convient donc de se référer principalement aux travaux de R. H. Brookes, à ceux de Ron Johnston, David Rossiter et Charles Pittie, à ceux de Michael Thrasher, Galina Borisyuk et Colin Rallings ou encore à ceux de Bernard Grofman et de Thomas L. Brunell pour bénéficier des meilleures connaissances en la matière[4].

Il est entendu, d'une manière générale, que le biais électoral correspond à la différence entre le nombre de sièges remportés par un parti A et la moyenne des sièges que remporteraient les partis A et B pour un même pourcentage de voix. Il peut être mesuré au moyen de deux méthodes distinctes fondées sur le partage et l'inversion des votes. D'un côté, il convient de comparer le nombre de sièges qui serait obtenu par les différents partis politiques en cas d'égalité du nombre de suffrages. De l'autre côté, il s'agit de confronter le nombre de sièges qui serait respectivement remporté par les différents partis politiques dans l'hypothèse où ils obtiendraient alternativement le même nombre de suffrages.

Aussi, « la mise en œuvre de cette méthode d'évaluation suppose […], au sein de chacune des circonscriptions, de transférer entre partis politiques un pourcentage de vote équivalent au seuil de bascule électoral, c'est-à-dire au nombre de suffrages nécessaires pour équilibrer ou inverser les résultats électoraux »[5].

Dans la mesure où ces biais électoraux peuvent résulter d'une pluralité de facteurs, les différents auteurs se sont évertués à en décomposer les différentes parties de manière à dissocier ce qui tient aux modalités de délimitation des circonscriptions électorales, à la géographie électorale, à la population des circonscriptions, au niveau d'abstention ou encore à l'influence des partis minoritaires. En outre, cette méthode, initialement élaborée dans le cadre de systèmes bipartites, a également fait l'objet d'une transposition à des systèmes tripartites afin de mieux faire ressortir l'influence des interactions entre partis politiques.

Au regard de ces considérations, l'application de tels instruments d'évaluation à la situation électorale française, sans toutefois prétendre atteindre immédiatement un niveau de raffinement comparable, semblait ouvrir de nouvelles perspectives pour l'enrichissement de la connaissance électorale.

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[4] R. H. Brookes, « The Analysis of Distorted Representation in Two-Party, Single-Member Elections », dans *Political Science*, vol. 12, 1960, p. 158 s. ; R. Johnston, D. Rossiter, C. Pattie, « Integrating and decomposing the sources of partisan bias: Brookes' method and the impact of redistricting in Great Britain », dans *Electoral Studies*, n° 3, vol. 18, 1999, p. 367; G. Borisyuk, R. Johnston, M. Thrasher, C. Rallings, « Measuring bias: Moving from two-party to three-party elections », dans *Electoral Studies*, n° 2, vol. 27, 2008, p. 245 ; G. Borisyuk, R. Johnston, C. Rallings, M. Thrasher, « A method for measuring and decomposing electoral bias for the three-party case », dans *Electoral Studies*, n° 4, vol. 29, 2010, p. 733 ; G. Borisyuk, R. Johnston, C. Rallings, M. Thrasher, « Parliamentary Constituency Boundary Reviews and Electoral Bias: How Important Are Variations in Constituency Size? », dans *Parliamentary Affairs*, n° 1, vol. 63, 2010, p. 4 ; R. Johnston, G. Borisyuk, M. Thrasher, C. Rallings, « Unequal and Unequally Distributed Votes: The Sources of Electoral Bias at Recent British General Elections », dans *Political Studies*, n° 4, vol. 60, 2012, p. 877 ; B. Grofman, W. Koetzle, T. L. Brunell, « An integrated perspective on the three sources of partisan bias: malapportionment, turnout differences, and the geographic distribution of party vote shares », dans *Electoral Studies*, n° 4, vol. 16, 1997, p. 457.

[5] G. Fichet, *op. cit.*, p. 460.

En ce sens, il est vrai que les évènements politiques de l'année 2017 ont été assez exceptionnels en France avec l'émergence d'une nouvelle force politique « La République en marche », l'élection de son candidat, Emmanuel Macron, à la Présidence de la République et sa victoire consécutive aux élections législatives.

Paradoxalement, il paraissait pourtant acquis que la structure électorale et politique du pays ne favorisait guère un renouvellement des élus et demeurait irrémédiablement favorable aux formations déjà établies, comme le laissait d'ailleurs entrevoir la bipolarisation de la vie politique symbolisée par l'alternance entre la gauche (Parti socialiste) et la droite (L'Union pour un mouvement populaire devenue Les Républicains).

Force est ainsi de constater que c'est bien souvent au moment où elles s'effondrent que les constructions humaines révèlent finalement toute l'étendue de leurs faiblesses.

L'alternance en faveur d'une nouvelle structure partisane offre ainsi une formidable opportunité de réfléchir à la réversibilité – et dans une certaine mesure à la réciprocité et à la sensibilité aux fluctuations des votes – en faisant notamment ressortir les éléments susceptibles de venir hâter ou, au contraire, ralentir le mouvement de la démocratie.

À dire vrai, l'ambition de cette étude, et donc sa problématique, est de s'interroger sur la manière d'identifier les différents facteurs conditionnant l'appariement d'un parti politique avec un système électoral de manière à faire réellement triompher la volonté des électeurs.

En l'occurrence, il apparaît effectivement que de nombreux éléments semblaient pouvoir faire obstacle à l'entreprise du Président Emmanuel Macron. À s'en tenir strictement au cas des élections législatives, il peut ainsi être fait mention, de manière non limitative, de la répartition des sympathisants politiques, des effets induits par le découpage des circonscriptions, de la présence de « fiefs politiques » historiques, de la faiblesse de l'implantation des structures locales comparativement aux autres formations politiques, de la notoriété des candidats sortants ou encore de l'existence d'alliés politiques.

À l'inverse, les élections législatives de 2017 ont finalement débouché sur une recomposition du paysage politique français – dont seul l'avenir sait pour combien de temps – et sur un profond renouvellement des membres de l'Assemblée nationale.

En conséquence, il conviendra successivement de s'intéresser à la mesure des biais électoraux (I) afin de s'assurer de l'égalité entre les partis politiques et de mettre en lumière les facteurs de la réversibilité des votes (II) en vue de mieux comprendre les réussites inégales dans le cadre de la compétition électorale.

I – La mesure des biais électoraux

L'issue des élections législatives de 2017 constitue, tout à la fois, un cas d'étude particulièrement attrayant eu égard aux nombreux bouleversements politiques et parlementaires mais aussi une véritable épreuve méthodologique dans la mesure où l'estimation des biais suppose de surmonter un certain nombre d'écueils résultant de la différence des systèmes électoraux.

Dans cette perspective, il convient, afin de faire ressortir tout l'intérêt et la potentialité de cette méthode d'évaluation, de mettre en lumière les modalités de la transposition aux élections législatives de 2012 (A) puis de discuter des conditions de son adaptation à dessein d'en permettre l'application aux élections législatives de 2017 (B).

A – La transposition aux élections législatives de 2012

L'apport des recherches portant sur les biais électoraux associé au manque de publications francophones sur le sujet plaidaient incontestablement en faveur d'une utilisation de ces méthodes dans l'analyse du système électoral français.

À cet égard, la transposition aux élections législatives françaises de 2012 se révélait d'autant plus intéressante que cette échéance électorale suivait de très près la révision des circonscriptions opérée en 2010, de telle sorte que les biais éventuellement constatés ne pourraient guère être vus comme la seule conséquence de l'œuvre corruptrice du temps[6].

Au cas d'espèce, la configuration du paysage politique français, avec un clivage gauche / droite encore marqué au niveau des candidatures, se prêtait plutôt à l'exercice. La principale difficulté, en comparaison de la situation britannique, tenait évidemment aux modalités de transfert des voix dans un système composé de deux tours de scrutin. Il en découlait quelques réserves méthodologiques susceptibles d'être améliorées en vue d'affiner les résultats. Eu égard au nombre d'élus au premier tour, à la logique bipartisane des duels au second tour et au nombre limité de triangulaires, l'analyse s'est ainsi portée sur les résultats obtenus lors du second tour de scrutin. Les candidats élus au premier tour se sont vu attribuer un score théorique à partir des estimations de reports de voix tandis que les cas de triangulaires ont été ramenés à des situations de duels en fonction des inclinaisons partisanes des différents candidats.

À partir de ces données, il avait alors été possible de conclure que le système électoral français s'avérait biaisé d'environ une quinzaine de sièges en faveur de la droite. En conséquence, il apparaissait, de cette manière et en suivant les simulations alors réalisées, que « la droite aurait pu disposer d'une majorité des sièges avec seulement 49, 27 % des voix »[7].

1. ***Estimation des biais électoraux affectant la représentation au sein de l'Assemblée nationale (Élections de 2012)***

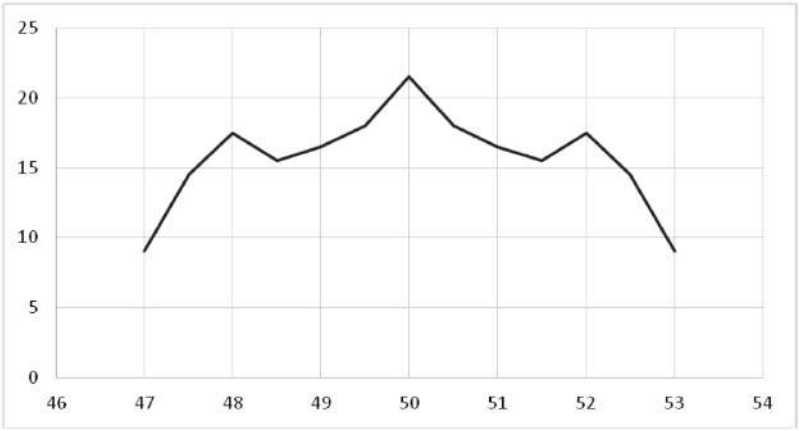
Parti politique	**Répartition des sièges à l'Assemblée nationale**		
	Situation actuelle	Partage des voix	Situation inverse
Gauche	344	267	215
Droite	233	310	362
Total	577	577	577

Il était d'ailleurs intéressant de noter que les deux méthodes de calcul des biais électoraux, à savoir le partage et l'inversion des votes, ne fournissaient pas des résultats identiques, renvoyant ainsi plus directement à des difficultés en matière de réciprocité et de sensibilité à la fluctuation des votes (le caractère asymétrique de la représentation étant particulièrement exacerbé en cas de partage des voix et donc de scrutin serré).

[6] *Ibidem*, p. 45. Les conclusions présentées ici se situent dans la continuité du travail amorcé dans la thèse précédemment mentionnée.

[7] *Ibidem*.

2. ***Biais électoraux suivant le pourcentage de voix (Élections de 2012)***



En l'occurrence, les biais apparaissaient être toujours favorables à la droite mais l'amplitude demeurait toutefois variable en fonction des scores électoraux, complétant ainsi l'analyse sous un angle moins strictement dépendant des résultats enregistrés par les candidats à l'occasion d'une élection donnée.

Afin de faire ressortir les raisons structurelles de cette réversibilité partielle des votes, l'accent avait également été mis sur le nombre important de « bastions politiques », c'est-à-dire de circonscriptions vraisemblablement acquises à un parti politique indépendamment de la succession des scrutins et des alternances politiques, tels qu'ils semblaient résulter du redécoupage de 2010. En ce sens, la nouvelle Assemblée nationale était en effet composée à 59 % de députés sortants tandis que près de 444 parlementaires avaient été élus avec un écart de voix supérieur à 5 % dont 330 avec un écart supérieur à 10 %.

3. ***Ventilation des circonscriptions remportées selon l'écart de voix (Élections de 2012)***

Parti politique	**Nombre de circonscriptions remportées selon l'écart des voix (Élection 2012)**				
	Supérieur à 5 %	Supérieur à 10 %	Supérieur à 15 %	Supérieur à 20 %	Supérieur à 25 %
Gauche	58	31	44	34	114
Droite	56	36	28	16	27

Il avait alors pu être considéré que les travers des découpages électoraux, et partant l'une des faiblesses dans le fonctionnement de la démocratie, pouvaient désormais tenir, comme dans de nombreux pays, à l'existence de biais électoraux récurrents et à l'insuffisante compétitivité des circonscriptions électorales[8].

Dans cette configuration, les deux principales formations politiques en présence semblaient pouvoir être en mesure de perpétuer leur propre existence au travers d'une carte électorale susceptible de leur fournir, en toute occasion, un nombre substantiel de sièges. Avec le maintien d'une certaine représentation parlementaire, les partis politiques se voyaient ainsi assurés de

[8] *Ibidem*, p. 513. « À défaut de pouvoir encore permettre l'émergence de majorités arbitraires, il se pourrait que les abus des redécoupages résident désormais dans la constitution de fiefs électoraux, au service de certains parlementaires et des partis politiques. »

conserver, par-delà les résultats électoraux et l'alternance politique, une certaine visibilité, la possibilité de constituer un groupe parlementaire ou encore de bénéficier des rentrées financières attachées au financement public des formations politiques[9].

Il en découlait la crainte d'une forme de verrouillage du système politique à travers notamment la limitation de l'apparition de nouvelles formations et leur accès aux assemblées parlementaires et les conséquences qui en découlent du point de vue de la féodalisation de l'espace public, de la participation électorale et de la vitalité des démocraties représentatives.

En définitive, il apparaissait effectivement nécessaire pour qu'une nouvelle force politique puisse émerger qu'elle corresponde à un mouvement profond et qu'elle « soit suffisamment puissante pour renverser les structures solidement implantées »[10]. C'est précisément ce qu'il se passa à l'occasion des élections présidentielles et législatives de 2017. À cette occasion, 67 des 141 circonscriptions remportées avec un écart supérieur à 25 % en 2012 furent quand même gagnées par un candidat de La République en marche, montrant ainsi, par anticipation, l'ampleur du phénomène et, par conséquent, sa difficile intégration, pour l'époque, dans un schéma d'analyse des circonscriptions électorales. Il est vrai que l'une des limites de cet instrument tient ainsi à son caractère explicatif, faute de pouvoir être prédictif, et à sa dépendance vis-à-vis des évolutions politiques comme en atteste son application aux derniers scrutins.

B – L'application aux élections législatives de 2017

Le résultat des élections législatives françaises de 2017 avec, dans la continuité de l'élection présidentielle, le large succès de La République en marche offre, à plusieurs égards, une nouvelle entrée analytique.

À ce titre, trois raisons peuvent être plus particulièrement mises en évidence. En premier lieu, cette méthode d'analyse nécessite l'accumulation d'un certain nombre de données afin de pouvoir affiner les calculs et les résultats. En deuxième lieu, la succession des élections, de surcroît en cas d'alternance politique, permet de porter un regard neuf sur les effets initialement attribués à une révision des délimitations électorales. En dernier lieu, l'émergence rapide d'une nouvelle formation politique et son accession au pouvoir, dans le cadre d'un mode de scrutin pourtant peu sensible « aussi bien aux variations d'opinions traditionnelles qu'à la manifestation de courants nouveaux »[11], pose nécessairement la question de son intégration dans un ensemble politique et électoral préexistant.

En l'espèce, la détermination des biais électoraux, et donc l'application de cette méthode, s'est toutefois révélée passablement plus ardue en raison des orientations statistiques et des précautions méthodologiques qui ont dû être mises en œuvre.

Tout d'abord, la dispersion des votes, avec l'apparition, en substance, de cinq ensembles politiques représentés à l'Assemblée nationale, à savoir La République en marche avec le Modem, Les Républicains avec l'UDI, le Parti socialiste, La France insoumise et le Front national, rendait une analyse bipartite difficilement envisageable. Le choix a toutefois été fait, pour des raisons de faisabilité matérielle mais également de rôle politique, de limiter l'analyse de la réversibilité des résultats électoraux aux trois principaux partis en sièges à l'Assemblée nationale, c'est-à-dire La République en marche, Les Républicains et le Parti socialiste. Par suite, et compte tenu de la présence asymétrique des différents partis au second tour des élections, une analyse limitée au seul

[9] C. de Nantois, *Le député : une étude comparative, France, Royaume-Uni, Allemagne*, LGDJ, Paris, 2010, p. 98.

[10] G. Fichet, *op. cit.*, p. 514.

[11] M. Duverger, « L'influence des systèmes électoraux sur la vie politique », A. Colin, Paris, dans *Cahiers de la Fondation nationale des Sciences politiques*, n° 16, 1950, p. 47 s.

scrutin de « ballotage » n'aurait guère été valide du point de vue de ses résultats. Enfin, l'absence de données électorales antérieures sur La République en marche limitait le recours à d'éventuelles comparaisons ainsi que les modalités de calcul des reports de voix entre les deux tours.

L'étude a donc, d'abord et avant tout, consisté en une reconstitution des structures de vote aux deux tours des élections législatives de 2017.

Au sein de chaque circonscription, les suffrages en faveur des différents candidats ont été agrégés autour des dix-sept nuances retenues par le Ministère de l'Intérieur pour la présentation officielle des résultats électoraux. Les voix en faveur de La République en marche et du Modem ont été d'emblée réunies compte tenu de leur alliance électorale. La même opération n'a toutefois pas pu être réalisée entre les Républicains et l'UDI en raison de leur présence concomitante dans une cinquantaine de circonscriptions.

Les partis politiques qualifiés pour le second tour, deux ou trois en fonction des situations (une seule triangulaire en 2017), ont vu leurs scores recalculés à partir des estimations des reports de voix sur la base de regroupements de votes effectués autour des cinq principales formations politiques.

En dépit du choix de limiter l'analyse de la réversibilité des résultats électoraux à trois partis politiques, les simulations ont été réalisées en tenant compte des différentes configurations de vote possibles entre ces cinq formations. Pour ce faire, des pourcentages de report de voix spécifiques, fondés sur les estimations des instituts de sondage, ont été appliqués au gré des différentes situations. Hormis le cas des triangulaires et des confrontations fratricides, les simulations ont donc été effectuées sur la base de dix types de duels (LREM/LR, LREM/PS, LREM/FN, LREM/FI, LR/PS, LR/FN, LR/FI, PS/FN, PS/FI et FN/FI).

Il s'est toutefois avéré que les estimations données, avant le premier tour et entre les deux tours des élections législatives, n'ont été que partiellement vérifiées dans les urnes, avec notamment une surestimation du score de La République en marche, de telle sorte que les reconstitutions de votes ne correspondaient pas parfaitement aux résultats effectivement constatés. Aussi, les taux de report ont été corrigés, lorsque les données étaient disponibles, sur la base de vérifications postérieures aux élections. En l'absence d'information, ou lorsqu'elle aboutissait à des résultats divergents entre plusieurs circonscriptions remportées par le même parti politique (une soixantaine de cas), des coefficients ont été affectés à ces dernières pour faire ressortir les particularités locales, de telle façon que le résultat recalculé dans la totalité des circonscriptions diffère de moins d'un pour cent du résultat réellement obtenu. En cas d'élection au premier tour, un score théorique de second tour a été calculé afin de pourvoir tester les différents scénarios électoraux. En outre, en cas de forte divergence entre les résultats (coefficient inférieur à 0,4 ou supérieur à 1,6), un mode de calcul des reports a été, sur la base des informations disponibles, appliqué au cas par cas (une quinzaine de circonscriptions) pour refaire ressortir les rapports de force locaux.

L'étude a, ensuite, naturellement consisté à recalculer les résultats électoraux et la représentation en sièges à l'Assemblée nationale des trois partis politiques en prenant les hypothèses où leurs nombres de voix obtenues auraient été égaux ou inversés. Il en découle sept scénarios en fonction de l'ordre d'arrivée des formations : ÉGALITÉ, LREM/LR/PS, LREM/PS/LR, LR/LREM/PS, LR/PS/LREM, PS/LREM/LR et PS/LR/LREM. Les « transferts de voix », équivalents aux seuils de bascule électoraux, ont alors été appliqués aux différentes formations afin de mesurer la réversibilité des votes et l'importance des biais électoraux. En pratique, les trois partis politiques ont donc vu, en fonction des situations, leur nombre de voix au premier tour des élections être augmenté ou diminué (avec, dans ce cas, une neutralisation des éventuels résultats négatifs) de manière à obtenir, à l'échelle nationale, un nombre de suffrages identique à ceux de leurs adversaires.

Les candidats qualifiés au second tour ont ensuite simplement bénéficié des reports de voix attachés au type de confrontation dans laquelle ils se trouvaient, de sorte à déterminer ultimement les vainqueurs virtuels.

Il ressort de cette analyse que le système électoral français serait biaisé en faveur des Républicains et du Parti socialiste au détriment de La République en marche. Quand bien même les résultats diffèrent légèrement suivant le raisonnement retenu, il apparaît, en se basant sur le partage des voix, que les biais électoraux s'élèvent respectivement à + 20 sièges pour Les Républicains, à + 14 sièges pour le Parti socialiste et à – 34 sièges pour La République en marche.

4. ***Estimation des biais électoraux affectant la représentation au sein de l'Assemblée nationale (Élections de 2017)***

Parti politique	**Répartition des sièges à l'Assemblée nationale**		
	Situation actuelle	Partage des voix	Inversions des voix
LREM	353	149	X / 45 / 10,5
LR	136	203	452 / X / 41
PS	51	197	455 / 129 / X
Autres	37	28	20,5
Total	577	577	577

En complément, il convient de noter, en recourant à l'inversion des voix, c'est-à-dire lorsque le résultat de chaque parti est comparé au résultat moyen qui aurait été obtenu par les deux autres partis dans l'éventualité où ils auraient obtenu le même nombre de suffrages, un transfert excédentaire de 18 sièges pour Les Républicains, excédentaire de 10 sièges pour le Parti socialiste et déficitaire de 36 sièges pour La République en marche, la différence tenant à la présence d'autres formations politiques.

Il convient ainsi de mettre l'accent sur la dimension relative des biais électoraux qui varient en fonction de l'ordre d'arrivée, des pourcentages de voix obtenus et des écarts entre les différentes formations. Il ne s'agit donc pas nécessairement d'un avantage ou d'un désavantage valable dans l'absolu mais d'une sous-représentation ou d'une surreprésentation valable par rapport à une situation électorale donnée. C'est toutefois en présence de biais systématiquement favorables ou défavorables que vient poindre la problématique de la réversibilité des votes.

Partant, il importe de rechercher les explications de l'existence et de la structure de ces biais électoraux.

En premier lieu, la répartition des voix au premier tour des élections, avec des écarts importants entre La République en marche, Les Républicains et le Parti socialiste recueillant respectivement, après mise en forme, 32,34 %, 18,33 % et 8,02 % des voix[12], explique le nombre important de sièges remportés et les disparités notables lors de l'inversion des votes.

[12] Les données ont été actualisées pour comptabiliser les candidats du Modem avec les candidats de la République en marche et pour tenir compte des accords électoraux entre Les Républicains et l'UDI et entre le Parti socialiste et Europe Écologie – Les Verts (EELV).

En deuxième lieu, il est intéressant de noter l'apparition réussie d'une nouvelle force politique, La République en marche, qui a pleinement bénéficié des effets du mode de scrutin majoritaire sans pour autant disposer de biais électoraux favorables. Cette situation n'est pas totalement inconnue, à l'image des Libéraux au Royaume-Uni, pour un courant politique souhaitant s'imposer entre deux formations historiques ancrées. En l'espèce, la différence tient toutefois au fait que La République en marche a disposé de la meilleure efficacité des votes avec, en moyenne, un siège pour 20 755 voix, traduisant ainsi une assez bonne répartition sur le territoire.

5. ***Nombre de voix par siège (Élections de 2017)***

Parti politique	Nombre de voix par siège (2017)
LREM	20 755
LR	30 537
PS	35 608
FN	299 045
FI	92 505

En conséquence, il semble que ces biais électoraux tiennent davantage au fait que La République en marche ne dispose pas, à l'exception du Modem avec lequel les circonscriptions ont été réparties dès le premier tour, d'alliés politiques permettant d'apporter des réserves de voix dans la perspective du second tour. À cet égard, il est intéressant de souligner que le nombre de voix obtenues par les candidats au second tour a, en moyenne, augmenté de 29 % chez les candidats « LREM » contre 63 % chez les candidats « LR ». En conséquence, dans l'hypothèse inverse où les candidats « LREM » arriveraient en deuxième ou troisième position, ils seraient, contrairement aux candidats « LR » et « PS », dans l'incapacité de rattraper leur retard, ce qui explique, en lien avec les écarts acquis au premier tour, les résultats particulièrement favorables.

En dernier lieu, le biais électoral en faveur des Républicains, malgré des résultats en voix assez faibles, reste finalement marqué en cas de partage des voix, ce qui leur permettrait, comme en 2012, de disposer d'une majorité avec un moindre nombre de suffrages. En ce sens, une bascule de 4,7 % des voix de La République en marche vers Les Républicains, soit une répartition à 27,6 % contre 23 % permettrait néanmoins, toutes choses étant égales par ailleurs, aux deux partis de disposer d'un même nombre de sièges. Au surplus, les résultats favorables du Parti socialiste, en comparaison du nombre de suffrages obtenus, et la surreprésentation à l'Assemblée nationale qui en découle, trouvent logiquement leur explication dans la solidité de leur enracinement local.

Au-delà de la prise en compte de la variation des inégalités de représentation et de l'explication des biais électoraux correspondant à une situation donnée, il convient désormais de s'intéresser aux facteurs influant sur la réversibilité des votes.

II – Les facteurs de la réversibilité des votes

L'analyse du résultat des élections législatives de 2017 montre, en dépit de l'existence de biais électoraux, que la position dominante dans laquelle se trouvaient Les Républicains et le Parti socialiste du point de vue de leur antécédence et de leur implantation n'a finalement guère constitué un obstacle insurmontable à l'accession au pouvoir de La République en marche.

Dans cette perspective, il convient de s'intéresser aux éléments ayant favorisé cette réversibilité des votes, certes imparfaite mais dénuée d'arbitraire, à travers l'influence sur le niveau des

résultats électoraux (A) avant de mettre, plus généralement, en évidence les conséquences sur l'appréhension des systèmes électoraux (B).

A – L'influence sur le niveau des résultats électoraux

Le succès rapide dans l'implantation d'une nouvelle formation politique, et bien plus encore dans la conquête du pouvoir à l'occasion des élections présidentielles et législatives, constitue finalement un phénomène rare qui, s'il est nécessairement porté par l'assentiment populaire, ne se heurte pas moins à un certain nombre de résistances.

Dans cette perspective, cet article se propose de vérifier quelques-unes des hypothèses pouvant influer sur le niveau de réversibilité des votes et donc d'expliquer la réussite de La République en marche par rapport à une situation électorale qui lui était présentée comme défavorable, ne serait-ce qu'en raison de l'articulation de la vie politique française autour de l'opposition classique entre les forces de droite et les forces de gauche.

Il va évidemment sans dire que la réussite du Président Emmanuel Macron et de son parti « La République en marche » tient d'abord et avant tout – y compris les évènements ayant émaillé la campagne électorale – à son positionnement censé dépasser les clivages partisans et aboutir à terme à une recomposition durable du paysage politique français.

Il n'en reste pas moins nécessaire d'analyser les autres facteurs ayant permis ce renouvellement inédit de l'Assemblée nationale avec seulement 25,4 % de députés sortants réélus en 2017 contre, comme cela a été précédemment mentionné, 59 % en 2012.

Tout d'abord, il est communément admis, bien que cela puisse donner lieu à discussion, que l'élection présidentielle emporte un effet d'entraînement sur les élections législatives[13], c'est-à-dire une certaine mise en conformité des deux scrutins, désormais rapprochés depuis l'instauration du quinquennat, ce qui favorise ainsi le ralliement de certains électeurs et l'attribution d'une majorité parlementaire au Président de la République.

À cet endroit, la comparaison des scores obtenus par le Président Emmanuel Macron lors du premier tour de l'élection présidentielle et les candidats « LREM » et « Modem » lors du premier tour des élections législatives montre une hausse moyenne du pourcentage de voix de 7,5 points entre les deux scrutins (soit une progression de 33 %).

Il est donc possible d'en déduire une restructuration partisane assez élevée par rapport aux votes constatés lors des élections législatives de 2012. Il convient également de mettre cette bascule en parallèle avec le nombre de voix, précédemment évoqué, qu'il serait nécessaire de transférer pour donner une majorité aux Républicains.

Dans cette optique, il est indéniable que l'état politique du pays est susceptible, dans la foulée des élections présidentielles, de venir bouleverser en profondeur les situations établies s'agissant de la coloration politique des circonscriptions électorales.

Ensuite, il convient de s'intéresser à la nature des circonscriptions remportées par La République en marche afin de mieux comprendre la dynamique et les circonstances ayant sous-tendu cette percée électorale et la prise de fiefs historiques.

À ce sujet, il est vrai que la sociologie électorale a déjà apporté un certain nombre d'éléments de réponse permettant d'appréhender le profil des électeurs ayant voté en faveur du Président de la République et, par voie de conséquence, le type de circonscriptions plus favorables aux candidats de La République en marche.

[13] P. Brunet, A. le Pillouer, « Pour en finir avec l'élection présidentielle », dans *La vie des idées*, 2011 ; P. Martin, « L'élection présidentielle et les élections législatives de 2002 », dans *Commentaire*, n° 3, 2002, p. 575.

Il semblerait, en effet, que cette nouvelle formation politique ait plus particulièrement attiré, lors de l'élection présidentielle, les personnes diplômées, appartenant aux catégories socio-professionnelles supérieures ou aux retraités et habitant dans des zones urbaines.

Au-delà de ces considérations, l'enjeu est assurément de savoir si le renversement des positions établies trouve une traduction dans l'inclinaison politique de la carte électorale. Dans cette perspective, il a été entrepris de reconstituer la généalogie des circonscriptions dont les frontières électorales sont demeurées inchangées depuis le redécoupage de 1986. L'étiquette politique des vainqueurs a ensuite fait l'objet d'une actualisation afin de pouvoir retirer des enseignements sur le long terme.

Il a ainsi été possible d'isoler 230 circonscriptions de référence dont 142 ont été remportées par l'alliance « LREM – MODEM » lors des élections de 2017. En rapportant les vainqueurs à la dichotomie classique entre gauche et droite, il en résulte 20 combinaisons de résultats.

6. ***Historique de la coloration politique des circonscriptions inchangées depuis 1986 et remportées par les candidats « LREM » (Élections de 2017)***

1988 (G)	1993 (D)	1997 (G)	2002 (D)	2007 (D)	2012 (G)	Nombre
D	D	D	D	D	D	26
D	D	D	D	D	G	17
D	D	D	D	G	D	2
D	D	D	D	G	G	6
D	D	G	D	D	D	5
D	D	G	D	D	G	7
D	D	G	D	G	G	4
D	D	G	G	G	G	1
G	D	D	D	D	D	6
G	D	D	D	D	G	4
G	D	D	D	G	G	1
G	D	G	D	D	D	8
G	D	G	D	D	G	10
G	D	G	D	G	G	6
G	D	G	G	D	D	1
G	D	G	G	D	G	1
G	D	G	G	G	D	3
G	D	G	G	G	G	22
G	G	G	G	D	G	2
G	G	G	G	G	G	10

Il ressort de ces résultats que les succès de La République en marche ont indifféremment concerné des circonscriptions situées à gauche et à droite. Il convient toutefois de souligner, parmi ces 142 circonscriptions, que 56 étaient historiquement de droite (avec un seul passage à gauche) contre seulement 34 historiquement de gauche (avec un seul passage à droite). Si l'attention s'est focalisée sur la chute du Parti socialiste eu égard au nombre très élevé de sièges perdus et le déplacement que cela révélerait de leurs électeurs vers La République en marche, cette analyse montre que Les Républicains ont été directement affectés par ce mouvement, ce qui explique d'ailleurs le faible nombre de suffrages recueillis. Au surplus, il est d'ailleurs intéressant de constater que seules 10 circonscriptions sont conformes aux différentes alternances politiques ayant marqué cette époque.

Enfin, il est apparu absolument nécessaire de s'intéresser aux effets de l'évolution de la législation relative au cumul des mandats électoraux. En effet, la loi organique du 14 février 2014[14] est venue interdire le cumul d'un mandat de député avec des fonctions exécutives locales, créant ainsi les conditions d'un renouvellement du personnel politique et, potentiellement, d'une remise en cause d'un certain nombre de bastions électoraux.

Au-delà du remplacement des candidats et des élus, il s'agit surtout de mesurer les effets de cette réforme sur les éventuels changements de bord politique des circonscriptions électorales. Il n'en reste pas moins que cet exercice demeure relativement fastidieux au regard des données nécessaires à l'établissement du diagnostic. Cela est notamment vrai s'agissant de l'implantation et du degré de notoriété des candidats appelés à remplacer les parlementaires n'ayant pas souhaité se représenter, ce qui plaide incontestablement en faveur d'une déclinaison de ce type d'analyses au niveau local.

En l'espèce, il apparaît que les députés sortants ne se sont représentés comme candidats que dans seulement 352 circonscriptions, soit environ 61 % des circonscriptions, ce qui correspond à peu près au nombre de parlementaires sortants réélus en 2012. À cette époque, ils étaient 470 députés à avoir sollicité un nouveau mandat (soit environ 81 % des parlementaires). En conséquence, l'élection des 430 nouveaux députés doit à la fois au renoncement de certains parlementaires à se représenter (225), dont près de la moitié sans doute en raison de la nouvelle législation électorale, et aux victoires remportées contre les députés en poste (205). Au demeurant, les députés sortants battus lors de ces élections l'ont été essentiellement par des candidats « LREM – MODEM » (166) et dans une moindre mesure « LR » (15) et « FI » (10).

En le même sens, La République en marche a bénéficié dès le premier tour des élections législatives du ralliement de 29 députés sortants, à raison de 28 issus de la gauche et 1 seul issu de la droite, montrant ainsi que cette victoire tient également à l'absorption du personnel politique de la gauche et d'une partie de la structure gouvernementale. En outre, cette liste pourrait d'ailleurs être allongée en intégrant, à l'image de l'ancien Premier ministre Manuel Valls, les députés s'étant présentés sous la bannière « majorité présidentielle » sans avoir reçu l'investiture officielle.

Il convient également de mentionner le cas de 36 députés sortants ayant été investis comme suppléants dans leurs circonscriptions. Cette stratégie s'est finalement avérée être efficace dans 16 circonscriptions, ce qui présente malgré tout un ratio légèrement meilleur comparativement aux résultats dans l'ensemble des circonscriptions électorales.

Pour autant, il convient de noter, assez paradoxalement, que les résultats du second tour des élections ne révèlent pas d'écarts de voix significatifs entre les candidats suivants qu'ils étaient ou non un parlementaire sortant. En effet, les députés réélus sortants l'ont été avec, en moyenne, 58,9 % des suffrages contre 57,8 % pour les candidats non sortants. À ce sujet, il importe de mettre en lumière le caractère assez tranché des résultats avec des députés élus avec, en moyenne, 58,08 % des voix.

7. ***Scores moyens des candidats « PS » et « LR » au premier tour des élections législatives en fonction du type de circonscription (Élections de 2017)***

Parti politique	**PS**	**LR**
Score moyen dans l'ensemble des circonscriptions	8,02	18,33
Score moyen dans les circonscriptions avec des députés sortants	15,9	27,3
Score moyen dans les circonscriptions avec des députés sortants comme suppléants	10,8	22,6
Score moyen dans les circonscriptions remportées	26,3	28,7

[14] Loi organique n° 2014-125 du 14 février 2014 interdisant le cumul de fonctions exécutives locales avec le mandat de député ou de sénateur.

À l'inverse, il est intéressant de noter que la présence ou non d'un parlementaire sortant influe grandement sur les résultats des candidats au premier tour des élections législatives. Il se rapproche d'ailleurs, pour Les Républicains, du résultat moyen dans les circonscriptions finalement remportées. Il est également possible de constater, en lien avec ce qui a été précédemment mentionné, que la présence du député sortant comme suppléant permet aux différentes formations politiques d'engranger des voix supplémentaires sans toutefois engendrer de hausse spectaculaire. Enfin, les succès du Parti socialiste sont à mettre en perspective avec des scores élevés dans certaines circonscriptions au premier tour associés à l'existence de réserves de voix.

En conclusion, il apparaît donc que la conjonction de ces différents facteurs fournit une voie d'explication à la mécanique des succès électoraux de La République en marche par rapport aux formations plus anciennes et, ce faisant, à la dynamique de réversibilité des votes.

B – Les conséquences sur l'appréhension des systèmes électoraux

L'application au cas français de l'évaluation des biais électoraux et de leur réversibilité débouche mécaniquement sur la question de son utilisation dans le cadre de l'analyse et du contrôle des systèmes électoraux.

Le grand intérêt du recours à ce type de méthode réside incontestablement dans l'accession à un nouveau niveau de connaissance. La problématique des biais électoraux et, à travers eux, celle de la réversibilité, de la réciprocité et de la sensibilité à la fluctuation des votes constituent des paramètres influant sur la nature des systèmes électoraux et, donc, sur le fonctionnement des démocraties représentatives.

Dans cette perspective, la valeur de l'analyse est essentiellement explicative en ce qu'elle permet de mieux comprendre les effets attachés à une réforme et à des résultats électoraux. Elle peut également revêtir une portée pédagogique lorsqu'il s'agit de démontrer que les inégalités de représentation et l'asymétrie des résultats ne résultent pas nécessairement de l'arbitraire d'un pouvoir politique désireux de conserver sa majorité parlementaire.

L'accent a été mis, dans cette étude, sur la méthodologie de la transposition aux élections législatives françaises et sur l'identification d'un certain nombre de facteurs susceptibles d'accélérer ou de freiner l'alternance et la réversibilité des votes ; il serait néanmoins utile, pour bénéficier d'une vue plus détaillée de la situation électorale des partis politiques, de prolonger cette analyse avec une décomposition des différents biais électoraux.

En ce sens, et compte tenu du fait que les biais électoraux peuvent être ou non volontaires, il serait particulièrement intéressant de pouvoir distinguer, dans la situation de La République en marche, la part des biais imputables à la délimitation des circonscriptions électorales (qui serait fortuite eu égard à l'antériorité des opérations par rapport à la naissance du mouvement), à la distribution géographique de ses sympathisants politiques (même si l'efficacité des votes traduisait plutôt une bonne ventilation), à la structuration du paysage politique (positionnement et nombre de formations politiques), aux comportements des citoyens (participation asymétrique) ou encore à la stratégie politique mise en place par chacune des structures partisanes (ce qui peut expliquer certains succès au niveau local).

Au demeurant, il est d'ores et déjà possible d'apporter une réponse s'agissant de l'influence de la carte électorale sur les résultats des différents partis politiques en recourant à un indicateur de l'efficacité différentielle qui permet de comparer l'évolution de la répartition des « votes efficaces », c'est-à-dire les voix qui ne sont pas gâchées ou excessives, suivant que les résultats électoraux soient comptabilisés au niveau des circonscriptions électorales ou à l'échelle des divisions administratives qui en forment les parties constitutives.

En partant du principe que les cantons français constituaient, avant la réforme de 2014[15], une matrice séculaire susceptible de donner « une idée de la répartition naturelle des électeurs ou,

[15] Loi n° 2013-403 du 17 mai 2013 relative à l'élection des conseillers départementaux, des conseillers municipaux et des conseillers communautaires, et modifiant le calendrier électoral.

plus exactement, […] une agrégation relativement neutre de la population »[16], il avait été possible de comparer, pour chaque département, les résultats des partis politiques dans les cantons et leurs résultats consolidés dans chacune des circonscriptions électorales.

Pour ce faire, l'indicateur de l'efficacité différentielle avait alors été calculé à partir de la formule suivante :

Indicateur I = $[V_{EF2}/V_{EFT2}] - [V_{EF1}/V_{EFT1}]$,

avec pour définitions :

$V_{EF1 =}$ la somme des voix efficaces du parti dans les différents cantons du département ;

$V_{EF2 =}$ la somme des voix efficaces du parti dans les circonscriptions législatives du département ;

$V_{EFT1 =}$ le nombre total de voix efficaces dans les différents cantons du département ;

$V_{EFT2 =}$ le nombre total de voix efficaces dans les circonscriptions législatives du département.

Il est à noter que la somme totale des indicateurs de l'efficacité différentielle des partis politiques est égale à 0 et que les valeurs extrêmes sont respectivement de – 1 et 1.

Le redécoupage des cantons ne permet plus, en l'absence d'évaluation précise de ses effets du point de vue des rapports de force politiques et électoraux, de procéder à la même analyse s'agissant des élections législatives de 2017. Une comparaison similaire a toutefois été rendue possible en prenant en considération, à la place des cantons, les 35 671 communes présentes au sein des circonscriptions électorales. Il en ressort que l'indice moyen de l'efficacité différentielle de La République en marche se situe finalement à -0,02, avec surtout deux tiers des différences d'efficacité du vote liées à la délimitation des circonscriptions inférieures à 0,10, ce qui laisse entrapercevoir une influence limitée de la carte électorale élaborée en 2010.

Au-delà de ces réflexions, le problème reste celui de l'intégration ou non de l'évaluation de la réversibilité des votes dans le contrôle des découpages électoraux, avec pour dessein de réduire les inégalités de représentation.

À ce sujet, il semble, nonobstant ses vertus, qu'elle ne pourrait guère constituer une bonne norme opérationnelle. Plus généralement, il a été défendu l'idée suivant laquelle les différentes sources des inégalités de représentation, qu'il s'agisse de l'effet déformant du scrutin majoritaire, des biais électoraux ou encore de l'insuffisante compétitivité des circonscriptions électorales n'appelaient pas les mêmes corrections.

En l'occurrence, plusieurs raisons viennent au soutien de cette conclusion. D'un côté, une prescription relative à la réversibilité, à la réciprocité et, voire même, à la sensibilité à la fluctuation des votes, serait difficilement sanctionnable dans la mesure où aucune révision électorale n'est absolument neutre, ce qui explique d'ailleurs toute l'importance accordée aux autorités en charge des délimitations. D'un autre côté, il pourrait sembler quelque peu aventureux de contraindre les autorités normatives à modifier le système électoral pour tenir compte des biais existants, ce qui reviendrait finalement à réintégrer des considérations partisanes et à subordonner l'architecture du système à la fortune diverse des partis politiques lors des différentes consultations électorales, donnant ainsi lieu à une quête vaine et désespérée.

En conséquence, le remède réside davantage dans le fait de mettre en lumière ces biais électoraux, c'est-à-dire nommer ce « mal nécessaire » pour le faire sortir du royaume de la suspicion et le traiter comme n'importe quelle autre composante des systèmes électoraux. La production de ce type d'études serait ainsi de nature à mettre fin aux présentations partisanes et aux interprétations fantaisistes qui peuvent être données des redécoupages en fonction de la réussite des formations politiques tout en donnant à ces dernières les moyens de faire évoluer utilement leurs stratégies électorales.

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[16] G. Fichet, *op. cit.*, p. 466.

Au terme de cette étude, il convient simplement de remettre en évidence que l'analyse de la réversibilité des votes et des biais électoraux, en complément des normes électorales présidant au fonctionnement des systèmes électoraux, permet de répondre aux diverses allégations d'arbitraire qui accompagnent, régulièrement, tout fait électoral et de donner aux citoyens ainsi qu'aux partis politiques une explication – et ce faisant un moyen de correction – par rapport aux causes et aux facteurs influant sur les inégalités de représentation.

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Les variables lourdes explicatives du vote ethnique au Bénin

Hygin KAKAI

En effet, le vote est l'exercice constitutif de la souveraineté. En démocratie, c'est l'acte par lequel le citoyen choisit ses gouvernants ; c'est aussi un droit inaliénable qu'il faut analyser à l'épreuve des faits électoraux. En ce sens, la dynamique électorale se heurte à des constances. Ethnie, région, terroir sont des déterminants qui marquent le jeu des acteurs politiques. Dans toute analyse sociale et politique, la figure de « l'ethnie » et/ou de la « région » s'interpénètre. Pour l'historien Jean-Pierre Chrétien, la problématique de l'ethnie devient l'enjeu d'un débat idéologique sur les conditions de la démocratie en Afrique. L'ethnicité devient un produit politique qu'on pourrait manipuler lors des échéances électorales. Dès lors, la politisation des identités se fait socialement (construit social) et se cristallise politiquement.

En empruntant l'approche d'analyse du politologue franco-roumain Sergiu Miscoiu, **le premier niveau de la problématique** est lié à la possibilité de mettre en relief la correspondance entre les principes défendus par la démocratie moderne et ceux issus de la tradition culturelle des groupes qui venaient de se constituer en nations. **Le second niveau** est lié à la capacité de la science politique d'analyser la manière des groupes ethniques de se structurer et de se représenter politiquement. Ainsi, à partir des paradigmes explicatifs de la sociologie électorale, comment peut-on conceptualiser le vote ethnique comme la légitimation d'une **offre électorale**[1] de type déterministe, économique et rationnel ? Ainsi, l'**hypothèse générale** qui sous-tend ce travail est que le vote ethnique au Bénin fait appel à un champ social et à l'expression du politique où l'électeur, acteur de partis politiques et de la société civile, interagisse également en fonction des sentiments d'appartenance ethnique, des intérêts individualistes et ethnoclientélistes.

L'analyse révèle que d'une part, avant le renouveau démocratique, les fondements du vote ethnique étaient profonds et ancraient l'autochtonie du fait politique, d'autre part, durant le renouveau démocratique le vote ethnique est un comportement électoral non négligeable qui rend compte de la dynamique de la participation politique.

En fait, si dans la perspective husserlienne, toute conscience est conscience de quelque chose, on peut en déduire que **les causes de l'ethnicisation de l'arène politique sont profondes**. L'étude du peuplement de l'actuel Bénin révèle qu'il existait des frontières ethniques qui séparaient les unités culturelles les unes des autres. Alain Blum et Eléna Filipova diront que « La terre appartient à ceux qui en sont les "titulaires", les autres en sont simplement des habitants, voire des hôtes ».

De l'historicité des ethnies, l'approche démographique montre que le poids statistique des ethnies ne s'égale pas au point où l'on retrouve des groupes socioculturels dominants (c'est-à-dire majoritaires) sans forcément que d'autres minoritaires en soient dominés. Près de 4 citoyens béninois sur 10 sont du groupe socioculturel « Fon et Apparentés » et sont majoritairement ou minoritairement représentés dans presque tous les départements du Bénin. Tandis que les Dendi et Apparentés sont plus que minoritaires. De fait, « les individus appartenant à un même groupe ethnique (indépendamment de sa taille) se trouvent dans une situation socialement majoritaire résidant sur "leur" territoire ethnique, et dans une situation socialement minoritaire

[1] Elle suppose la configuration électorale, i.e. la consultation, les modes de scrutin, les candidats, les partis, les enjeux, la campagne ; la stratégie électorale et la conjoncture. Elle présente donc des opportunités de captation de ressources.

sur le reste du territoire national » (Alain Blum et Eléna Filipova). Cependant, **le paysage social reste multiethnique mais dynamique.** Autrement dit, malgré le fait que la démocratie soit représentative au point qu'à plus de 50% des voix, un candidat à l'élection présidentielle est déclaré vainqueur et que les groupes socioculturels du Sud font 66,70 % de l'ensemble de la population béninoise, l'analyse électorale montre que le vote ethnique n'est pas unilatéral et statique. De 1996 jusqu'à nos jours, l'élection présidentielle a été toujours remportée par un candidat du Nord, issu d'un groupe plus ou moins minoritaire.

En outre, l'ethnicité fait appel à d'autres variantes telles que le régionalisme et la logique du fils du terroir. Si le régionalisme est l'exclusivité accordée aux individus d'une région donnée, le terroir est une donnée à géométrie variable, c'est-à-dire une réalité fluide qui peut s'élargir ou se rétrécir selon le type d'élection. **C'est un identifiant géographique** qui fait de l'individu l'être qui politiquement exerce une influence sur son milieu d'origine, son milieu d'appartenance ethnique et de vie quotidienne.

Analysant l'autochtonie du fait politique avant le renouveau démocratique, la présente recherche révèle que quel que soit le mode de désignation des gouvernants dans l'Afrique notamment dans le Bénin précolonial, l'ethnicité n'était pas un déterminant. L'ethnopolitique n'existait donc pas dans les traditions africaines. De ce fait, nous soutenons l'idée selon laquelle l'ethnicité politique est une invention coloniale.

De même, le vote dans les colonies françaises, au lendemain des indépendances et les différents régimes politiques qui s'étaient succédés ont fait preuve de mobilisation politique sur fond ethnique au point où on assistait à une fragmentation de la citoyenneté. S'inscrivant dans la logique de Balandier, ce désordre politique engendre de nombreux coups d'état qui, cependant, se retrouvent dans les arcanes ethniques du pouvoir politique. Peut-on dire que de ce désordre naît un nouvel ordre politique ?

L'option idéologique marxiste-léniniste faite après le coup d'état du 26 octobre 1972 au Bénin permettait de relever un défi ethnique qui consistait à la réalisation d'une neutralité ethnique dans l'arène politique et au sein de la société toute entière. Mais, **la désethnicisation de l'arène politique** conduisant à la naissance du concept d'équilibre régional peut davantage renforcer l'ethnicité d'une part (en Europe de l'Est, on parle de la roumanisation, de la bulgarisation, de la russification, etc.) ou d'autre part n'est qu'une forme de théâtralisation atténuant les différences ethniques sans pouvoir les faire disparaître (cas du Bénin). Autrement dit, le régime révolutionnaire n'a pas pu désethniciser l'arène politique car la prégnance des logiques de terroir était encore forte.

Toutefois, la transcendance ethnique à travers la conférence nationale souveraine (CNS) et le référendum constituant de décembre 1990 sont à l'actif de l'instauration de la transition démocratique au Bénin. **Mais, le vote à l'ère démocratique n'est-il pas un vote ethnique ?**

La critique du droit des élections révèle que la carte électorale obéit à une subdivision ethnique voire régionale puisque les circonscriptions électorales ne sont rien d'autre que la résultante des champs culturels. De plus, l'espace ethnique est empiriquement le cadre de référence de création des partis politiques. **La géosociologie électorale confirme cette tendance.** Cette ethnorégionalisation du vote est un produit des stratégies politiques développées par des courtiers électoraux négociant l'offre électorale dans un espace territorialisé. Il en est de même de la campagne électorale qui est, par excellence, le lieu de communication ethnique.

Le vote ethnique a aussi une explication économique. Cette explication va de la simple raison de subsistance (la pauvreté) à des phénomènes très complexes tels que l'existence d'un

circuit communautaire de financement politique, le don électoral, l'échange, le clientélisme, l'ethnoclientélisme et la corruption électorale territorialisée. Nous concluons que le vote ethnique a essentiellement une valeur d'échange-don plutôt qu'une valeur d'usage à cause de l'intentionnalité de l'acte de l'un et de l'autre.

Le vote ethnique **c'est également une question de rationalité électorale**, c'est-à-dire qu'il s'agit contrairement à ce qu'on pourrait croire d'un choix rationnel. Indépendamment des intérêts économiques, la perspective actionniste et interactionniste permet de comprendre que l'électeur peut faire ses propres calculs et prendre une marge de manœuvre vis-à-vis de l'identification partisane. Au sein d'une territorialité, il en est de même de l'électeur non conformiste qui prend une distance vis-à-vis du fait communautaire pour opérer un vote non ethnique pour telle élection et qui est capable de revenir sur sa décision pour tel autre type d'élection. Le vote ethnique est donc un comportement électoral instable.

Cependant, il est méthodique de mettre en exergue l'action limitée du pouvoir constituant dans l'appropriation du vote ethnique, de la socialisation politique qui peut permettre de minimiser l'ampleur du vote ethnique et d'en arriver à un vote politique. Nous sommes certains que la démocratie peut contribuer à la réduction des inégalités au sein d'une société si les acteurs usent d'ingénierie constitutionnelle pour mettre en rapport déterminant culturel et devenir de l'État.

Navalny's Casus. Did the Central Election Commission of the Russian Federation Have Powers to Register Mr. Navalny as a Candidate for President of Russia? Review of Legal Grounds

Alexey SZYDLOWSKI

First of all, we shall raise issues of legal importance that will help us resolve the so-called Navalny's Casus, i.e. answer the following questions:

1. **What is the phenomenon of the Central Election Commission?**
2. **Did the Central Election Commission of the Russian Federation Have Powers to Register Mr. Navalny as a Candidate for President of Russia?**

Thus, this paper is not an insight into political grounds of the occurred events, but just an attempt to address the above issues from the perspective of the language and spirit of the Russian law and legal traditions.

Constitutional Crisis in 1992-1993 in Russia

In 1992-1993 Russia saw a keen political struggle caused by a confrontation between two opposing parties: the President of Russia Boris Yeltsin with his government and the Vice-President Alexander Rutskoy with the Supreme Soviet of Russia (Parliament). The point of the conflict was the rate of the reforms to be implemented and the presidential powers. According to the then-effective Constitution (Fundamental Law) of the RSFSR as of April 12, 1978 (with democratic amendments)[1], major part of the powers belonged to the Parliament, while Yeltsin demanded to strengthen his own powers. The Parliament also stood for gradual implementation of the reforms, while Yeltsin desired to carry them out very quickly. The outcome of the conflict was a direct violation of the then-effective Constitution by the President Yeltsin, following which he was *de jure* deprived of power. With regard to the course of the events:

On September 21, 1993, the President of Russia Boris Yeltsin signed the anticonstitutional Decree on Staged Constitutional Reform in the Russian Federation No. 1400[2]. According to the decree, Yeltsin terminated the powers of the Russian Parliament and scheduled elections to the State Duma. However, according to subparagraph 11, paragraph 6.1, Article 121-5: "The President of the Russian Federation has no right to dissolve or suspend activities of the Congress of People's Deputies of the Russian Federation and Supreme Soviet of the Russian Federation;". On September 21, 1993, President Yeltsin obviously committed a gross violation of the then-effective Constitution. Moreover, according to Article 121-6 of the Constitution: "The powers of the President of the Russian Federation may not be used to change the national-state structure of the Russian Federation, dissolve or suspend activities of duly elected government authorities, otherwise they shall be immediately terminated." Thus, having signed Decree No. 1400, President Yeltsin automatically *de jure* ceased to be the President of Russia. On the same date, September 21, 1993, the Presidium of the Supreme Soviet of Russia adopted a resolution proving automatic

[1] Constitution of the Russian Soviet Federative Socialist Republic (Extraordinary Session, the Supreme Soviet of the Russian SFSR), Vedomosti VS RSFSR, Moscow, 1978.

[2] Decree, P.R., 1993 of 21.09.1993 No. 1400 about stage-by-stage constitutional reform in the Russian Federation. Collection of acts of the President and Government of the Russian Federation (39).

impeachment of the President of Russia following a violation of the Constitution. On the same date, the Constitutional Court of the Russian Federation called for an extraordinary hearing made Finding No. Z-2[3] on Compliance of the Acts and Decisions of the President of the Russian Federation B.N. Yeltsin Related to His Decree on Staged Constitutional Reform in the Russian Federation No. 1400 as of September 21, 1993 and Appeal to the Citizens of Russia as of September 21, 1993 with the Constitution of the Russian Federation that read as follows: "Decree of the President of the Russian Federation B.N. Yeltsin on Staged Constitutional Reform in the Russian Federation No. 1400 as of September 21, 1993 and his Appeal to the Citizens of Russia as of September 21, 1993 are inconsistent with Part 2, Article 1; Part 2, Article 2; Article 3; Part 2, Article 4; Parts 1 and 3, Article 104, Part 3, Paragraph 11, Article 1215; Article 1216; Part 2, Article 1218; Articles 1651 and 177 of the Constitution of the Russian Federation and constitute grounds for impeachment of the President of the Russian Federation B.N. Yeltsin or enforcement of other special mechanisms of his liability subject to Article 12110 or 1216 of the Constitution of the Russian Federation."

Pursuant to the above findings, on September 22 and 24, 1993 the Supreme Soviet of Russia on the basis of Articles 121-6 and 121-11 of the Constitution of Russia adopted a resolution to terminate the powers of President Yeltsin from the date when Decree No. 1400 was issued and delegate the powers of the President of Russia to Alexander Rutskoy[4]. This was a legally accomplished fact: from September 22 (24), 1993, Alexander Rutskoy became the President of Russia[5]. He took the office and started exercising the powers of the President of Russia. Then, a civil conflict commenced, where the police and half of the population supported the sitting President of Russia Alexander Rutskoy, while the regular army and a little bit more than half of the population backed the individual Boris Yeltsin. The result of the civil conflict was that the individual Yeltsin ordered the army to fire warheads at the sitting Parliament of Russia, deputies of the Supreme Soviet of Russia, the sitting President and people who came there to defend the Constitutional democratic values. According to official figures, about 150 individuals were killed during that bloody coup.

It was the moment of civil conflict, when the individual Yeltsin faced the main legal problem – how to form new authorities in the country provided that all previous ones were suppressed or refused to obey. He also needed an institution that would start the organization and the conduct of elections in direct violation of the Constitution of Russia. As can be seen from records of various meetings and other documents of that period, for example: "The Moscow Regional Council started a meeting of the regional heads of the Central Russia association. The meeting is attended by authorized representatives of Vladimir, Ivanovo, Kaluga, Kostroma, Moscow, Ryazan, Smolensk and Yaroslavl Regions. For the Government, the meeting is attended by the First Vice-Prime Minister of the Government Oleg Soskovets. The meeting is chaired by the First Deputy Head of the Moscow Region Administration Anatoly Dolgolaptev. Opening the meeting, A. Dolgolaptev noted that the only authorities that remained functional those days in Russia were representative and executive

[3] The conclusion of the Constitutional Court of the Russian Federation of September 21, 1993 No. Z-2 (1993) "About compliance of the Constitution of the Russian Federation of the actions and decisions of the President of the Russian Federation B.N. Yeltsin connected with his Decree 'About Stage-by-stage Constitutional Reform in the Russian Federation' of September 21, 1993 No. 1400 and the Address to citizens of Russia on September 21, 1993".

[4] The resolution of the Supreme Council of the Russian Federation on the termination of powers of the President of the Russian Federation Yeltsin B.N. (No. 5780 – I of September 22, 1993), unpublished, Moscow, 1993.

[5] The resolution of the Supreme Council of the Russian Federation on execution of powers of the President of the Russian Federation by the vice-president of the Russian Federation Rutskoy A.V. (No. 5781 – I of September 22, 1993), unpublished, Moscow, 1993.

authorities of the federal subjects"[6], Boris Yeltsin obviously decided to create a new fourth (shaping) branch of power in Russia that would be formed by the only then-legitimate Russian authorities – executive authorities and parliaments of the subjects of the Russian Federation – and such independent branch of power was a formed Central Election Commission for elections to the State Duma.

On September 29, 1993, Boris Yeltsin, not *de jure* being the President of Russia, approved with his Decree No. 1505 the Regulation on the Central Election Commission for elections to the State Duma[7]. According to Article 3 of the Regulation "the main tasks of the commission are as follows: secure consistent enforcement of the laws on election of deputies of the Russian Federation; manage the operations of the electoral boards; secure voting rights of citizens and citizen groups; control the preparation and the conduct of elections." According to Article 4 of the Regulation, "the Commission will consist of the chairman and twenty members of the commission". Ten members of the Commission were appointed by Yeltsin from candidate subjects of the Russian Federation represented by their legislative (representative) authorities. The other ten members of the Commission were appointed from candidates represented by heads of executive authorities of the subjects of the Russian Federation.

Having established the Central Election Commission for elections to the State Duma on September 29, 1993, Boris Yeltsin formed an absolutely then unconstitutional authority, that later became *de facto* and *de jure* the fourth branch of power in Russia.

There is nothing unusual in four branches of power. For example, Sun Yat-sen, one of the founders of modern China, about a hundred years ago developed his draft constitution of China, in which he proposed a Constitution of Five Powers[8], where he also marked the electoral branch of power as a separate branch and called it a shaping branch of power; so, Boris Yeltsin did not invent anything new when he had to form Russian government authorities "from the ground up" and establish a fourth branch of power independent from other authorities. It should be noted that this idea could not be implemented without the support of the army and regional authorities of the subjects of the Russian Federation. It stands to reason that Boris Yeltsin selected only representatives from the most loyal regions to form the first Central Election Commission of Russia. Below is a closer look at the first Central Election Commission of Russia:

1. Nikolai Timofeevich Ryabov, Chairman of the Central Election Commission;
2. Alexander Vladimirovich Ivanchenko, Vice Chairman of the Central Election Commission, PhD in Law;
3. Valery Andreevich Bagin, Deputy Head of the Tyumen Region Administration;
4. Andrei Georgievich Beloborodov, Adviser to the Head of the Krasnoyarsk Territory Administration;
5. Raif Terentievich Biktagirov, columnist for *Izvestiya Tatarstana* newspaper, PhD in Law;
6. Liliya Zaudinovna Vikhlentseva, Head of the Legal Department of the Supreme Soviet of the Karachay-Cherkess Republic;

[6] *Russian Journal*, "October, 1993. Chronicle of a Revolution. September 30. Tenth day", 1997 (online). Available at: http://old.russ.ru/antolog/1993/chron102.htm (accessed on April 24, 2018).

[7] Decree, P.R., 1993 of 29.09.1993 No. 1505 about the structure of Central Election Commission on State Duma elections of Federal Assembly of Russia in 1993.

[8] Yun-hu, Z.A.N.G., "The Evolution of Sun Yat-sen's Thoughts on Five-Power Constitution [J]", in *Journal of Historical Science*, 8, 2007, p. 8.

7. Revomir Bayarovich Garmaev, Vice Chairman of the Supreme Soviet of the Republic of Buryatia;
8. Vladimir Ivanovich Emelianov, Head of the Legal Department of the Vladimir Regional Council of People's Deputies;
9. Petr Ivanovich Zhigaltsov, Chairman of the Permanent Commission of the Arkhangelsk Regional Council of People's Deputies;
10. Tatiana Dmitrievna Zrazhevskaya, Chairperson in Voronezh State University, PhD in Law;
11. Viktor Stepanovich Karpunov, Chairperson in Omsk Law Enforcement Academy, PhD in Law;
12. Sergei Petrovich Korovinskikh, Head of the Department of Justice of the Stavropol Territory Administration;
13. Valery Evaldovich Krasnyanskiy, Director of a Law Firm, PhD in Law, St. Petersburg;
14. Margarita Alexandrovna Kuznetsova, Head of the Department for Supervision over Compliance with the Laws on Minors of the Chelyabinsk Region Public Prosecution Office;
15. Valery Petrovich Naumov, Head of the Vurnary District Administration, Chuvash Republic;
16. Alexander Sanchaevich Oorzhak, Counselor to the President of the Tyva Republic for Legal Policy, PhD in Law;
17. Yury Nikolaevich Saltykov, Head of the Directorate of the Tax Police Department of the Russian Federation for the Astrakhan Region;
18. Yury Vasilievich Tarabarov, Member of the District Court of the Komi-Permyak Autonomous District;
19. Larisa Efremovna Tkachenko, President of Saratov Regional Notary Chamber;
20. Anastasiya Ivanovna Tur, Head of the Legal Department of the Magadan Region Administration;
21. Iul Petrovich Fomichev, President of the Corporation of Wood Enterprises and Joint Stock Companies in Forest Sector, Leningrad Region.

The first Central Election Commission of Russia obviously had no members from regions that did not back Boris Yeltsin, for example Sverdlovsk Region, the legislature of which backed Alexander Rutskoy and turned against Boris Yeltsin. However, in regions that supported the Yeltsin's coup, governors started active financing of the army. One of the numerous events of that time can shed light on the amount of regional help to Yeltsin. By an "Order of the Mayor of Moscow (No. 530 as of September 22[9]), military unit 3111 was given 200 million rubles 'to provide financial aid to personnel' from the reserve fund of the Government of Moscow." It turned out later that this was the military unit which was involved in firing at the Russian Parliament.

Turning to the Central Election Commission of Russia, it should be noted that it appeared to be contemplated by Yeltsin as temporary institution intended to elect new Russian authorities and wind up. However, the results of the elections to the State Duma of the Russian Federation turned out to be nowhere near Yeltsin's expectations. The State Duma elected along with the members of the Federation Council and the referendum held to adopt the new Constitution of Russia turned out to be opposition to Yeltsin. The members of the 1st State Duma were as follows:

[9] *Russian Journal*, "October, 1993...", art. cit.

Table 1. Members of the 1st State Duma of Russia, 1993-1996

Position	Lists	Leaders	Votes	%	Mandates
1	LDPR	Zhirinovsky, Kobelev, Marychev	12,318,562	22.92	64
2	Choice of Russia	Gaidar, Kovalev, Pamfilova	8,339,345	15.51	64
3	CPRF	Zyuganov, Sevastianov, Ilyukhin	6,666,402	12.40	42
4	Women of Russia	Fedulova, Lakhova, Gundareva	4,369,918	8.13	23
5	Agrarian Party of Russia	Lapshin, Davydov, Zaveryukha	4,292,518	7.99	37
6	Yabloko	Yavlinsky, Boldyrev, Lukin	4,233,219	7.86	27
7	**Party of Russian Unity and Accord (PRES)**	**Shakhrai, Shokhin, Zatulin**	**3,620,035**	**6.73**	**22**
8	Democratic Party of Russia	Travkin, Govorukhin, Bogomolov	2,969,533	5.52	14
9	Russian Democratic Reform Movement (RDRM)	Sobchak, Fedorov, Basilashvili	2,191,505	4.08	5
10	Civic Union	Volsky, Bekh, Vladislavlev	1,038,193	1.93	10
11	Future of Russia – New Names	Lashchevsky, Sokolov, Mironov	672,283	1.25	2
12	Kedr	Lymar, Chiburaev, Baranov	406,789	0.76	1
13	Dignity and Grace	Frolov, Gubenko, Grishin	375,431	0.70	3
	Independent	Candidates in a single-seat constituency			130
	None of the above		2,267,963	4.22	—
	Null and void ballot papers		3,946,002	6.84	—
	Total (Turnout 54.81%)		58,187,755	100.00	450

It is almost impossible to determine and describe precise forms, number and identities of the members of the blocks and fractions existing in the 1st State Duma, as the majority of coalitions were formed depending on the vote on a specific issue and bill. The only group of deputies that remained loyal to Boris Yeltsin all the way through was the PRES (6.73%) group, which had no influence on the general agenda. Under the conditions of another deprivation of power threatening Yeltsin, which had good reasons behind it, for example, initiation of the procedure of impeachment by deputies of the State Duma of Russia: CPRF – 42; Agrarian Party of Russia – 30; Choice of Russia – 10; Russian Way – 6; New Regional Policy – 3; Women of Russia – 2; Yabloko – 2; LDPR – 1; PRES – 1; Democratic Party of Russia – 0; 2 independent deputies (Y.P. Vlasov, A.Y. Lezdinsh); 31 deputies voted against, including 21 deputies from LDPR fraction (Choice of Russia – 7; Democratic Party of Russia – 1; PRES – 1; independent deputy A.V. Guskov); 4 deputies abstained (Choice of Russia – 2; New Regional Policy – 1; Liberal Democratic Union – 1); a total of 133 deputies participated in voting; and official charges of high treason or a grave crime against the state (see below) laid against Boris Yeltsin compelled him to walk on thin ice and have another variant of dissolution of the opposition Russian Parliament at the ready. All other things equal, dissolution of the Central Election Commission of the Russian Federation, which had already proven to be

efficient as a shaping and independent body from the Russian Parliament and Court branch of power would be a bad idea. Therefore, probably, Yeltsin not only refused to abolish the Central Election Commission, but started to strengthen the fourth electoral branch of power in every possible way.

To understand how strong the situation was, below we shall provide the full text of the Suggestions of Deputies of the Russian Parliament to Initiate Impeachment Procedure against Boris Yeltsin.

SUGGESTION

of the Deputies of the State Duma of the Federal Assembly of Russian Federation to Lay Charges against the President of the Russian Federation for His Impeachment

Activities by President B.N. Yeltsin within recent years evidence that the President of the Russian Federation constantly commits acts that cannot be determined in any other way than a grave crime.

This refers primarily to the following:

1. In September-October 1993, having issued Decree No. 1400 on Staged Constitutional Reform in the Russian Federation and given an order to use military units for the purpose of forceful termination of the activities of the Council of People's Deputies and the Supreme Soviet of the Russian Federation, President B.N. Yeltsin committed crimes involving calls to dismantle the statehood (Article 70 of the Criminal Code of the RSFSR), obstruction of the activities of constitutional authorities (Article 791 of the Criminal Code of the RSFSR) and abuse of power or authority associated with violence, use of weapons, actions demeaning victims (Part 2, Article 171 of the Criminal Code of the RSFSR).

2. In December 1994, President B.N. Yeltsin as the Commander-in-Chief of the Russian Federation gave order to commence hostilities in the Chechen Republic. By doing that, he infringed the requirements of Article 102 of the Constitution of the Russian Federation, which provides for approval of the presidential decrees on imposition of the state of emergency or martial law by the Federation Council. Having put the Federation Council aside from deciding the issue of the use of military units in Chechnya, the President again committed an abuse of power associated with violence and the use of weapons, i.e. a crime provided in Part 2, Article 171 of the Criminal Code of the RSFSR.

3. In June 1995, President B.N. Yeltsin instructed the Minister of Internal Affairs to storm hospital compound in Budyonnovsk filled with children, women, old people and other civilians kept hostages by Chechen rebels. By this step leading to numerous casualties, the President once again violated Part 2, Article 171 of the Criminal Code.

The above acts by B.N. Yeltsin are qualified by law as grave crimes.

All of that exhausts patience of the deputies who are witnesses to a wide range of other crimes committed by the President that fall outside the Constitution of the Russian Federation (involvement in dissolution of the USSR by arranging and signing the Belavezha Accords, intervention in authorities of the Federal Assembly on privatization matters, issue of decrees opening the way to pillage of national wealth and leading to impoverishment of millions of citizens, assignment of management of pre-election blocks to the Head of the Government and the Chairman of the State Duma, which is a gross violation of the constitutional principle of separation of powers, repeated disregard of the Duma's invitations to attend its sessions, etc.)

Considering all these circumstances, we, deputies of the State Duma, pursuant to Article 93 of the Constitution, lay a charge of grave crimes against people against Boris Nikolaevich Yeltsin

and consider it necessary to initiate the procedure of impeachment of the President of the Russian Federation.[10]

Obviously being in the state of constant uncertainty, Boris Yeltsin started strengthening the electoral branch of power. In 1994, he initiated adoption of Federal Law on Fundamental Guarantees of Electoral Rights of Citizens of the Russian Federation No. 56-FZ as of December 6, 1994[11], where the standing of the Central Election Commission of the Russian Federation and other election commissions in the system of government authorities is explicitly defined. Thus, Article 11, Status of Election Commissions, of the above law provides full independence of election commissions in Russia: "In preparation and conduct of elections, election commissions are, within their competence, independent of national and local authorities", "Acts adopted by election commissions within their competence, as provided in federal laws, laws and other regulations of legislative (representative) authorities of the subjects of the Russian Federation, are binding on executive authorities, local authorities, nongovernmental organizations, enterprises, institutions, organizations and officers, and lower (according to the level of the elections held) election commissions.

The Central Election Commission of the Russian Federation and election commissions of the subjects of the Russian Federation are legal entities. Other election commissions may be recognized as legal entities in accordance with the laws and other regulations of legislative (representative) authorities of the subjects of the Russian Federation.

Government authorities, local authorities, nongovernmental organizations, enterprises, institutions, organizations, mass media and their officers must give assistance to election commissions in implementation of their powers, in particular provide the required premises, transport, means of communication, technical equipment, information and materials, respond to requests of election commissions within the time limits, as provided in federal laws, laws and other regulations of legislative (representative) authorities of the subjects of the Russian Federation, and offer the possibility to publish printed information of election commissions, as provided in federal laws, laws and other regulations of legislative (representative) authorities of the subjects of the Russian Federation." The above statutory provision was later included almost without any changes in a new, more comprehensive Federal Law on Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation No. 124-FZ as of September 19, 1997[12]. The Law of 1997 also retains the enshrined principles of independence of the electoral branch of power. Article 21 of the Law provides: "11. The Central Election Commission of the Russian Federation and election commissions of the subjects of the Russian Federation are government authorities that are engaged in preparation and conduct of elections and referendums in the Russian Federation in accordance with the competence, as provided in this Federal Law, federal constitutional laws, other federal laws and laws of the subjects of the Russian Federation. 12. Election commissions, referendum commissions are, within their competence, independent of national and local authorities. 13. Resolutions and acts adopted by

[10] The State Duma of the Russian Federation, "Chronicle of an additional meeting number 259 of the State Duma of the Russian Federation, May 13, 1999" (online). Available at: http://api.duma.gov.ru/api/transcriptFull/1999-05-13 (accessed on April 24, 2018).

[11] Federal Law on Fundamental Guarantees of Electoral Rights of Citizens of the Russian Federation 1994 (No. 56-FZ as of December 6, 1994), Collection of the legislation of the Russian Federation, Moscow.

[12] Federal Law on Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation 1997 (No. 124-FZ as of September 19, 1997), Collection of the legislation of the Russian Federation, Moscow.

election commissions and referendum commissions within their competence, as provided in this Federal Law, federal constitutional laws, other federal laws and laws of the subjects of the Russian Federation, are binding on federal executive authorities, executive authorities of the subjects of the Russian Federation, public institutions, local authorities, candidates, registered candidates, electoral associations, electoral blocks, nongovernmental institutions, organizations, officers, electors and referendum participants." However, the electoral power was centralized even more by the President of Russia Vladimir Putin in 2002. Putin was, probably, psychologically affected by the loss of his former boss, Anatoly Sobchak, Mayor of Saint Petersburg, during Putin's employment in Sobchak's Administration, when following unsuccessful elections of his boss Putin lost almost everything – his office, money, contacts and social status. Since then, Putin has, probably, decided not to lose elections any more, otherwise it is difficult to explain why an important provision of the laws of 1994 and 1997 stating that members of the Central Election Commission must have a higher legal education was completely excluded from the law of 2002. Degradation of the legal level of the members of the Central Election Commission of Russia is evidenced both by provisions of the law, and by education of the chairmen and members of the commission. Article 12 of Federal Law on Fundamental Guarantees of Electoral Rights of Citizens of the Russian Federation No. 56-FZ as of December 6, 1994 provided: "Members of the commission must have a higher legal education or an academic degree in law." Paragraph 3, Article 22 of Federal Law on Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation No. 124-FZ as of September 19, 1997 provided: "Members of the Central Election Commission of the Russian Federation must have a higher legal education or an academic degree in law." After the reform implemented by President Vladimir Putin, this provision was amended to read as follows: "Members of the Central Election Commission of the Russian Federation must have a higher legal education" – Federal Law on Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation No. 67-FZ as of June 12, 2002[13], which was also amended, becoming "5. Members of the Central Election Commission of the Russian Federation shall have higher professional education. (Clause 5 as amended by the Federal Law of January 30, 2007, No. 6-FZ)". This is the provision that allowed Vladimir Putin to appoint Vladimir Churov holding a degree in physics the Chairman of the Central Election Commission in 2007. Vladimir Churov achieved prominence as he was Vladimir Putin's subordinate in Saint Petersburg Administration and it was him, whose name was mentioned in connection with rigged elections in the Russian Federation. Ella Panfilova, the current Chairman of the Central Election Commission of the Russian Federation has no higher legal education either and holds a qualification of an electronics engineer.

The author thinks that this historical and legal review of the phenomenon of the Central Election Commission of the Russian Federation demonstrates that the election commission was originally contemplated and established as an authority being superior to government authorities and, if necessary, having the right to put itself above Constitution and use only basic democratic principles as the source of law. Below we shall look into basic arguments.

Status of the Central Election Commission of the Russian Federation as at the Russian Presidential Election 2018

The status of the Central Election Commission of the Russian Federation is determined by the area of the Russian constitutional law in general, and Articles 20 and 21 of special Federal Law on

[13] Federal Law on Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation 2002 (No. 67-FZ as of June 12, 2002), Collection of the legislation of the Russian Federation, Moscow.

Fundamental Guarantees of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation No. 67-FZ as of June 12, 2002. According to Marat Baglai[14], Chairman of the Constitutional Court of Russia (1997-2003), the Constitution and the effective constitutional legal system provide that apart from three branches of power, in Russia there are six federal government authorities with a special status: Public Prosecution Office, Central Bank, Accounts Chamber, Human Rights Commissioner, Academy of Sciences and Central Election Commission. It should be noted that all the above federal government authorities with a special status have a superior supervisory authority being either the President, or one of the chambers of the Parliament, except for the Central Election Commission, which is by operation of law, within its competence, independent of any national and local authorities, thus being, in fact, the forth branch of power. Resolutions of the commission are, also by operation of law, binding on all government authorities and can be revoked only by decision of the Supreme or Constitutional Court. Status of the members of the election commission is also an important issue. Members of the Election Commission of Russia (electoral justices) have immunity from administrative and criminal prosecution. They can be subjected to administrative punishment only with the consent of the Prosecutor General of the Russian Federation, while decision to institute a criminal case against them is to be made personally by the Chairman of the Investigative Committee of Russia (equivalent to the Director of the Federal Bureau of Investigation – FBI in the U.S.). Thus, having absolute power within their competence, members of the Central Election Commission of Russia can make any decision at their own discretion. The author calls attention to the following provision of the Russian criminal law, which is also very important: Article 141 of the Criminal Code of the Russian Federation. According to this Article, obstruction of the exercise of electoral rights is punishable with imprisonment for up to five years[15]. Thus, when making a decision with respect to registration of the nominated candidate for President of the Russian Federation Alexei Navalny, members of the Central Election Commission of Russia faced a choice, whether to register Mr. Navalny as a candidate for President of Russia, and in case of a further decision of the Supreme or Constitutional Court of Russia to revoke the registration, avoid any negative consequences for them, or deny registration, but if this decision is further revoked by resolution of the Supreme or Constitutional Court of Russia, it will incur negative consequences in the form of potential criminal prosecution with probability of imprisonment for up to five years. The members of the Central Election Commission obviously made an illogic decision choosing to deny registration of Mr. Navalny as a candidate for election with legal consequences being the worst for them.

Possible Conclusions

In view of the foregoing, the author comes to the following reasoned conclusions.

1. The Central Election Commission of the Russian Federation was established in a period of acute political crisis and contemplated as the fourth shaping (electoral) branch of power being independent of the other three ones and able to come into collision with them, if necessary, and make its own decisions only on the basis of fundamental democratic principles, and not the national laws, which was further enshrined in the national laws.
2. The Central Election Commission of the Russian Federation had all powers and the required authority, as provided in the national laws and political convention, to register Mr. Navalny

[14] M. V. Baglai, *Constitution Law of Russian Federation*, NORMA-INFRA, Moscow, 2010.

[15] Criminal Code of the Russian Federation (c.4), Collection of the legislation of the Russian Federation, Moscow, 1999.

as a candidate for President of Russia. The decision to deny registration as a candidate for election had a negative and antidemocratic nature, which could further lead to negative legal consequences for the members of the commission in the form of criminal prosecution for obstruction of the exercise of electoral rights available to the citizens of the Russian Federation.

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Les quotas et les sièges réservés en fonction du genre. Le cas de la Bosnie-et-Herzégovine et de la République de Moldova

Florina CĂLIN

Introduction

La problématique des quotas et sièges réservés en fonction du genre ne peut pas être comprise indépendamment des notions de base de l'étude de genre. Il faut intégrer l'existence des quotas dans l'intégralité de l'imaginaire de l'égalité de genre.

Tout d'abord, il faut s'appuyer sur quelques définitions concernant le système social de genre, qui est un système de structures économiques, sociales et politiques qui soutiennent et reproduisent des rôles et des caractéristiques spécifiquement masculins et féminins.

Dans ce cadre apparaît la notion de démocratie paritaire, qui soutient que la société se compose d'autant de femmes que d'hommes, que leur pleine jouissance de la citoyenneté est subordonnée à une représentation égale dans le processus de la prise de décision politique et que la participation équivalente ou presque des femmes et des hommes, dans un rapport de 40/60 est un principe démocratique. Conformément au Conseil de l'Europe, la démocratie paritaire est au fait la pleine intégration de la femme, sur pied d'égalité avec l'homme, à tous les niveaux et dans tous les aspects du fonctionnement d'une société démocratique, par des stratégies multidisciplinaires.

Par conséquent, la participation équilibrée des femmes et des hommes à la prise de décision politique se détache comme objectif de la démocratie paritaire, participative, inclusive et finalement représentative. Le Conseil de l'Europe définit la participation équilibrée comme étant la représentation de chacun des deux sexes au sein d'une instance de décision dans la vie politique qui ne doit pas être inférieure à 40%[1].

Les barrières invisibles à l'encontre de la concrétisation de la représentation politique des femmes sont de 3 types : individuelles, gouvernementales et sociétales. L'étude présent va se focaliser sur les barrières gouvernementales, qui sont liées à la dimension législative et régulatrice, mais sans négliger que celles-ci découlent des perceptions dégagées par les autres barrières mentionnées auparavant.

> « Quelle que soit la région du monde considérée, les femmes restent largement absentes de la sphère politique, souvent en raison de lois, de pratiques, de comportements et de stéréotypes sexistes discriminatoires. »
> (Résolution de l'Assemblée générale des Nations Unies sur la participation des femmes à la vie politique, 2011)

Afin de réduire les éventuels déséquilibres au niveau sociétal et législatif, un exemple coercitif émerge par l'introduction des conditions minimales pour la représentation des femmes : **sièges réservés** (action directe et possible sous la forme de garanties constitutionnelles par le système de sièges réservés pour certains groupes, c'est-à-dire les femmes) et la fixation de **quotas** (un pourcentage spécifique des candidats à sélectionner doit être des femmes).

[1] Glossaire du CdE.

Les quotas – solution pour la parité en politique ?

Le *quota de genre* représente la détermination d'une proportion ou d'un nombre défini de postes, de sièges ou de ressources réservés à un groupe particulier, généralement selon certains critères ou certaines règles, en vue de corriger un déséquilibre antérieur, généralement en matière de prise de décision ou d'accès à la formation ou à l'emploi[2].

Il existe deux grands types de quotas : les quotas imposés par la constitution ou par la loi et les quotas créés par les partis politiques.

International IDEA distingue entre 3 catégories de quotas de femmes appliqués dans la sphère politique : Sièges réservés (constitutionnels et/ou législatifs) ; Quotas légaux de candidats (constitutionnels et/ou législatifs) et Quotas adoptés par les partis politiques (volontaires).

Les sièges réservés ont comme objectif de réguler le nombre de femmes élues et les autres 2 types veulent fixer un minimum de femmes sur les listes de candidats.

Les quotas sont souvent perçus sous l'égide de la discrimination positive, mais la plus partagée position est de ne pas les concevoir comme un traitement favorable, mais plutôt comme un moyen de rétablir la justice. Les structures internationales comme l'UE, l'ONU ou l'UA soutiennent ces mécanismes sans les nommer des « quotas », mais « des mesures temporaires spéciales », notamment dans la Convention de l'ONU sur l'Élimination de toutes les formes de discrimination contre les femmes de 1979.

Il faut bien différencier entre les notions de *quota* et *quota de genre*, en prenant en considération le fait que certains pays utilisent ce mécanisme aussi pour les minorités régionales, ethniques, linguistiques ou religieuses. À la base, le quota de genre a été conçu pour permettre aux femmes d'accéder aux fonctions politiques, en dépassant les barrières invisibles enracinées dans la société. Beaucoup de systèmes lient l'application des quotas à la représentation équilibrée du genre, en adoptant une vision plus nuancée, qui tend vers plus de neutralité. Les objectifs sont ainsi harmonisés – la sous-représentation des femmes comme des hommes, par la fixation d'un plafond pour les deux sexes. Cette situation laisse entrevoir une série de polémiques concernant le nombre différent de seuils établis : par exemple 40/60 au lieu de 50/50. Souvent, les experts de genre considèrent qu'il y a les trois échelons de quota : 30, 40 et 50, chacun correspond aux spécificités, besoins et limites de faisabilité de chaque société.

Il existe aussi un système de cumul des quotas, ainsi appelé le double quota, qui exige un certain pourcentage de femmes sur les listes des partis ; mais veille que celles-ci ne soient pas placées en bas de liste.

Les fondements de l'imaginaire *pour* le quota de genre sont : l'argument de la justice sociale conformément auquel les femmes représentent la moitié de la population ; fait qui détermine leur droit à une représentation politique égale ; l'argument des expériences et des intérêts communs des femmes, qui en dépit les différences d'âge, ethnie, race, culture, éducation et revenu, représentent un catalyseur d'actions, différencié par rapport aux intérêts et besoins d'hommes. À tout cela s'ajoutent les deux théories : la théorie d'Anne Phillips qui énonce que les femmes doivent être présentes sur la scène politique, afin que leurs intérêts puissent réellement être représentées ; et la théorie de la masse critique qui soutient le fait que pour se détacher de la culture dominante masculine, les femmes ont besoin d'être représentées dans un nombre suffisamment élevé, pour relever les priorités et les opinions en fonction d'un agenda propre.

[2] Commission européenne, *100 mots pour l'Égalité. Glossaire sur l'égalité des chances entre les femmes et les hommes*, 1998.

Les principaux arguments *contre* les quotas énoncent que ceux-ci sont discriminatoires envers les hommes ; qu'ils mènent à des structures législatives moins compétentes – les femmes en étant recrutées à travers des réseaux informels ; les femmes élues grâce aux quotas sont moins respectées et n'ont pas de pouvoir décisionnel réel, ainsi qu'ils dirigent l'idée de représentation vers un concept forcé et donc faussé.

L'utilisation de quotas pour améliorer la représentation politique des femmes est très répandue. Conformément au Rapport de la Banque Mondiale de 2016, plus de 40% des économies analysées ont des quotas pour les femmes relatives aux sièges au Parlement et dans les collectivités locales.

On a choisi à traiter la Bosnie-et-Herzégovine et la République de Moldova, des pays de l'Europe qui se trouvent dans une situation instable du point du vue économique et politique et représentent des pays prioritaires pour l'Union Européenne et pour le Conseil de l'Europe.

La Bosnie-et-Herzégovine

La Bosnie-et-Herzégovine est un État d'Europe du Sud situé dans la Péninsule des Balkans. Elle est divisée en trois entités territoriales non-indépendantes : la Fédération de Bosnie et Herzégovine, la République serbe de Bosnie et le District de Brčko.

Pays en voie de développement, avec une population musulmane de plus de 50% et avec un fort component patriarcal qui domine la société d'après-guerre, qui a obtenu son indépendance à partir de 1992. La paix a été signée à Dayton, en 1995 – l'accord de Dayton donnant une nouvelle Constitution au pays. Aucune femme n'a participé au processus de paix[3]. Dans cette perspective, les femmes n'ont pas eu le droit de participer à la reconstruction de leur pays, en leur destituant leur pouvoir d'action et d'exprimer la parole – situation qui a limité les perspectives d'une paix durable, et qui s'est reflétée dans la société post-guerre. Le passé conflictuel récent de la BiH a engendré la division actuelle du pays, du point de vue identitaire et ethnique. À tout cela s'ajoute la religion dominante, qui affecte la conception de la femme dans la sphère publique. Des arguments historiques de ce pays ont favorisé un milieu inégalitaire à plusieurs niveaux. C'est pour cette raison que la BiH représente un cas très intéressant à analyser dans la perspective des mécanismes appliqués pour augmenter l'égalité de genre, afin de comprendre leur niveau d'efficacité dans une situation de reconstruction post-guerre.

Les femmes ont représenté une première cible durant la guerre qui a dévasté la Bosnie-et-Herzégovine. Le génocide, le viol systématique massif et la purification ethnique ont été les armes létales contre les femmes, utilisées dans le but d'éliminer une partie de la population.

Société essentiellement patriarcale, celle-ci a favorisé la perpétuation de l'image de la femme – victime même après la guerre. À part l'image de la femme-victime, il ne faut pas ignorer l'autre extrême – la femme criminelle, en tant que « kapos » ou directement impliquée dans les crimes de guerre. Les deux dimensions ont conduit à la construction d'une image négative et faible de la femme dans la société bosniaque. Paradoxalement, les femmes se sont retrouvées en majorité dans la société d'après-guerre, mais avec des problèmes caractéristiques à une minorité[4].

La communauté internationale a investi beaucoup dans la promotion des droits de l'Homme en Bosnie-et-Herzégovine après les massacres qui ont décimé l'espoir en l'humanité, notamment le plus fort, celui de Srebrenica de juillet 1995.

[3] http://www.fmreview.org/fr/dayton20/mlinarevic-isakovic.html. Consulté le 20.04.2018.
[4] Jasmina Musabegovic, *Visages de femmes en Bosnie : paradigmes*, p. 179.

Le rapport de l'OSCE de 2015 sur l'égalité hommes-femmes au niveau local met en évidence l'état des lieux de l'applicabilité des principes sur l'égalité de genre établis au niveau étatique par des lois, politiques, programmes ou stratégies, ainsi que par les standards établis au niveau régional et international. L'introduction et la promotion des principes sur l'égalité de genre au niveau des communautés locales sont très relevantes pour comprendre la vision de l'appareil gouvernemental à cet égard. Conformément à l'OSCE, la BiH enregistre un progrès significatif dans la création et la promotion de l'égalité de genre, et dispose d'un cadre constitutionnel et légal, des mécanismes institutionnels pour l'égalité de genre et d'un plan stratégique d'action pour l'égalité de genre.

La Constitution de la Bosnie-et-Herzégovine est alignée aux standards internationaux et régionaux en matière du respect des droits de l'Homme, de l'égalité de chances et de l'anti-discrimination. Elle stipule le fait que les principes généraux du droit international sont une partie intégrante de la Constitution du pays et ses entités. Ainsi, 15 des instruments internationaux les plus importants en la matière ont été incorporés, parmi lesquels aussi la Convention de l'ONU relative à l'Élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW).

Après la Constitution, depuis 2003, l'instrument législatif principal est *la Loi sur l'égalité de genre*, définie par le Journal Officiel de la BiH – Official Gazette, no. 16/03, 102/09, consolidée 32/10. La loi définit les sanctions pour tout type de discrimination basée sur la différenciation de sexe, en incluant des mécanismes de protection par des procédures disciplinaires, civiles et criminelles[5]. L'article 15 de la loi définit l'obligation des partis politiques, d'autorités, de la société civile et des structures managériales de promouvoir le principe de l'égalité de genre dans les processus de la prise de décision[6].

L'article 23 de la loi sur l'égalité de genre prévoit l'adoption au niveau national d'un plan d'action pour l'égalité de genre. Ce document doit prévoir les actions fondamentales dans l'idée de corriger les inégalités de genre et stipuler les obligations légales, mais dans toutes les sphères de la société, de manière appliquée. Le plan national doit être périodique et intégré dans le plan stratégique conçu pour une plus longue période. BiH dispose de deux plans stratégiques GAP BiH : le premier a été *Gender Action Plan 2006-2011*, le deuxième est *Gender Action plan 2013-2018*.

Des mécanismes institutionnels ont été conçus pour veiller le bon respect de la loi sur l'égalité de genre, ainsi que sur les éventuels ajustements qui s'imposent à travers l'expérience des cas pratiques. Le réseau de ces mécanismes est constitué par une série d'entités gouvernementales : l'Agence pour l'égalité de genre en Bosnie-et-Herzégovine, Le centre pour l'étude du genre de la Fédération de la BiH et le Centre pour l'Équité et l'Égalité du gouvernement de la République Srpska. Lors du lancement du rapport de l'UNICEF à cet égard, Les Nations Unies ont proposé l'harmonisation de la législation électorale avec la loi sur l'égalité de genre. La recommandation no. 30 du Comité CEDAW visait aussi à établir une promotion plus accrue des femmes au sein des partis politiques – recommandation qui a été ultérieurement prise en compte.

Les femmes en Bosnie-et-Herzégovine ont acquis le droit au vote en 1946 – dans l'ancienne République de Yougoslavie. L'ancien système communiste a offert une série d'avantages sous l'égide des principes égalitaristes, comme l'inclusion dans la sphère publique et politique. À l'époque, cela s'est traduit par un système de sièges réservés aux femmes. Le parti communiste a instauré

[5] OSCE, Manual For Gender Equality at The Local Level, mars 2015.

[6] UNICEF, Situation analysis, Report on the Status of Gender Equality in Bosnia and Herzegovina, Rapport UNICEF, 2009.

le système de sièges réservés, fait qui s'est concrétisé en 24,1 % des femmes dans l'Assemblée parlementaire, en 1986. Au sein du parti communiste, les femmes représentaient entre 1968 et 1975 environ 20 % et 37 % dans les années 1980. La ligue socialiste a bénéficié du plus élevé pourcentage de femmes : 50%. Toutefois, le pouvoir politique réel des femmes était minimisé par le réseau des femmes qui étaient promu au sein du système[7].

L'histoire de l'émergence « des mesures affirmatives » pour la représentation des femmes dans la politique commence avec les premières débats et manifestations vers plus d'inclusion. Les années 1990 et 1996 ont conduit vers la guerre et les femmes ont été exclues de tout processus qui impliquait le pouvoir et l'influence, en renforçant les cas extrêmes et les rôles traditionnels de chaque genre. Les premières élections ont été organisées en 1996, dans le contexte d'après-guerre, avec l'appui de la communauté internationale, notamment de l'OSCE. Sans avoir une institutionnalisation électorale minimale, les femmes n'ont pas représenté une priorité – étant donné le contexte tendu d'après la crise politique. Les données à l'époque montrent que 9,4 % des candidats pour l'Assemblée parlementaire étaient des femmes et une seule femme a été élue, donc un pourcentage de 2,4 %[8]. La campagne pour l'introduction des quotas a commencé en 1997 jusqu'en 1998, soutenue par l'OSCE et par les États-Unis à travers l'USAID.

Les sièges réservés ont été enlevés dans les années 1990, mais le système de quotas existe sous la forme de quota de genre sur les listes de candidats, depuis 1998. Ce système a été introduit suite aux pressions lors des manifestations des ONGs et de la communauté internationale. La loi stipulait par l'article 7.50 le quota de 30 % de femmes sur chaque liste de parti. Le non-respect de ce système attirait des sanctions. À partir de 2001, a été introduit un quota de genre de 33 %. La commission électorale centrale n'approuvait pas les listes de parti si elles ne respectaient pas le quota.

En 2013, la loi a été amendée par l'introduction d'un quota de 40 % au lieu de 33 %, fait qui n'a pas eu une conséquence majeure dans la représentation des femmes dans la politique.

Le quota de genre implémenté sous cette forme est affecté par des autres facteurs comme le système électoral et les stéréotypes de genre enracinés dans la société en Bosnie-et-Herzégovine. Dans cette circonstance, les femmes perdent environ 15-20 % des mandats[9].

Une série d'amendements en 2016 sur l'article 4.19 de la loi électorale ont impacté la représentation des femmes principalement par le nombre de mandats accordés à la fin du processus électoral, par l'introduction d'un seuil de 20 % pour le parti en question. Si ce seuil n'est pas accompli, les mandats sont distribués en fonction de la position sur la liste de candidats[10], fait qui détermine un système électoral semi-ouvert.

Le plus récent développement consiste dans la loi qui impose la présentation des listes de candidats avec minimum 40 % de candidats du sexe le moins représenté avec une règle obligatoire – les listes qui sécurisent les places des femmes (*the zipper system*).

[7] National Gender Task Force Office, Bosnia and Herzegovina, Application of quotas: legal reforms and implementation in Bosnia and Herzegovina, International IDEA, 2004, p. 1.

[8] *Ibidem*, p. 4.

[9] http://www.measurebih.com/uimages/Edited20Extended20Summary20GA20Report20MEASURE-BiH.pdf?lipi=urn%3Ali%3Apage%3Ad_flagship3_pulse_read%3BIxfEsbS0QwaqNMucZqC1VA%3D%3D. Consulté le 25.04.2018.

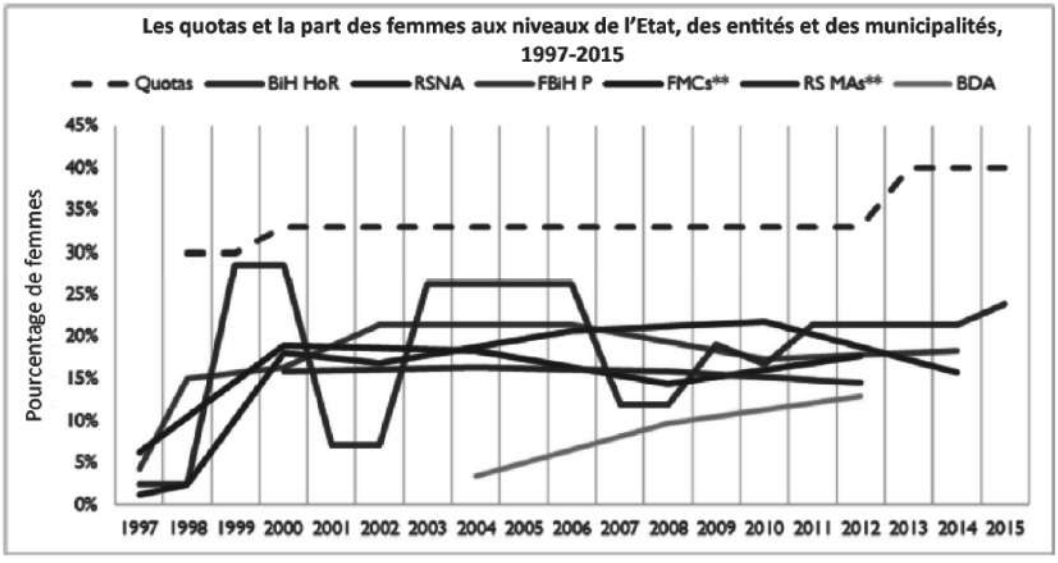
[10] Adnan Kadribasic, « More women in parliaments of Bosnia and Herzegovina expected next year », 2017, disponible en ligne : https://www.linkedin.com/pulse/more-women-parliaments-bosnia-herzegovina-expected-next-kadribasic. Consulté le 20.04.2018.

Article 4.19, Loi électorale de la BiH
« Chaque liste de candidats doit comprendre tant d'hommes que de femmes, qui doivent être représentés de manière égale. Une représentation égale entre les sexes existe lorsque l'un des sexes est représenté par au moins 40 % du nombre total de candidats dans la liste.
Les candidats du genre sous-représenté seront répartis sur la liste des candidats de la manière suivante : au moins 1 candidat du sexe sous-représenté parmi les 2 premiers candidats, 2 candidats du sexe sous-représenté parmi les 5 premiers candidats, et 3 candidats du sexe sous-représenté parmi les 8 premiers candidats ».[11]

Une autre proposition d'amendements à la loi électorale introduite par la commission du parlement pour l'égalité entre les femmes et les hommes et qui tendait à 50 % les quotas hommes-femmes et à placer systématiquement les candidats du sexe minoritaire en deuxième position sur la liste du parti a été rejetée par l'assemblée parlementaire de la BiH le 27 avril 2016[12].

Le pourcentage de femmes dans les structures législatives et exécutives reste insatisfaisant à tous les niveaux. Il est important d'observer les différences en matière de pourcentages de femmes : 2 % en 1992[13] et en 2016, 21,4 % au Parlement[14].

Les données du Forum économique mondial, lors du rapport publié en 2016, montrent que la Bosnie-et-Herzégovine se situe parmi les seuls six pays qui n'ont pas connu de ministres femmes[15].



Source : Gender analysis report for Bosnia and Herzegovina, USAID, 2016.

[11] Traduction d'anglais : « *Each list of candidates shall include both male and female candidates, who are equally represented. Equal gender representation exists when one of the sexes is represented by at least 40 % of the total number of candidates in the list. The candidates of the underrepresented gender shall be distributed on the candidates list in the following manner: At least 1 candidate of the underrepresented gender amongst the first 2 candidates, 2 candidates of the underrepresented gender amongst the first 5 candidates, and 3 candidates of the underrepresented gender amongst the first 8 candidates etc.* »

[12] Respect des obligations et engagements de la Bosnie-et-Herzégovine, Assemblée parlementaire, Conseil de l'Europe, 15 décembre 2017.

[13] UNICEF, art. cit., disponible en ligne : https://www.unicef.org/bih/Gender_SitAn_BiH(1).pdf. Consulté le 27.04.2018.

[14] Participation équilibrée des femmes et des hommes à la prise de décision, Rapport CdE, 2016.

[15] http://www.lemonde.fr/les-decodeurs/article/2017/10/12/dans-le-monde-la-presence-marginale-mais-croissante-des-femmes-en-politique_5200078_4355770.html. Consulté le 20.04.2018.

En dépit des efforts d'augmenter progressivement le quota, ainsi que les nombreuses tentatives d'adapter ce quota à la société bosniaque (par un système de rotation, par des débats sur un quota de 50 %, etc.), la représentation des femmes reste majoritairement stagnante ou même diminue aux certains niveaux de la gouvernance territoriale[16]. Les rapports sur la question nous indiquent que la moyenne nationale est aujourd'hui de 18 %, en-deçà du quota de 40 % de femmes inscrit dans la loi.

« Sur les 9 ministères que compte la Bosnie-Herzégovine, deux sont dirigés par des femmes, soit la défense et les droits de l'homme. Le nombre de femmes maires est de 6 en 2016, contre 2 en 2012. Les femmes représentent 18.5% des conseillers municipaux. »[17]

Toutefois, il est relevant de noter les efforts de conscientisation qui sont faites à l'égard de la parité dans l'administration électorale. Par exemple, concernant l'organisme qui gère les élections : la loi électorale exige que la composition d'une commission électorale reflète, de manière générale, une représentation égale des deux sexes. Ainsi, les hommes et les femmes doivent représenter chacun un minimum de 40 % du nombre total de membres de la Commission électorale. La loi dispose aussi que des efforts doivent être faits pour garantir que le sexe le plus faiblement représenté au sein des commissions électorales municipales et des comités de bureau de vote ne soit pas en dessous de 40 % du nombre total de membres[18].

M. Dragan Ović, le Président de la Présidence de la Bosnie-et-Herzégovine, lors d'une déclaration au sein des Nations Unies, accentue le fait que la BiH mène encore un travail soutenu dans la direction de la parité des sexes[19].

La République de Moldova

La République de Moldova est un pays d'Europe orientale, république démocratique de type parlementaire, considérée le pays le plus pauvre de l'Europe conformément aux rapports de l'Assemblée parlementaire du Conseil de l'Europe. Elle a été un état intégré dans l'Union soviétique et après la chute de l'URSS, la République de Moldova a gagné son indépendance en 1991.

La société moldave est de type patriarcal[20], ce qui détermine des relations et des liens traditionnels entre les genres, et fait perpétuer les rôles traditionnels associés aux genres. Le sondage du Baromètre du genre dans la République de Moldova montre que 64,6 % des gens considèrent que la responsabilité de l'homme est de travailler pour un salaire, en tant que la responsabilité principale de la femme est d'être femme au foyer. En dépit de ce fait, les influences du monde contemporaine occidentale et le phénomène de la migration et les échanges intensifiés transforment de plus en plus les relations sociales en Moldova. Conformément à l'étude du Conseil de l'Europe sur la représentation politique dans les états du partenariat de l'Est, la Moldavie se situe dans la catégorie du développement humain moyen. Afin de mieux comprendre la position de la Moldavie à l'échelle européenne, on prend le cas comparatif Norvège – République de Moldova : la Norvège se situe sur la première position dans le classement du développement humain pour l'année 2014, tandis que Moldova se situe sur la 107^{e} place.

[16] USAID, Gender analysis report for Bosnia and Herzegovina, 2016.

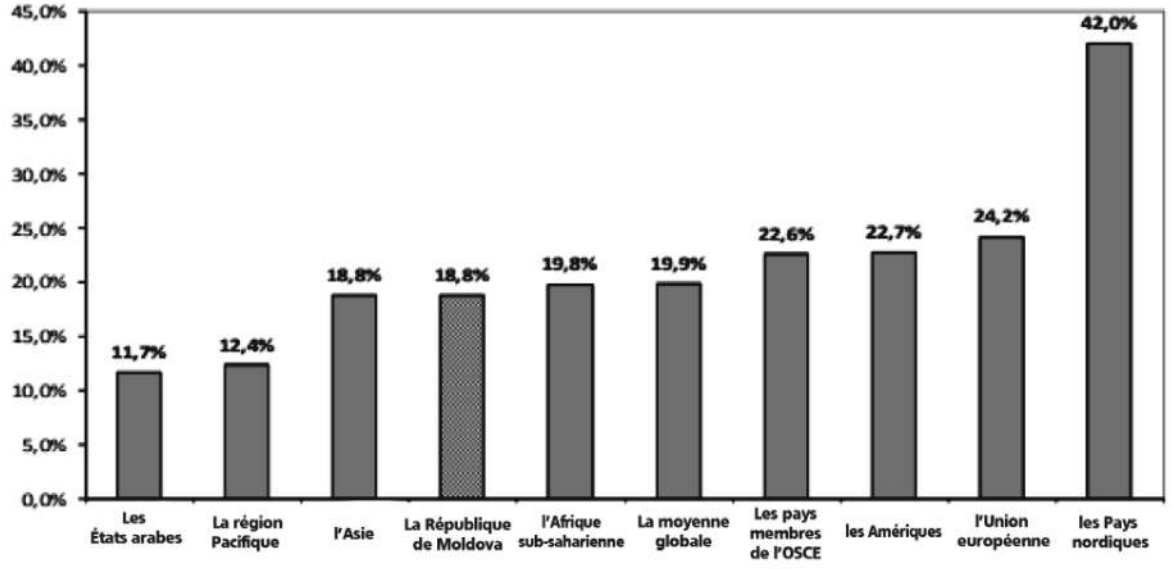
[17] http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21385&LangID=F. Consulté le 10.03.2018.

[18] http://md.one.un.org/content/unct/moldova/en/home/presscenter/articles/-infografic--moldova-face-un-pas-istoric-in-promovarea-egalitii-.html. Consulté le 28.04.2018.

[19] https://gadebate.un.org/fr/72/bosnie-herz%C3%A9govine. Consulté le 28.04.2018.

[20] Conformément au Baromètre de genre dans la République de Moldova, le principal sondage dans la République de Moldova sur la question d'égalité de genre.

L'Index de l'égalité de genre n'enregistre pas une croissance significative, mais en 2016, la République de Moldova a dépassé le seuil de 70 points (de 100 maximum). L'explication de base réside dans un changement au niveau sociétal, des mentalités, ainsi que dans une ouverture vers les recommandations et l'appui de la communauté internationale. Toutefois, la République de Moldova figure encore en dessous de la moyenne européenne en matière de représentation de femmes dans les structures législatives, avec 18,8 %.



La moyenne au niveau régional du niveau de la représentation de femmes dans les structures législatives nationales[21]

En 1994, le premier pas vers une égalité de genre a été fait par la ratification de la Convention de l'ONU relative à l'Élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW), auquel s'ajoute l'adoption de la plateforme et du Programme d'action de Beijing, en 1995.

Au niveau national, a été instituée une unité appelée la Sous-commission pour les opportunités égales, qui a fonctionné entre 1998 et 2000, au sein de la Commission pour les droits de l'Homme du Parlement. Cette unité a permis une extension des travaux sur la représentation des femmes en politique, en partant des objectifs de base comme les problèmes de la femme et de la famille.

En 1998, a été adopté le *Plan d'actions prioritaires pour l'amélioration de la situation de la femme et la croissance de son rôle dans la société*. Ensuite, à partir de 2001, a été instituée l'unité *gender*, qui a développé à son tour des sous-divisions – des points focaux *gender* au sein du Ministère du travail, de la protection sociale et de la famille[22]. Ces points focaux se sont développés de plus en plus au sein des institutions publiques centrales, mais pas au niveau de l'administration locale. Une autre étape essentielle a été réalisée en 2006, lors de l'entrée en vigueur de la Loi no. 5-XVI relative à l'égalité de chances entre hommes et femmes, qui a mis les bases du Plan National sur la promotion de l'égalité des genres dans la société initialement prévu pour 2006-2009, étendu après pour 2010-2015 et 2016-2020.

[21] http://progen.md/files/9798_cotele_de_reprezentare_ro.pdf. Consulté le 23.04.2018.
[22] http://www.viitorul.org/files/MONITOR%20SOCIAL10%20Gen_0.pdf. Consulté le 12.05.2018.

La démarche d'harmoniser la législation nationale aux standards européennes en matière d'égalité de chances a eu un impact positif sur la représentation des femmes dans la sphère publique et politique, mais il ne reste toutefois pas un progrès significatif.

Avant les mesures affirmatives adoptées en 2016, la situation de la représentation de femmes dans les structures législatives a connu une légère croissance progressive, mais sans un impact réel sur l'influence des femmes dans la sphère politique et sur leur pouvoir décisionnel.

Le mandat au Parlement	**Le nombre de femmes au Parlement**	**Le pourcentage de représentation**
1990 – 1993	12 sur 380	3,8
1994 – 1998	5 sur 101	4,9
1998 – 2001	9 sur 101	8,9
2001 – 2005	16 sur 101	15,8
2005 – 2009	21 sur 101	20,9
2009'07 – 2010	26 sur 101	25,7
2010 – 2014	19 sur 101	18,8

Le niveau de représentation de femmes au Parlement de la République de Moldova entre 1990 et 2014.[23]

La parité de genre trouve son applicabilité dans la République de Moldova par l'existence des quotas des partis, dont le respect est fortement influencé par un stimulant financier. Les avantages financiers sont accordés d'autant plus pour les partis qui adoptent les quotas de manière volontaire. Le parti qui ne va pas remplir la condition du quota va être privé du financement pour une année entière[24]. Ainsi, le parti démocrate, le parti libéral et le parti *Notre Parti* ont introduit des quotas de minimum 30 %, mais *de facto* – le parti libéral 13 %, le parti démocrate 21 %, le parti communiste 33 % et le parti des socialistes 20 %.

La Loi no. 71, votée en avril 2016, a modifié 15 autres lois nationales, y compris le Code électoral. Celle-ci prévoit qu'au moins 40 % des membres du gouvernement doivent être des femmes et le même quota s'applique pour les listes des candidats.

Le débat sur l'introduction des quotas a pris beaucoup d'années, parce qu'initialement la loi sur l'égalité de chances entre hommes et femmes (2006) a proposé des mesures alternatives aux quotas, en proposant d'équilibrer progressivement la participation des femmes à la vie politique. Comme arguments principaux ont été : le besoin de temps pour introduire progressivement le quota, par une croissance organique du nombre de femmes parmi les candidats ; ensuite, le seuil déjà atteint de 30 % lors des dernières élections – pourcentage qui prend en considération les femmes sur les listes, mais pas celles qui arrivent à la prise de décision. Un autre argument réside dans les barrières sociétales, notamment la mentalité patriarcale qui domine encore l'électorat. Les arguments énoncés par les opposants des quotas restent pertinents dans une certaine mesure. Toutefois, il reste encore difficile à quantifier l'impact des quotas introduits en 2016, aucune étude exhaustive sur ce sujet n'étant pas encore disponible.

[23] http://progen.md/files/9798_cotele_de_reprezentare_ro.pdf. Consulté le 22.04.2018.

[24] https://www.timpul.md/articol/a-fost-votat-proiectul-de-lege-care-prevede-cota-de-gen-91167.html. Consulté le 22.04.2018.

La République de Moldova a signé la Déclaration des objectifs du Millénaire pour le développement et à travers cet acte, a pris la responsabilité de la promotion de l'égalité de genre, l'autonomisation et l'émancipation des femmes. Une priorité du troisième objectif de la Déclaration vise *La croissance de la représentation des femmes au niveau de la prise de décision*.

L'implémentation progressive de la Loi 212 relative à l'égalité de chances, en vigueur depuis 5 ans, a établi une nouvelle étape dans la consolidation du partenariat entre la République de Moldova et l'Union européenne[25]. La République de Moldova a suivi la recommandation Rec. (2003)31 du Comité de Ministres du Conseil de l'Europe, concernant la participation égale de femmes et d'hommes au processus décisionnel politique et publique. La participation équilibrée ne doit pas être inférieure à 40 % pour chaque genre. Dans cette perspective, le quota implémenté en 2016 se rapproche de l'objectif recommandé par le Conseil de l'Europe.

Une implication majeure peut être constatée par l'appui de l'ONU à travers l'agence ONU Femmes et par l'appui financier de l'Agence de Nations Unies pour le développement international, l'USAID. Pour la représentante de l'ONU Femmes en Moldavie, le moment critique le représente la dissémination de l'information et des réglementions légales concernant la représentation équilibrée sur les listes de candidats[26].

La communauté internationale a soutenu de manière systémique la reforme dans le secteur des droits de l'Homme et de l'égalité de chances en République de Moldova.

Avant l'introduction des quotas, la situation était marquée par une visible stagnation concernant la représentation des femmes dans la vie politique[27]. Il reste à suivre les évolutions lors des dernières cycles électoraux – de 2014 et 2018. Dernièrement, les institutions européennes ont apprécié les évolutions en matière législative, mais ont dénoncé le manque d'instruments nécessaires pour leur implémentation.

Le cas de la Bosnie-et-Herzégovine est un exemple notable pour les efforts de démocratisation et développement dans une situation de reconstruction post-guerre. Ici, on peut noter la dynamique créée entre les organismes nationaux soutenus par la communauté internationale en matière d'égalité de genre, mais sans maximiser la réussite des quotas – qui se sont avérés peu fonctionnels.

La République de Moldova représente un exemple de réussite avec le quota de 40 %, malgré les résultats qui ne sont pas évidents jusqu'à maintenant. Dans ce cas, il est essentiel d'apprécier la coopération avec la communauté internationale, afin de pérenniser les activités menées à démocratiser le pays et de le rapprocher à l'Union européenne, surtout à travers la participation équilibrée du genre à la vie politique.

Les pays étudiés démontrent comment les quotas peuvent être intégrés dans le système législatif électoral, mais sans avoir des impacts majeurs sur la représentation des femmes à l'échelle politique. Même si le manque de ce mécanisme institué à équilibrer la participation des femmes et des hommes pourrait occasionner des pourcentages réduits concernant la participation de femmes, cependant il ne favorise pas un changement profond de la situation dans la société visée. Il s'agit d'un travail complémentaire qui doit être mené surtout par une action aux racines sociétales, au niveau de la mentalité collective.

[25] https://www.coe.int/ro/web/chisinau/supporting-national-efforts-for-prevention-and-combating-discrimination-in-moldova/-/asset_publisher/bO3MWAjPhYgz/content/press-relea-1?inheritRedirect=false. Consulté le 20.04.2018.

[26] http://md.one.un.org/content/unct/moldova/ro/home/presscenter/articles/-infografic--moldova-face-un-pas-istoric-in-promovarea-egalitii-.html. Consulté le 22.04.2018.

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National Minorities and Voting Rights: An Analysis of Indonesian Migrants in Malaysia and Bangladeshi Migrants in India

Jieun PARK

1. Background and Research Question

The principle of universal suffrage demands the right to vote be non-discriminatory and as inclusive as possible for every adult citizen (Norris 2015, p. 6). While the definition itself appears to be quite lucid, its practice is not as simple because different notions such as citizenship, identity, and national sovereignty are intertwined with the interpretation of universal suffrage. The heated debate about where to draw a line between foreigners and citizens is one instance unveiling the complex nature of universal suffrage (Hayduk 2004, p. 502).

Many of the multi-ethnic states – at least 25 states – have (or had) extended the voting rights, which were traditionally enjoyed by citizens only, to noncitizen immigrants in the late 20th Century though the scale and scope of the rights granted vary from state to state (Earnest 2003; Sadiq 2005).[1] While such phenomenon, on one hand, can be interpreted as an extension of rights and political participation thus a practice of international human rights norm and democratic norm (Jacobson 1997; Sassen 1998), it also implies a "collapse of the distinction between citizen and immigrants" and even a threat to the absolute state sovereignty on the other hand (Sadiq 2005, p. 104). What one can easily perceive, therefore, is the nature of universal suffrage that must be understood as a coagulation of different concepts such as citizenship, identity, and national sovereignty.

Apart from such nature of universal suffrage that requires both meticulous and comprehensive approaches for analysis, what needs to be pointed out when pursuing and justifying another research on universal suffrage is the earlier studies' tendency towards overlooking the experiences of Asian states. An extension of suffrage to ethnic minorities has taken place not only in those Western traditional immigrant receiving countries but also in some of Asian countries where the populations of foreign residents and ethnic minorities are not insignificant.

Indonesians in Malaysia and Bangladeshis in India, for instance, have long been the subject of debate in both social and political arenas, and the matters such as the voting rights of ethnic minorities and noncitizen suffrage have fostered continued debate at political and social levels. Upon such premise, the research questions that the paper aims to answer are the following: What explains the extension of voting rights to illegal migrants in India and Malaysia in the late 20th century? Why did the nature of the poorly institutionalised documentation system remain as it was for decades? What explains the responses of the ruling parties and natives in the border areas towards such phenomenon?

[1] David C. Earnest (2003) orders the voting rights of foreign residents in 26 states by "scope" and "scale". Scope of the voting rights differs. The resident foreigners in some states such as New Zealand are allowed to vote even in parliamentary elections, whereas other states including Canada and the Netherlands limit the voting rights to local elections. Moreover, the scope of the rights also varies. Some states extend the voting rights to all those noncitizens who fulfill the requirements of residency period while other states enfranchise only those of specific nationality.

2. Literature Review

Earlier studies on the matter of enfranchising noncitizen immigrants can be classified into three categories. The first group gives weight to the role of global or/and humanitarian norms such as democracy and human rights. The role of campaigns based on such norms is often highlighted as an explanation for noncitizen voting rights (Hayduk 2004). There are a number of studies suggesting that the grant was indeed normatively compelling in many of the multicultural democracies in the era of globalisation (Habermans 1990; Shapiro 2003). While another group of scholars suggests that industrialization leads to universal suffrage (Congleton 2004; Hirschman 1994), others maintain that an extension of voting rights to particular ethnic minorities takes place when political elites perceive and expect certain groups of foreign residents to be their electoral strength and vote banks (Homer-Dixon 1994; Kassim 1987; Sadiq 2005; Seshan 1998).

While all three appear plausible to a certain degree, none of them can grasp the comprehensive picture of the cases of Indonesian migrants in Malaysia and Bangladeshi in India. For instance, the extension of voting rights to Indonesian migrants in Malaysia and Bangladeshi migrants in India did not emerge from calls or campaign from the public or particular groupings. Moreover, while the explanation of industrialization can reveal that industrialization and universal suffrage are somewhat related, no causal relationship can be found. In addition, many of the studies attempting to explain universal suffrage by industrialization look into European experiences only – making the explanation less sound when applied to other regions' experiences (Cogleton 2004).

Lastly, many scholars looking into the cases of multiethnic developing countries have applied the variable of vote banks which I categorized as the third group of earlier studies. Many earlier studies on the cases of Malaysia and India are reliant heavily on the explanation of vote banks. However, while tacit support of the UMNO (United Malays National Organization) of Malaysia and CPI(M) [Communist Party of India (Marxist)] of India for illegal migrants existed, the single variable of vote banks is not only incomplete,[2] but also extremely difficult to prove. The difficulty emerges largely from the availability of reliable sources. For instance, many of the studies accusing certain parties [UMNO and CPI(M)] of considering illegal immigrants as their vote banks are based heavily on assumptions and often biased towards particular political parties.

3. Methodology and Approach

The paper looks into two cases: Malaysia and India. More specifically, the phenomenon of suffrage extension to Indonesian immigrants in Sabah state of Malaysia and Bangladeshi immigrants in West Bengal state of India is examined. Interestingly, the ruling parties of both regions have been accused of encouraging the entry of illegal migrants and providing assistance in fraudulent documentation to grant the migrants voting rights and citizenship. The time period of analysis is from the 1970s to the 1990s as the issue of noncitizen voting in the two countries has brought about heated social and political debates since the late 20th century.

Another similarity – which indeed is a major obstacle for analysis – is that the primary source is extremely limited if not nonexistent. It is, therefore, an extremely difficult task to estimate the number of illegal migrants from Indonesia and Bangladesh and it is more difficult to find out how many illegal immigrants became able to vote and enjoy other privileges of citizenship. It is mainly

[2] For instance, it cannot explain the gradual implementations of strict policy changes from the 1990s towards Indonesian and Bangladeshi immigrants. Moreover, the movement of people across borders must be understood in the contexts of the long history of cross-border movement and the need for labour which have taken place for centuries.

due to the fact that the identification system of citizens was more or less nonexistent in both countries. Even though the Census reports exist, it is believed that the statistics were somewhat distorted and/thus considered unreliable (Kassim 1987; Sadiq 2005; Sharma & Bhushan 2014). For instance, the 1991 census of Malaysia referred to "self-identification" of individuals regarding their citizenship (Sadiq 2005, p. 111).

Therefore, while the paper uses primary sources such as Census reports and newspaper articles, the argument will be developed on the premise that the reliability of the sources is highly questionable. Secondary sources such as academic papers will also be used, but a critical view is particularly necessary as many of the works develop their arguments based on interviews of certain politicians, or/and news articles projecting partial information only.

To overcome the limit as such, the paper adopts sociological institutionalism as a framework for analysis. For many institutionalists, "institution" is considered as an explanatory variable as it provides leverage to certain actors while it can deny access to others – even when it does not directly cause certain actions (Fitzgerald 1996, p. 65; Skocpol 1992, p. 54).[3] The strength of such theoretical framework is that it not only shows a more comprehensive picture of the phenomenon, but can overcome the difficulties emerging from unreliability of sources as the framework will prevent the analysis from relying on a particular point of view.

4. Analysis

The paper maintains that the decision makers and politicians of the two countries gave tacit support for the influx of illegal migrants and for the poorly institutionalised system of identification, and that there was not much compelling motivation and incentive for them to introduce highly restricting policy implementations, mainly because the anti-immigrant sentiment of the natives in the border areas was not as severe at least until the early-mid 1990s. The two types of institutions[4] that account for such atmosphere are 1) economic environment and 2) political culture of the border areas.[5]

Malaysia – Facts and Figures

A report drafted by UN-ESCAP (Economic and Social Commission for Asia and the Pacific) holds that international migration added about 0.4 per cent to Malaysia's total population growth during 1980-1991 period, and that the number of both documented and undocumented migrants reached 2.5 million during the boom period of 1991 – 1996.[6] According to the 1991 Census, the total population of Malaysia was 18.4 million and the foreign-born population was 989,000 (Prime

[3] One of the aspects distinguishing sociological institutionalists from historical and rational choice institutionalists is that it takes a broader definition of institution which includes culture, customs, norms, or/and traditions. More specifically, they argue that formal institutions are largely dependent upon society and culture which are considered as the larger macro level variables, and the individual is considered as a dependent and less important variable (Koelble 1995, p. 232).

[4] The concept of "institution" is borrowed from sociological institutionalism, as stated earlier.

[5] It is, however, not to argue against that the nature of documentation system is the immediate cause enabling easy and fraudulent process of enfranchising illegal migrants. While the significant impact of such nature of the system should not be overlooked, it should also be pointed out that many developing countries have similar issue with documentation system, but not all of them have the same experience of having suffrage illegal migrants.

[6] Available at: http://www.unescap.org/esid/psis/population/5appc/doc/Malaysia_country_report.doc. (UN ESCAP. *Malaysia Country Report for the Fifth Asian and Pacific Population Conference: Population and Poverty in Asia and the Pacific*, p. 9).

Minister's Department 1996, p. 107).[7] When such figure is compared with the 1980 Census, it represents 47 per cent of increase in the foreign-born population, and the population originating from Indonesia and the Philippines explains such sharp increase (Prime Minister's Department 1996, p. 107).[8] According to a migrant advocacy NGO, the number of undocumented immigrants as of 2000 was over one million and about 75 per cent of migrants are Indonesians (Gurowitz 2000, p. 865).

While no record of those who falsely obtained citizenship is available, what one could expect from the facts – the increase in foreign-born population and the relatively high number of those regularized[9] – is the likelihood of relatively easy access of illegal immigrants to enter Malaysia and to change status by the early 1990s. In fact, the availability of fake identity documentation and obtainment of real documentation through a fraudulent way have long been a social and political issue in Sabah and Malaysia.[10] As for Sabah, the rate of population growth was surprisingly large.[11] Not to mention the geographical proximity, what makes the region more susceptible to the influx of illegal migrants and the rampant availability of fraudulent identity documentations is the fact that the use of legal identity documentations is almost nonexistent among the natives.[12] Sadiq, in his paper published in 2005, claims that there was a pervasiveness of illegal immigrants in Sabah state by stating that there were 1.3 million illegal immigrants out of 3.3 million total residents in Sabah (Sadiq 2005).

Malaysia – Economic Environment

Even though it was as early as in 1976 that the problem of illegal migration was raised in Parliament by the opposition DAP (Democratic Action Party) (Garcés-Mascareñas 2012, p. 63), it was not until the mid-late 1990s when the Malaysian government's crackdowns, including criminalization and deportation, were launched. It is believed that the number of immigrants and of those enfranchised grew until the mid-1990s, and such increase could be seen as a consequence of economic environment.

Population movement between the two neighbouring countries – Malaysia and Indonesia – has been frequent for centuries. Most flow occurred from Indonesia to Malaysia owing mainly to Malaysia's fast growing economy and industrialization. It is known that the British colonial government preferred Indonesians to Chinese or Indian labourers due mainly to social and political aspects: they had an expectation that Indonesians would "easily assimilate with the local Malay society and became more productive workers" (Arifianto 2009, p. 617). Even after Malaysia's independence in 1957, such expectation of assimilation still functioned as a motivation

[7] Available at: http://www.epu.gov.my/en/rmk/seventh-malaysia-plan-1996-2000 (Prime Minister's Department, Malaysia. *Seventh Malaysia Plan 1996-2000*, p. 107).

[8] Available at: http://www.epu.gov.my/en/rmk/seventh-malaysia-plan-1996-2000 (Prime Minister's Department, Malaysia. *Seventh Malaysia Plan 1996-2000*, p. 107).

[9] It is believed that 320,000 illegal immigrants were regularized as legal immigrants in Malaysia in the year of 1992 (Stalker 1994, p. 152).

[10] Available at: https://www.todayonline.com/world/concern-suspected-terrorists-getting-fake-malaysian-ids-easily (Today. February 12, 2018. *Concern as suspected terrorists getting fake Malaysian IDs easily*).

[11] Between 1981 and 1991 Sabah experienced an annual growth rate of 5.5 per cent whereas the average Malaysian rate was 2.6 per cent. The population grew dramatically from 1950s to 1990s, and the growth rate of population in the 1980s and 1990s was almost three times that of other states such as Sarawak and Peninsula – though the fertility rates and death rates were similar (Sadiq 2005, pp. 109-110).

[12] Available at: http://www.theborneopost.com/2012/03/10/40000-people-in-sabah-dont-have-birth-certificates/.

of successive governments to continue encouraging Indonesian migration at least for two more decades (Arifianto 2009, p. 618).

As is often the case with many other border areas, Sabah's border line has been particularly more porous when it comes to trade and economy. According to a report published by IOM, the number of irregular migrants working in the plantation sector in Sabah and Sarawak and in Peninsular Malaysia already reached 500,000 in 1985 (Kaur 2014, p. 206). For Sabah alone, a record shows that almost one in every three residents is a foreigner (Sadiq 2005, p. 108). It is true that the presence of Indonesian migrants began to be perceived as a challenge or even a threat to local workers since the late 1980s as Indonesian migrants started to move to urban area and to enter some economic sectors reserved for local workers (Garcés-Mascareñas 2012, p. 62). Nevertheless, it was not until the mid-late 1990s when the government implemented highly restrictive policy towards the illegal immigrants (Arifianto 2009, p. 619; Kaur 2009, p. 302; Garcés-Mascareñas 2012, p. 91).

It was the New Economic Policy (NEP) implemented in 1971 which acted as an institution promoting increased level of inflow of both legal and illegal migrant workers. One consequence of the NEP, which put its emphasis on urbanisation, industrialization and the development of rural areas, was the shortage of labour force in rural sector. It was quite natural that Indonesian workers began to fill the positions created in domestic service and agricultural sector when considering the long history of population movement. Even though there were official channels – via government agencies – making the acquisition of Indonesian migrant workers, more were brought by illegal ways and through informal networks due to the acute labour shortage. Many scholars note that Indonesian workers were "hardly noticeable" due to their ethnic and linguistic similarities, and more Indonesians were welcomed as their presence was barely felt (Kassim 1987, pp. 267-268). Indeed, an overall preference for Indonesian migrant workers existed in Sabah – especially among the middle class Malays and plantation companies who were seeking cheap labour for domestic service and agricultural sector (Kassim 1987, p. 277).[13]

In addition, as discussed earlier, the majority of the citizens in Sabah state did not possess official documentations such as birth certificates and blue cards – hinting the likelihood that the natives considered the issue of suffrage migrants less seriously or that they at least were not fully aware of such phenomenon. Overall, all these factors – the Malaysia's more developed economy, the implementation of NEP, and the poorly institutionalised documentation system of Sabah – together brought about one unexpected consequence: the increase in the number of those who obtained fake identity documentation or real documentation through a fraudulent way.

Malaysia – Political Culture

Interestingly, the Filipinos and Indonesians who were categorized as "Others" in the 1970 Census became included in "Malaysian Citizens" since 1980 Census, and such fact is often interpreted as an endeavour of the regional governments in Sabah (Sadiq 2005). Some scholars argue that such unusual change in categorization reflects not only the nature of loosely managed documentation system, but also the UMNO's interests in legalising and normalising Indonesian illegal immigrants who were perceived as a counterbalance to non-Malays and a help to Malays' electoral strength vis-à-vis the non-Malay (Liow 2003, p. 26; Garcés-Mascareñas 2012, p. 60).

[13] Hatred and anti-Indonesian sentiment largely increased with the economic recession and policy changes were followed at that time. It was in the mid-late 1990s when thousands of Malaysians lost their jobs and the presence of Indonesians became more visible due to their continued inflow.

What must be noted is the fact that the issue of Indonesian immigrants was a highly politicised – if not securitized – issue particularly since the 1990s with certain political figures and media demonizing Indonesians as foreigners and criminals, inflaming anti-immigrant sentiment among the Malays, and giving exaggerations and misrepresentations of migrants (Healey 2000, p. 233). Therefore, as pointed out earlier, it remains extremely difficult to prove that the ruling parties/governments actively led such process of granting illegal migrants voting rights considering such endeavours to securitize the issue.

It would thus be hasty to conclude that certain actors – such as parties and governments – actually took actions to encourage illegal migrants and actively helped them obtain citizenship/voting rights. Even though UMNO showed a rather lukewarm attitude towards the need for altering the poorly institutionalised process making the acquisition of voting rights/citizenships much easier, such attitude must be understood in a more comprehensive picture and the overall atmosphere of the border area.

As Garcés-Mascareñas (2012) suggests, the political and social atmosphere around the issue must be understood in the context of "double-border", which is a concept indicating that the border between the two countries was constituted and obscured by the two elements – "ethnicity" and "citizenship". He states the following:

> "[…] the application of the first migration policies in Malaysia was based on two (sometimes contradictory) principles: citizenship and ethnicity. In other words, the border was drawn not only between citizens and noncitizens, but also (or at the same time) between Malays (including Indonesians) and non-Malays." (Garcés-Mascareñas 2012, p. 61)

Not to mention geographical proximity and similarities in language and culture, population movement between the two neighbouring countries has been frequent for centuries, and the Malays preferred Indonesian immigrants over those from other countries primarily due to their ethnic similarities. The lukewarm attitude of politicians, thus, should also be perceived in line with such political atmosphere. In other words, with the double-border still in operation and the less severe anti-Indonesian sentiment, the politicians of the region faced not much political incentive to make a furious voice calling for changes in the existing system.

India – Facts and Figures

As is the case with Malaysia, what makes it difficult to estimate the numbers of illegal immigrants and of the suffrage illegal immigrants in India is the absence of reliable records. The system of identification of citizens has been almost nonexistent in India. Many studies experience the same difficulty and use alternative ways – such as referring to unofficial records or/and pursuing survey or interview (Datta 2004; Datta 2011; Sarkar 2010; Sharma & Bhushan 2014; Shamshad 2017; Bhardwaj 2014; Singh 2007).

The interactions across the border between India and Bangladesh have a long history and the migration of Bangladeshi (East Bengalis) is considered to be a century old at least (Shamshad 2017). The modern border was established in 1947 with the partition of Bengal, but the region of Bangladeshi remained as a province of Pakistan (East Pakistan) from 1947 to 1971. It was in March 1971 when the declaration of independence of Bangladesh was made and assured (Datta 2004, p. 336). Movement of people between India and Bangladesh was a quite free and common phenomenon even after the border was demarcated.

According to the 2001 Census, most immigrants residing in India are originating from Asian countries (98 per cent) and Bangladesh sends the most migrants (more than 3 million people),

which is about 60% of all immigrants (Nanda 2005). It is assumed that up to 10 million people from East Pakistan fled to India during the Bangladesh liberation war and that about 91,000 Bangladeshis on average crossed the border each year during 1981-1991 (Sharma & Bhushan 2014, p. 5). Another record shows that about two million voters' names were deleted from the voters' list of Bangladesh during the years 1991-1995 – implying the large scale of migration (Bhardwaj 2014, p. 63).

West Bengal is an Indian state with its border running 2,216 km along Bangladesh, and the movement of people has been perceived as a historical and natural phenomenon. It is believed that up to 1971 over 4.7 million refugees of Bangladesh fled to West Bengal (Datta 2004, p. 337). According to an estimate recorded in 2003, there were over 15 million Bangladeshis who were in "unauthorized situation" and the majority of them (about 8 million) were residing in West Bengal (Nanda 2005, p. 488).

While there is no official record estimating the number of illegal Bangladeshi immigrants who obtained voting rights/citizenship falsely, many unofficial estimates hold that there have been "many" illegal immigrants registered as voters (Rath 2015; Kulkarni 2012). As for the case of West Bengal, such hypothesis is often substantiated by its annual growth rate of population which had been higher than the average Indian rate (Sharma & Bhushan 2014), and the fact that Election Commission of India (ECI) has received complaints from political parties regarding the use of noncitizens in voter rolls since the 1990s (Kulkarni 2012, p. 9).[14]

India – Economic Environment

Bhardwaj argues that the border demarcating India and Bangladesh is so porous that discussions on legality or/and citizen-like rights may be considered nonsensical in some of the border areas.[15] He further elaborates his argument by stating that:

> "The present context of migration neglects the historical population movements in the subcontinent. In fact, the entire issue of 'illegal' migration from Bangladesh to India is an absurd concept as there is no idea of legal migration in this region… The border includes plains, mountains, rivers, wetlands, jungle terrain, agricultural lands, national parks, sanctuaries, reserve forests, large estuaries and enclaves with remarkable biological and environmental diversity. Not being fully demarcated on the ground, the boundary, in many places, cuts through rivers, mountains, char lands, agriculture lands, and public institutions, and has resulted in the emergence of many enclaves on the border areas. This unique intermix of habitation as close as on the boundary itself, leaves the border areas heavily populated. Similarly, the people of both countries work in close proximity, using the land till the last inch for cultivation purposes. The lack of permanent boundary pillars and fencing on the border creates patrolling problems, and facilitates illegal movement across the border." (Bhardwaj 2014, pp. 65-66)

[14] Another accusation is regarding deleting the names of genuine Indian citizens from the electoral rolls. One suggests that about 2.2 million citizens' names were struck off the rolls during the 2006 West Bengal election (Kulkarni 2012, p. 13).

[15] According to Bhardwajm, there are three sectors where border line between the two countries is not clearly demarcated. The three sectors are comprised of the following: 1) 2.5 km of Lathitila/Dhumabari in the Assam sector; 2) 1.5 km of the Berubari sector at Mouza Daikhata-56 Khudipara-Singhpara in the West Bengal sector; 3) 2.5 km of the Muhuri river of the Belonia sector at Naokhali/Comilla in the Tripura sector (Bhardwaj 2014, p. 66).

What can be inferred from such description is not only the geographical proximity itself but a different conceptualisation of border lines and cross-border movement in the border areas. Such aspect is well reflected in the forms of trade. "Informal trade", which has long been the typical practice and form of trade, illustrates the nature of economic interactions in the border areas including West Bengal. Such practice is an institution that affects the behaviour of people and that shapes social atmosphere and economic environment. As Singh (2007) outlines, border trade between India and Bangladesh has long been determined by informal/social networks such as ethnic ties rather than formal contracts. The informal trading arrangements in West Bengal are so prevalent that even firms enter into such practice through their ethnic or/and personal ties, and that formal traders also prefer to use it as a mechanism when resolving disputes (Singh 2007, p. 365). On one hand, the prevalence of informal trade is indicative of the absence of formal institutions or/and the inefficiency of formal trading mechanisms.

A number of empirical studies reveal similar aspect. Shamshad (2017) highlights that trade and labour in West Bengal are dependent heavily on the interactions along the borders and the people from both sides. He also implies that there is an overall ethnic, cultural, or/and religious affinity with Bangladeshis in West Bengal due to the historical interactions. Another scholar named Sarkar interviewed 100 households that have similar refugee backgrounds and reside in West Bengal, and the results disclose how social networks and informal ties are embedded in economic activities (Sarkar 2010). 58 of the 100 households answered that one of major considerations for choosing their present place of residence was economic consideration and that they were helped by friends/relatives/family members when they were seeking their jobs and settling down in the area (Sarkar 2010, p. 26).

Even though no official record of the numbers of enfranchised illegal immigrants exists, it appears that the inflow of Bangladeshi immigrants has been continuous and that many of them somehow have obtained voter's identity cards or/and even naturalized. One institution promoting the social atmosphere more susceptible to the entry of immigrants and permanent residence in India is the nature of trade and economic activity. As a result of informal trading institution, the effects of formal institutions such as the border line were more or less nullified, and the inefficiencies of other formal systems such as formal trading arrangements and identification/documentation of citizens were aggravated.

India – Political Culture

As discussed earlier, movement of people across the border line between India and Bangladesh has long been a natural phenomenon. At the same time, the chance of securing documentations proving citizenship status – such as voter identity card – was very high.[16] Changes in such atmosphere began to take place in the early 2000s. Coupled with the threat of terrorism, the fencing of the border and the Indian government's vigilance were heightened. As the number of Bangladeshis had continued to increase for decades, their presence was a lot more felt and media began to highlight the crimes committed by Bangladeshi immigrants and depict them as "infiltrators" (One India 2015). The matter of illegal immigrants and their presence became highly politicized and often perceived as a security issue. As a result, the number of Bangladeshi immigrants reduced and the acquisition of such documentations and naturalisation became difficult since the early 2000 (Shamshad 2017; Sarkar 2010).

[16] A number of empirical studies substantiate it. For instance, Sarkar does so by showing that only two out of 100 households he interviewed did not possess voter identity cards (Sarkar 2010, p. 20).

Nevertheless, the attitude of the State Government largely remained sympathetic towards Bangladeshis. While it would be difficult to refute the argument that CPI(M), which ruled the state seven consecutive terms, during 1977-2011, maintained its lukewarm attitude even when there were social movements calling for more restrictions on the inflow of Bangladeshis, other aspects should also be taken into account in order to understand the overall political culture of the period. First of all, among those residing in the border area, the abovementioned affinity for Bangladeshis still existed to certain extent, and the fellow feeling of migrant community was particularly obvious even in the 2000s (Sarkar 2010, p. 9). Also, it was a difficult task for any state government to adjust its stance to be more severe and strict on the issue of illegal immigrants due to diplomatic concerns (Bhardwaj 2014, p. 73).

More importantly, the sympathetic attitude of CPI(M) must be considered in the context of the era and the party's ideology. It should be noted that many Bangladeshi immigrants were considered as refugees in the late 20th century and the ruling government was not free from the norm of human rights in the era of globalisation. In fact, a member of CPI(M) expressed the party's concerns about human rights and implementing more restrictive policy programs to Bangladeshi immigrants, and explained that the hatred towards the Bangladeshi "infiltrators" was largely incited and politicized by the opposition party BJP (Bharatiya Janata Party) (Shamshad 2017). Moreover, the sympathetic stance of the ruling government and CPI(M) continued due to its ideology and identity – CPI(M) is a party representing the working class and some of its senior leaders were of East Bengali origin (Shamshad 2017).

5. Conclusion

The primary concern of the paper is the voting rights of noncitizens and those who falsely obtained citizenship. While the cases of traditional immigrant receiving countries – mostly European and Western – received continuous attention from scholars, many of the experiences of those countries with shorter history of democratic elections and universal suffrage pose a puzzling question as well. As the cases of Malaysia and India suggest, the principle of universal suffrage can be of complexity, thus requires further research.

The paper argues that earlier studies' approach presenting one single factor is insufficient and ineffective to explain the complexity of the two countries' experiences. Considering the dynamics embedded in the issue of voting rights extended to illegal immigrants, the paper borrows some ideas from sociological institutionalism and suggests that two sociological institutions – economic environment and political culture – explain the extension of voting rights to illegal immigrants in India and Malaysia in the late 20th century. The politicians and decision makers in the border areas – West Bengal state of India, Sabah state of Malaysia – did not find particular incentives to reform the poorly managed documentation/identification system and to implement highly restrictive immigration policy because of the political and social atmosphere that were heavily affected by the institutions of environment and political culture.

One of the main obstacles to pursuing the research is the access of reliable sources. The primary sources which should provide the actual number of immigrants for instance were more or less nonexistent, which resulted in more reliance on secondary sources. Nevertheless, the use of secondary sources was also of difficulty due to the highly politicised nature of the issue in both countries. That said, the major significance of the paper is that it explores the cases that have received less attention and that it attempts to draw an overall picture of the cases by applying the idea of institution as an analytical framework. By doing so the paper further aims to provide

explanations not only for the two countries, but for those multiethnic countries where border, citizenship, and identity are somewhat distinctively conceptualized and are less institutionalised, so that the scale and scope of suffrage extended even to some of their illegal immigrants.

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Intellectuels roumains à l'aube de la démocratie : les élections de mai 1990

Camelia RUNCEANU

Dans la Roumanie postcommuniste les premières élections (parlementaires et présidentielles) ont lieu le 20 mai 1990. À la date des premières élections postcommunistes on compte 24 formations politiques, créées à partir de janvier 1990, et 71 formations politiques y participent. Selon la loi électorale de 1990, les candidatures au parlement peuvent se présenter sur des listes constituées par des « partis ou formations politiques » ou comme « candidat indépendant », individuellement et en dehors d'une organisation politique. Mais le cadre législatif de 1990 – et seulement celui-là – permet aussi la présentation des candidatures sur des « listes de candidats indépendants[1] ».

Des journalistes de l'après 1989, des auteurs de la période communiste et d'autres intellectuels de la période communiste forment des « liste[s] des indépendants » (trois) pour participer aux premières élections du 20 mai 1990. Alors que certains intellectuels ont intégré des structures du pouvoir en place, certains autres se portent candidats aux premières élections postcommunistes aux côtés des journalistes, critiques du pouvoir en place, et d'une victime du régime communiste et représentant de l'Association des anciens détenus politiques de Roumanie, Constantin Ticu Dumitrescu, détenu politique des années 1950.

Parmi ces candidats indépendants on retrouve des membres du premier groupement apparu publiquement après la chute du communisme réunissant des producteurs culturels de la période communiste. Le Groupe pour le dialogue social (GDS) est le seul « groupe » réunissant depuis fin 1989 jusqu'à présent des intellectuels des plus reconnus et/ou, dans la majorité des cas, les plus visibles, s'étant imposés dans l'espace public. Tous les membres fondateurs du GDS ne sont pas des « intellectuels[2] », mais la grande majorité d'entre eux a publié avant 1989. Parmi eux on compte les plus célèbres des rares opposants[3] et dissidents de l'époque communiste[4]. Le prestige associé à ce groupement notamment dans les années 1990 doit beaucoup à l'intégration des quelques dissidents, opposants ou, plus largement, de ceux qui ont critiqué des mesures prises par des institutions de la période communiste. L'attrait qu'exerce le GDS en tant que position centrale dans l'espace intellectuel tient pour une bonne part au prestige associé aux membres des professions littéraires dans la période communiste, ainsi qu'au pouvoir que des membres du GDS obtiennent après 1989. Le seul groupement d'intellectuels créé en tant qu'association civique qui perdure jusqu'à présent est un lieu de rencontre entre des intellectuels et des politiques après 1989 et un lieu de socialisation politique pour nombre d'intellectuels dans les années 1990. Le GDS a dominé l'espace intellectuel après 1989.

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[1] Selon l'article 11 du Décret-loi n° 92 du 14 mars, publié dans *Monitorul Oficial al României* (Journal Officiel de la Roumanie), 35, le 18 mars 1990.

[2] Par le terme d'« intellectuel » on désigne les personnes qui transfèrent leur capital de notoriété, gagné dans leur contexte d'appartenance professionnelle, dans l'espace public pour revendiquer un droit d'intervention dans les affaires publiques (Christophe Charle, *Naissance des « intellectuels » 1880-1900*, Éditions de Minuit, Paris, 1990).

[3] Doina Cornea étant la plus connue, à l'étranger comme en Roumanie. D'autres opposants sont un écrivain marginal et marginalisé, Dan Petrescu, mais aussi un chercheur physicien, Gabriel Andreescu.

[4] Parmi les dissidents on compte un intellectuel des plus notoires de la dernière période communiste, Mircea Dinescu. Un autre dissident parmi les membres fondateurs du GDS, Radu Filipescu, n'appartient pas au monde intellectuel, étant le seul détenu politique des années 1980 à intégrer le GDS au moment de sa constitution.

Plusieurs rencontres entre futurs membres fondateurs du GDS ont précédé son apparition officielle qui date du dernier jour de décembre 1989, le 31 décembre, dans une conférence organisée à l'Hôtel Intercontinental. C'est le jour de la publication de l'arrêté-loi sur « l'enregistrement et le fonctionnement des partis politiques et des organisations citoyennes en Roumanie[5] ». Les premiers partis politiques à se constituer sont les partis traditionnels, créés officiellement durant la première moitié du mois de janvier 1990. Le 11 janvier 1990 est la date de l'apparition officielle du Parti national paysan chrétien démocrate (PNȚCD) – même si certaines chronologies retiennent le 8 janvier 1990 comme la date de son enregistrement –, qui se présente comme continuateur du Parti national paysan, interdit en 1947[6]. Le 15 janvier est la date de l'apparition d'un autre parti traditionnel, le Parti national libéral (PNL)[7], initiative des anciens « jeunes libéraux » datée du 22 décembre, à la tête duquel se trouve un collectif[8].

Le GDS est créé en vertu d'une loi qui date de la période de l'entre-deux-guerres (Loi n° 21 de 1924) qui n'a pas été abrogée durant la période communiste. Le GDS s'est constitué en association civique et non pas en formation politique comme certains membres du GDS, moins nombreux cependant, l'auraient imaginé[9]. Le choix de se constituer en association civique et non pas en parti politique précède son apparition officielle, le 31 décembre 1989, et d'à peu près un mois la décision du Front du salut national (FSN), qui s'est défini comme « organe provisoire d'État[10] » ou « organe du pouvoir d'État » pour « prendre toutes les attributions[11] », de se constituer en parti politique. Le GDS comme concurrent du FSN vu ses revendications[12] se présente, à travers sa tribune, l'hebdomadaire *22*, comme le « porte-parole de ceux qui sont sortis dans la rue pour imposer leurs droits » :

> « À première vue […], on pourrait croire qu'entre le GDS et le FSN il y avait une certaine communauté de langage et d'idéaux. Mais, dès le début, le GDS s'est situé fermement sur une position à l'extérieur du Front. Soutenant, comme le faisait aussi le FSN, qu'il était la voix authentique et le représentant de ceux qui ont lutté dans les rues, le GDS a abouti dans un court temps à concurrencer le FSN pour s'approprier les symboles de

[5] Sur la base de l'Arrêté-loi n° 8 du 31 décembre sur les partis politiques et les organisations citoyennes, est créée aussi l'Association des anciens détenus politiques de Roumanie (AFDPR), le 2 janvier.

[6] Son leader, Corneliu Coposu, lance la nuit du 22 au 23 décembre un « appel au pays ». Plus tard, dans un entretien réalisé par un membre fondateur du GDS, Andrei Cornea, publié dans l'hebdomadaire du GDS, Corneliu Coposu précise que le parti est constitué « le jour même de la Révolution par les survivants de l'holocauste communiste, qui demandent des excuses à l'opinion publique pour leur âge avancé » (*22*, 172, le 27 mai 1993). De jeunes et des anciens membres du parti se réunissent le 26 décembre 1989.

[7] À la différence du PNȚCD, le PNL n'a pas été « dissout officiellement ou interdit », formellement le parti n'a pas cessé d'exister sous le communisme. Mais il est disparu de la scène politique et « plusieurs de ses membres ont enduré des souffrances comparables à celles des membres du PNP » [Peter Siani-Davies, *Revoluția română din decembrie 1989* (La Révolution roumaine de décembre 1989), Humanitas, Bucarest, 2006, p. 346].

[8] Parmi les anciens « jeunes libéraux » on compte des exilés des années 1950 dont Radu Câmpeanu, qui sera aussi le candidat aux élections présidentielles de 1990, auxquels s'ajoutent des héritiers des hommes politiques d'avant l'installation du communisme et d'autres représentants des professions libérales.

[9] À la proposition venue de la part de certains membres fondateurs du GDS de se constituer non pas en « groupement », structure de la société civile naissante, mais en parti politique, la majorité des membres répondent négativement.

[10] Ion Iliescu, Vladimir Tismăneanu, *Marele șoc din finalul unui secol scurt. Despre comunism, postcomunism, democrație* [Le Grand choc de la fin d'un siècle court. Du communisme, du postcommunisme, de la démocratie], Éditions encyclopédiques, Bucarest, 2004, p. 186.

[11] *Ibidem*, p. 189.

[12] Peter Siani-Davies, *op. cit.*, p. 307-308.

> la révolution qu'il envisageait, contrairement à certains membres du FSN, animée par des valeurs libérales[13]. »

Plusieurs membres du GDS composent une des deux « liste[s] des indépendants », constituées à Bucarest, regroupant des intellectuels, candidats aux premières élections postcommunistes. La liste des candidats indépendants soutenus par le GDS est présentée pour la première fois[14] fin avril 1990, publiée à plusieurs reprises dans l'hebdomadaire du GDS, *22*. Dans les trois semaines précédant le scrutin, la liste est présentée, à une seule exception près, sur la dernière page de la publication du GDS. Dans chaque numéro les candidats sont présentés le plus souvent dans des textes biographiques signés par des rédacteurs de *22* ou par des collègues des candidats. Certains candidats sont présentés par l'intermédiaire des entretiens signés par des rédacteurs de *22*. Neuf membres du GDS (dont six sont des membres fondateurs du GDS, trois autres étant des membres cooptés en 1990)[15] composent la liste proposée par *22*. Deux membres fondateurs du GDS appartenant à la génération des aînés (Alexandru Paleologu et Petru Creţia) se portent candidats au Sénat aux côtés d'un peintre consacré dans la période communiste dont la production artistique est marquée par son intérêt pour l'orthodoxie (Sorin Dumitrescu) et d'un prêtre (Iustin Marchiş), ces deux étant des membres du GDS cooptés en 1990. Sur la même liste, se portent candidats au Sénat un écrivain notoire de la période communiste et journaliste (Octavian Paler), ancien membre de la nomenklatura politique, signataire d'une lettre de protestation rassemblant des auteurs consacrés et bien connus de la période communiste (« la lettre des sept[16] »), et un bien connu médecin et universitaire (Alexandru Pesamosca), tous les deux appartenant à la génération la moins représentée dans le GDS alors (et lors de sa création), à savoir ceux qui sont nés dans les années 1930. Quatre membres fondateurs du GDS se portent candidats à l'Assemblée des députés : l'historien et l'archéologue (Radu Popa), le philosophe devenu éditeur (Gabriel Liiceanu), l'écrivain débutant dans la période communiste et rédacteur en chef de *22* au cours de l'année 1990 (Stelian Tănase), l'ingénieur et détenu politique des années 1980 (Radu Filipescu[17]). Ils sont des candidats indépendants aux côtés d'un ancien procureur de la période communiste (Ioan Mărculescu), condamné à la prison dans les années 1980, appartenant à la même génération que les aînés du GDS, ainsi que d'« un des journalistes nés de la Révolution[18] » et juriste (Florin Gabriel Mărculescu), membre du GDS, coopté en 1990, mais aussi d'un ancien détenu politique des années 1950 et leader de l'AFDPR (Constantin Ticu Dumitrescu) et d'un journaliste de la période communiste (Petre Mihai Băcanu), emprisonné au cours de l'année 1989 pour sa tentative d'imprimer, à l'aide de certains collègues, un journal clandestin et rédacteur en chef de *România liberă,* tout comme un technicien dans l'industrie aéronautique (Pompiliu Militaru). La liste soutenue par le GDS à travers

[13] *Ibidem*, p. 307.

[14] *22*, 15, le 27 avril 1990 (sur la première page).

[15] Les membres fondateurs du GDS sont au nombre de 34. À l'automne 1990, le GDS compte 52 membres.

[16] La « lettre des sept intellectuels » est diffusée au 9 avril par Radio Free Europe et transmise aux agences de presse parisiennes. Elle paraîtra aussi dans *Libération* (du 10 avril, dans un article signé par Véronique Soulé). La « lettre des sept », adressée au président de l'Union des écrivains, rassemble des écrivains notoires pour soutenir l'écrivain Mircea Dinescu. Leurs revendications sont strictement professionnelles : ils demandent l'intervention de l'Union des écrivains pour défendre la cause du poète, mais aussi que les sanctions imposées à Dinescu prennent fin, qu'il reçoit le droit de signature. Cette lettre a été signée initialement par Geo Bogza, Dan Haulică, Octavian Paler, Ştefan Augustin Doinaş, Andrei Pleşu, et ensuite par deux autres, Mihai Şora et Alexandru Paleologu. Les quatre derniers se retrouveront parmi les membres fondateurs du Groupe.

[17] Début avril 1990, Radu Filipescu annonce avoir renoncé à faire partie du Parti républicain : « toute forme de désunion me déplaît et la lutte pour le pouvoir ne m'attire pas » (*22*, 12, le 6 avril 1990).

[18] *22*, 17, le 11 mai 1990.

sa tribune, l'hebdomadaire *22*, comprend 15 candidats indépendants dont huit intellectuels (six auteurs de la période communiste, un artiste et un médecin), trois journalistes (dont deux de la période communiste), un ancien procureur et deux détenus politiques.

Le seul parmi des membres fondateurs du GDS à justifier son entrée en politique par la nécessité d'une participation des intellectuels à l'élaboration d'une nouvelle Constitution est un historien et archéologue, le seul des deux historiens à se porter candidat aux élections de 1990, Radu Popa :

> « […] je me suis mis sur une liste de candidats indépendants […] en toute conscience de la valeur de ceux qui sont sur la liste et de la nécessité accrue que ces hommes, intellectuels de bonne qualité et de bonne volonté, participent et contribuent à l'élaboration de la Constitution tellement nécessaire à nous tous pour resituer le pays sur de nouvelles bases viables[19] ».

Quand les anciens politiques communistes contestent aux intellectuels leur contribution à la naissance d'une opposition à la dictature, Alexandru Paleologu, intellectuel notoire de la période communiste et ancien détenu politique des années 1950, recourt à la mémoire collective pour défendre la position des dissidents et des opposants de la dernière période communiste[20].

Des textes critiques rédigés avant la chute du communisme doivent servir aux nouveaux enjeux politiques du moment quand ils ne peuvent pas faire appel à une activité de dissidence inscrite dans la mémoire historique, a posteriori le public est invité à lire leurs prises de position comme des attestations de leur anticommunisme. Leurs prises de position des derniers mois du régime communiste sont caractérisées après décembre 1989 comme « anticommuniste[s] ». Le 21 décembre, à la BBC est transmis le texte de Petru Creţia, daté de novembre 1989[21], portant l'intitulé « Fin de siècle en Roumanie », qui sera publié dans *22* pendant la campagne électorale de mai 1990. Quelques jours avant les élections de mai 1990 auxquelles Petru Creţia participe sur la liste regroupant des intellectuels et des journalistes, dont la plupart sont des membres du GDS, il demande au rédacteur en chef adjoint de la publication du GDS, l'écrivaine Gabriela Adameşteanu, de publier son texte où il critiquait la dictature personnelle. Ce texte était déjà publié dans le premier numéro de l'hebdomadaire *România literară* [La Roumanie littéraire] paru en 1990. Sa publication dans *22* précède de peu sa candidature aux élections « quand [sa] lucidité et [sa] moralité » sont contestées[22], comme l'auteur le précise. Le texte demande une explication de la part de son auteur, l'auteur accompagne le texte daté de l'automne 1989 d'un autre précisant qu'« il a été pensé comme un texte antitotalitaire, c'est-à-dire anti-Ceauşescu […] aujourd'hui je serais heureux qu'il soit lu comme un texte anticommuniste[23] ».

Après 1989, les intellectuels jouissant de la plus grande reconnaissance dans les milieux intellectuels recourent à l'archive de soi (correspondance, témoignage) dès qu'ils revendiquent une nouvelle position et/ou qu'ils se sentent appelés à justifier leurs engagements (Petru Creţia, Gabriel Liiceanu, Andrei Pleşu, etc.) de l'intellectuel « anticommuniste » ou/et de l'intellectuel membre d'un groupement qui s'est imposé comme représentant du pôle de « l'anticommunisme ».

L'aversion pour la classe politique communiste requiert de la publicité, des pamphlets datés des derniers mois de 1989 sont publiés pour témoigner des contraintes subies par les intellectuels

[19] *Ibidem.*

[20] *22*, 1, le 20 janvier 1990.

[21] Petru Creţia (né en 1927), chercheur, traducteur des auteurs de la philosophie classique, mais aussi des classiques de la littérature et éditeur d'Eminescu, se trouvait alors à l'étranger.

[22] Plusieurs membres du GDS, notamment ceux qui prennent position pour soutenir les manifestations de rue et contre le pouvoir en place sont calomniés dans la presse extrémiste.

[23] *22*, 18, le 17 mai 1990.

dans la période communiste[24]. Gabriel Liiceanu, philosophe qui a obtenu sa notoriété vers le milieu des années 1980 en publiant son journal où il racontait sa formation sous la tutelle du philosophe Constantin Noica (ami d'Emil Cioran et de Mircea Eliade, appartenant à la même génération)[25], signe dans le premier numéro de la publication du GDS son « appel aux canailles », texte repris dans un ouvrage portant le même titre[26]. En avril 1990[27], le philosophe-essayiste Gabriel Liiceanu publie dans *22* le texte enregistré pour la télévision roumaine au cours du mois de mars, mais diffusé en avril. En fin du texte l'auteur nous informe de ce retard, « enregistré le 6 mars, transmis le 6 avril, pendant la nuit », pour souligner combien la télévision publique marginalise les intellectuels surtout que l'enregistrement passera pendant la nuit[28]. Le texte intitulé le « procès de Ceaușescu » introduit ce qui deviendra le projet collectif des intellectuels présenté comme projet et but de la société postcommuniste, à savoir le « procès du communisme ». Le texte est publié dans *22* un mois avant les premières élections auxquelles les intellectuels participent en nom propre, comme indépendants[29].

Si pour Gabriel Liiceanu l'intellectuel roumain devrait « jouer le rôle du médecin de l'âme[30] », pour Stelian Tănase, en 1990, « l'intellectuel authentique se trouve toujours en opposition[31] ». Ces deux intellectuels sont parmi les candidats au statut d'élu en 1990. Gabriel Liiceanu peut miser sur sa notoriété acquise pendant la période communiste, la reconnaissance de ses pairs et son succès auprès du public, que nous révèlent aussi les classements publiés ultérieurement dans *22*[32]. Stelian Tănase est très attiré par les mouvements de protestation[33].

Un autre membre fondateur du GDS (Gabriel Andreescu) se présente en tant que candidat indépendant sur une autre liste, constituée dans une ville de province, candidature annoncée dans *22*. Gabriel Andreescu, chercheur physicien, ancien opposant au régime communiste, se présente aux élections sur une « liste de candidats indépendants » constituée à Buzău, sa ville de naissance. Sur la même liste sont candidats aux élections de 1990 une avocate et un architecte. *22* le présente comme candidat indépendant parmi des membres fondateurs du GDS. L'opposant Gabriel Andreescu

[24] Gabriel Liiceanu publie l'article « Méditations sur l'activiste [communiste] » daté du 23 septembre 1989 dans *22*, 4, le 9 février 1990. Le texte sera repris dans un de ses ouvrages qui rassemble ces prises de position en étroite liaison avec la production journalistique du GDS, sauf que le texte est daté d'août 1989 et que son auteur ne garde que les passages où il présente le portrait de l'activiste, excluant le récit sur son expérience avec un activiste communiste, à savoir le premier secrétaire du parti au niveau de l'Université de Bucarest, mais accompagnant son texte dans ce volume d'une dédicace à l'activiste en question « et à tous les activistes » (Gabriel Liiceanu, *Apel către lichele* [Appel aux canailles], 3e édition revue, Humanitas, Bucarest, 2005, p. 15-19).

[25] À partir de 1990, Gabriel Liiceanu est éditeur, fondateur des Éditions Humanitas, et professeur de philosophie à l'Université de Bucarest.

[26] *22*, 1, le 20 janvier 1990.

[27] *22*, 14, le 20 avril 1990.

[28] Gabriel Liiceanu, *op. cit.*, p. 123.

[29] La liste est publiée de nouveau dans le numéro qui précède de peu les premières élections postcommunistes (*22*, 18, le 17 mai 1990), sous le slogan « Espérons ensemble, changerons ensemble » et avec une citation tirée de Platon : « Que du pouvoir ne se rapprochent que ceux qui ne l'aiment pas ». Au bas de la page est publiée la « déclaration d'adhésion » à la Proclamation de Timişoara signée par le Front populaire de Moldova qui est dans le même temps un appel au non-soutien des « activistes roumains qui ont contribué à l'instauration et au maintien du régime communiste » qui se présentent aux élections.

[30] *22*, 15, le 27 avril 1990.

[31] *22*, 16, le 4 mai 1990.

[32] *22*, 62, le 29 mars 1991.

[33] Stelian Tănase est un des vice-présidents de l'Alliance civique et des initiateurs de la fondation du Parti de l'Alliance civique, avant de siéger au Parlement en 1992 comme représentant du Parti de l'Alliance civique et leader des députés de ce parti.

est interviewé par Victor Bârsan, chercheur physicien et membre fondateur du GDS, texte présenté sous l'intitulé « Pour être crédible dans l'avenir, il faut avoir été crédible dans le passé ». Questionné sur le choix d'une candidature comme indépendant, Gabriel Andreescu affirme :

> « […] les indépendants pourraient répondre plus exactement au besoin de la société de s'identifier avec quelque chose […] les indépendants correspondent au moins à l'espérance concernant l'honnêteté, la lucidité, si nécessaires à la société roumaine[34] ».

Deux autres membres fondateurs du GDS (Mircea Dinescu et Andrei Pleşu) participent aux premières élections sur une autre liste des indépendants constituée à Bucarest aux côtés de deux autres intellectuels (Dan Hăulică et Ion Caramitru). Mircea Dinescu est alors président de l'Union des écrivains, élu fin décembre 1989, alors qu'Andrei Pleşu est ministre de la Culture[35] dans le gouvernement provisoire, constitué le 31 décembre.

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Les intellectuels sont plutôt rares à se retrouver dans la rue aux côtés des manifestants. Certains intellectuels du GDS participent à la nouvelle structure du pouvoir, créée le 22 décembre 1989.

Dans l'après-midi du 22 décembre 1989, Ion Iliescu, futur président élu de la Roumanie postcommuniste, parlant au balcon du Comité central, annonçait que la Securitate n'existait plus car elle était incluse dans l'armée ainsi que la disparition des « anciennes structures – le parti, le gouvernement [qui] ont été en réalité éliminés », et qu'il constituera avec d'autres le Conseil du Front du salut national exprimant son espoir que des formations similaires soient créées au niveau local[36]. La nuit du 22 décembre, le programme du FSN, portant l'intitulé « Communiqué au pays du Conseil du Front du salut national », est présenté à la télévision roumaine par Ion Iliescu et s'achève avec la composition du Conseil du Front du salut national :

> « Doina Cornea, Ana Blandiana, Mircea Dinescu, László Tőkés, Dumitru Mazilu, Dan Deşliu[37], le général Ştefan Guşă, le général Victor Stănculescu, Aurel Dragoş Munteanu[38], Corneliu Mănescu, Alexandru Bârlădeanu, Silviu Brucan, Petre Roman, Ion Caramitru, Sergiu Nicolaescu, Mihai Montanu, Mihai Ispas, Gelu Voican Voiculescu, Dan Marţian, le capitain Mihai Lupoi, le général Gheorghe Voinea, le capitain Emil Dumitrescu, Vasile Neacşa, Cristina Ciontu, Marian Baciu, Bogdan Teodoriu, Eugenia Iorga, Paul Negriţiu, Gheorghe Manole, Cazimir Ionescu, Adrian Sârbu, Constantin Cârjan, Géza Domokos, Magdalena Ionescu, Marian Mierlă, Constantin Ivanovici, Ovidiu Vlad, Valeriu Bucurescu et Ion Iliescu[39]. »

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[34] *22*, 16, le 14 mai 1990.

[35] Arrêté du CFSN n° 12 du 28 décembre 1989, publié dans *Monitorul Oficial al României*, 6, le 29 décembre 1989.

[36] Au même moment il annonçait que certaines informations non-confirmées indiquaient le fait que Ceauşescu a été arrêté près de Târgovişte.

[37] Dan « Deşliu a été poète du réalisme socialiste pendant les années 1950, mais en 1971 il a protesté contre la révolution culturelle de Ceauşescu et s'est transformé en défenseur des écrivains non-conformistes de l'Union des écrivains » (Dennis Deletant, *Ceaușescu și Securitatea. Constrângere și disidență în România anilor 1965-1989*, Humanitas, Bucarest, 1998, p. 266). Dan Deşliu proteste en mars 1989 en envoyant une lettre ouverte à Ceauşescu et Doina Cornea se « déclare solidaire avec » Dan Deşliu tout comme avec Mircea Dinescu et Aurel Dragoş Munteanu (*ibidem*, p. 267). Pour les prises de position de Dan Deşliu au sein de l'Union des écrivains et pour ses protestations de 1989 voir Lucia Dragomir, *L'Union des Écrivains. Une institution transnationale à l'Est : l'exemple roumain*, Belin, Paris, 2007, p. 279-280 et 289-290).

[38] Jeune écrivain qui se solidarise avec des écrivains interdits ou protestant contre le régime dans une lettre ouverte datée d'avril 1989, adressée au président de l'Union des écrivains (Dennis Deletant, *op. cit.*, p. 267).

[39] *Monitorul Oficial al României*, 1, le 22 décembre 1989, p. 2.

Le programme du Front du salut national est accompagné de la précision concernant l'élargissement du Conseil du Front du salut national (CFSN), mentionnant que ce « communiqué constitue une première plateforme-programme du nouvel organisme du pouvoir d'État de Roumanie[40] ». Au 22 décembre, le CFSN, « tel qu'il a été annoncé par Iliescu […] comprenait 39 membres seulement, mais jusqu'au 30 décembre, il est arrivé au nombre de 145[41] » membres.

Du CFSN dans sa composition initiale, telle qu'elle est annoncée le 22 décembre, font partie trois signataires de la « lettre des six », Corneliu Mănescu, Alexandru Bârlădeanu et Silviu Brucan[42], et deux futurs membres fondateurs du GDS, représentants des professions littéraires, Doina Cornea et Mircea Dinescu, ainsi que d'autres écrivains ayant pris position contre le régime ou interdits de publication (Dan Deşliu, Ana Blandiana et Aurel Dragoş Munteanu)[43]. Tous les membres du CFSN dans sa composition initiale semblent avoir été présents lors de cette première réunion et d'autres encore[44]. D'autres membres du GDS participeront à la première séance du CFSN du 27 décembre. Dans l'ordre de leur prise de parole lors de cette séance il s'agit d'Andrei Pleşu, d'Ascanio Damian et de Mariana Celac. Ces derniers ne se retrouvent pas sur la première liste du CFSN, mais ils seront inclus dans la liste agrandie des membres du CFSN, dont le nombre est établi à 145 membres[45].

À la première séance du CFSN, du 27 décembre 1989, participent aussi, semble-t-il, d'autres qui ne seront pas inclus sur la liste élargie du CFSN, comme c'est le cas de Magda Cârneci, alors que certains autres y seront inclus sans être présents à cette première réunion du CFSN, comme c'est le cas de Radu Filipescu ou de Gabriel Andreescu. Magda Cârneci dit avoir fait partie du CFSN dans

[40] Ion Iliescu, Vladimir Tismăneanu, *op. cit.*, p. 402. Ion Iliescu précise : « Non pas front comme structure politique, mais Conseil du Front du salut national comme structure étatique ; donc une structure pour prendre toutes les tâches d'un organe provisoire d'État. » (*ibidem*, p. 186).

[41] *Ibidem*, p. 276. Le nombre de 145 membres du CFSN est annoncé par l'article 3 de l'Arrêté-loi n° 2 du 27 décembre, publié dans *Monitorul Oficial al României*, 4, le 27 décembre 1989.

[42] Tous les signataires de cette lettre de protestation se sont confrontés à différentes périodes avec la direction du PCR (PMR) et par la suite, plus directement, avec Nicolae Ceauşescu. Les signataires se présentent comme il suit : « Gheorghe Apostol, ancien membre du Bureau politique et président des syndicats ; Alexandru Bârlădeanu, ancien membre du Bureau politique et président du CSP [Conseil national de la recherche scientifique] ; Corneliu Mănescu, ancien ministre des affaires étrangères et président de l'Assemblée générale de l'ONU ; Constantin Pârvulescu, membre fondateur du PCR ; Grigore Răceanu, militant du PCR ; Silviu Brucan, ancien rédacteur en chef adjoint de *Scânteia ».* La plus connue protestation collective venant de l'intérieur est la « lettre des six », telle qu'elle est restée dans la mémoire historique. Des militants communistes des années 1930, occupant diverses importantes fonctions dans l'appareil de l'État et du parti jusqu'à la fin des années 1960, occupant des fonctions dans les plus hautes structures du pouvoir, adressent à Ceauşescu une lettre de protestation. La « lettre des six » attire l'attention des médias étrangers beaucoup plus que toute autre lettre collective et toute autre protestation des représentants des professions intellectuelles (nous y reviendrons). Cet acte de dissidence venant des anciens militants communistes, la majorité (cinq) ayant occupé des fonctions politiques importantes, est beaucoup plus connu et discuté que tout autre acte similaire venant des intellectuels, et plus largement du monde intellectuel : qu'il soit question de la « lettre des sept », la lettre de protestation rassemblant les « grands », auteurs notoires de la période communiste, autres lettres signés par des intellectuels (chercheurs dans la plupart des cas ou écrivains) ou celle diffusée et rendue publique plus tard, la « lettre des dix-huit intellectuels » réunissant les « jeunes », scientifiques surtout et écrivains non pas tout aussi connus ou moins connus.

[43] Deux interprètes aussi appartenant à deux générations différentes (Sergiu Nicolaescu et Ion Caramitru) dont un embrasse la même vision que le GDS, se situant dans la période postcommuniste dans le courant de l'anticommunisme : Ion Caramitru (né en 1942).

[44] Dans la transcription de cette séance apparaissent aussi des « voix » sans nom, sauf d'autres témoignages, cela ne permet pas de dire qui sont les absents.

[45] Arrêté-loi n° 2 du 27 décembre 1989, publié dans *Monitorul Oficial al României*, 4, le 27 décembre 1989.

sa première composition[46] même si elle ne se trouve pas sur la première liste du CFSN, rendue publique le soir du 22 décembre, mais elle est présente lors de la première séance du CFSN.

D'autres seront cooptés, inclus sur la liste du CFSN, qui s'agrandit par l'inclusion d'autres propositions venues des intellectuels mêmes. Dan Petrescu, membre fondateur du GDS, est lui aussi membre du CFSN, sur la liste des 145 membres du CFSN, datée du 27 décembre[47]. À la différence d'Andrei Pleşu qui est coopté au CFSN à l'occasion de la première séance du CFSN[48], Dan Petrescu semble se trouver à Bucarest, à la Télévision, déjà le 22 décembre, aux côtés de Doina Cornea, de Mircea Dinescu, d'Ana Blandiana et d'autres encore.

Dans la période suivante sont devenus membres du CFSN d'autres membres fondateurs du GDS : le physicien chercheur et opposant au régime, Gabriel Andreescu, et l'ingénieur et ancien détenu politique des années 1980, Radu Filipescu. Ces deux sont devenus membres du CFSN à la proposition de Doina Cornea. Mais aucun d'entre eux ne participe à la première séance du CFSN du 27 décembre lorsqu'il est décidé de la nomination d'Andrei Pleşu et de celle de Mihai Şora comme ministres respectivement de la Culture et de l'Enseignement. Gabriel Andreescu se trouvait à Buzău et est amené à Bucarest par des officiers de la Securitate. Se trouvant dans la prison de la Securitate, il est libéré le 22 décembre. Radu Filipescu, de son côté, dissident et détenu politique – emprisonné à deux reprises dans les années 1980 – est arrêté le 22 décembre et libéré le même jour.

À la fin de l'année 1989, participent ainsi au Conseil du Front du salut national (CFSN), créé le 22 décembre 1989, apparu officiellement le 31 décembre, plusieurs membres fondateurs du GDS : Doina Cornea, Mircea Dinescu, Andrei Pleşu, Radu Filipescu, Gabriel Andreescu, Mariana Celac, Dan Petrescu, Ascanio Damian, Magda Cârneci. Font partie du CFSN dans sa composition initiale les deux premiers ci-dessus mentionnés tout comme Ana Blandiana, les trois figurent en tête de la liste des membres du CFSN, rendue publique le 22 décembre. On retrouve aussi Liviu Antonesei, membre du GDS à partir d'octobre 1990, comme « chef pour "animation culturelle – jeunesse" dans la Commission culturelle du CFSN, dirigée par monsieur Caramitru[49] ».

Andrei Pleşu et Mihai Şora sont ministres dans le gouvernement provisoire, respectivement de la Culture[50] et de l'Enseignement[51]. Certains autres membres fondateurs du GDS intègrent ces deux institutions (re)créées fin décembre 1989.

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[46] Magda Cârneci, « Un peuple de poètes », dans Dan Lungu, Lucian Dan Teodorovici (dir.), *Str. Revoluţiei nr. 89* [89 Rue de la Révolution], Polirom, Iaşi, 2009, p. 84. Dans un entretien réalisé avec Magda Cârneci à titre d'« intellectuelle roumaine vivant en France », elle déclare de même qu'« en raison du fait d'avoir participé activement à la Révolution de décembre 1989 (j'ai été membre du Front du salut national), j'ai été invitée à Paris en 1990 afin de prendre part à une "Rencontre des jeunes révolutionnaires de l'Europe de l'Est", patronnée par le président François Mitterrand ».

[47] Aucun ouvrage traitant de la « révolution roumaine » n'inclut pas la liste des 145 membres du CFSN telle qu'elle s'est constituée lorsqu'on décide de ses règles de fonctionnement, le 27 décembre 1989. Il faut alors recueillir leurs témoignages ou d'autres témoignages venus d'autres participants à ces événements ou de ceux qui sont de leurs proches (collaborateurs ou amis).

[48] Andrei Pleşu, Petre Roman, Elena Ştefoi, *Transformări, inerţii, dezordini. 22 de luni după 22 decembrie 1989* [Transformations, inerties, désordres. 22 mois après le 22 décembre 1989], Polirom, Iaşi, 2002, p. 96.

[49] Dorin Popa, Liviu Antonesei, *Scriitorii şi politica 1990-2007. De la Iliescu la Băsescu şi retur* [Les écrivains et la politique 1990-2007. D'Iliescu à Băsescu et de retour], Institut européen, Iaşi, 2007, p. 41.

[50] Le 28 décembre, par l'Arrêté n° 12 du CFSN, le Ministère de la Culture est fondé par la « réorganisation du Conseil de la culture et de l'éducation socialiste qui se dissout » et Andrei Pleşu est nommé ministre de la Culture. Arrêté du CFSN n° 12 du 28 décembre 1989, publié dans *Monitorul Oficial al României*, 6, le 29 décembre 1989. Cet acte normatif est abrogé par la Loi n° 7 de 1998.

[51] Le 30 décembre, par l'Arrêté n° 27 du CFSN, le Ministère de l'Enseignement est fondé par la « réorganisation du Ministère de l'Education et de l'Enseignement qui se dissout » et Mihai Şora est nommé ministre de l'Enseignement. Arrêté du CFSN n° 27 du 30 décembre 1989, publié dans *Monitorul Oficial al României*, 8, le 31 décembre 1989. Cet acte ne concerne pas seulement ce ministère.

Dan Petrescu est nommé en janvier 1990 dans le premier gouvernement provisoire comme adjoint du ministre de la Culture[52]. Plusieurs membres du GDS, fondateurs ou cooptés plus tôt ou plus tard au GDS, travaillent au sein du Ministère de la Culture ou dans des institutions qui fonctionnent dans la subordination de ce ministère. Deux d'entre eux vont diriger des institutions nouvelles créées en 1990 par le Ministère de la Culture. Horia Bernea (coopté au GDS en octobre 1990) dirige le Musée du paysan roumain, (re)création dont il est l'initiateur, après la disparition du Musée du parti. Radu Bercea dirige à son tour le nouvel Institut d'études orientales « Sergiu Al-George », intégré au moment de sa création par Andrei Cornea, qui travaillait jusqu'en 1990, comme d'autres membres fondateurs du GDS, à l'Institut d'histoire de l'art. Un autre membre fondateur du GDS, l'historien chercheur Andrei Pippidi, appartenant à la même génération qu'Andrei Pleşu, sera coopté pour travailler dans le Ministère de la Culture dirigé par ce dernier. Étant sollicité pour travailler dans le nouveau Ministère de la Culture, Andrei Pippidi refuse le poste de secrétaire d'État, selon ses propres affirmations, préférant « pouvoir publier dans *22*[53] ». Andrei Pippidi est membre de la Commission nationale des monuments historiques du même ministère à partir de 1990, alors que Radu Popa est vice-président de la commission[54]. Magda Cârneci est directrice du Département d'arts visuels, alors que dans le même temps elle est directrice de l'Institut d'histoire de l'art de l'Académie roumaine. Magda Cârneci garde son poste dans l'administration jusqu'en automne, moment de son départ en France pour continuer ses études, mais restera à la direction de l'Institut d'histoire de l'art jusqu'en 1992. Teodor Baconsky[55] est responsable du nouveau Département pour les Cultes, créé au sein du nouveau Ministère de la Culture, à l'initiative d'Andrei Pleşu, alors que le gouvernement provisoire inclut aussi un Ministère des Cultes, créé en janvier et fonctionnant jusqu'aux premières élections postcommunistes. Magda Cârneci et Teodor Baconsky partiront à l'automne de 1990, ainsi que d'autres – tel est le cas de Bogdan Ghiu, rédacteur de *22* –, pour poursuivre leur formation en France.

Sorin Antohi est nommé directeur pour l'enseignement préuniversitaire au sein du Ministère de l'Enseignement, dirigé par Mihai Şora dans le gouvernement provisoire. Si ce dernier ne fera plus partie du gouvernement installé après les premières élections, Sorin Antohi est resté dans ce poste jusqu'en novembre 1990, moment de son départ en France comme boursier du Gouvernement français pour un « séjour de haut niveau ».

À la suite de la décision prise le 23 janvier lors de la réunion du CFSN concernant la participation du Front du salut national aux élections[56], les anciens opposants et certains dissidents se retirent de cet organisme qui « exerce le pouvoir politique dans l'État » depuis le 22 décembre 1989 : Doina Cornea, Ana Blandiana, Gabriel Andreescu, Mariana Celac, Radu Filipescu[57]. Le 23 janvier 1990, lors d'une séance du CFSN et « après un long débat », on décide de la participation du FSN comme parti politique aux élections de 1990, avec 128 des 141 voix exprimées (dont 8

[52] Arrêté du Gouvernement n° 34 du 10 janvier 1990, publié dans *Monitorul Oficial al României*, 7, le 12 janvier 1990. À cette même occasion est nommé un autre ministre adjoint de la Culture : Coriolan Babeti.

[53] Entretien consultatif avec Andrei Pippidi (le 24 mars 2004).

[54] Arrêté n° 91 du 5 février 1990, publié dans *Monitorul Oficial al României*, 20, le 6 février 1990. L'archéologue et l'historien médiéviste Radu Popa, né en 1933, est mort en 1993. En 1993, Andrei Pippidi est vice-président de la Commission nationale des monuments historiques dont il est devenu président entre 1997 et 2000, après le succès de l'ancienne opposition civique et politique aux élections de 1996.

[55] Teodor Baconky ne sera coopté dans le GDS qu'en 2007, alors qu'il publiait dans *22* en 1990.

[56] *Monitorul Oficial al României*, 15, le 25 janvier 1990.

[57] À l'exception d'Ana Blandiana, ils sont des membres fondateurs du GDS.

voix contre cette décision et 5 abstentions)[58]. La décision, reçue positivement par l'opposition, est accompagnée de demandes concernant la séparation entre le parti politique et l'organisme dirigeant et de contestations de la légitimité du nouveau pouvoir constitué en décembre 1989 comme représentant du mouvement révolutionnaire[59]. C'est le moment de l'apparition des voix dissidentes, retraits du CFSN des opposants bien connus avant 1989 et d'une opposition ouverte au pouvoir en place, suite à l'annonce concernant la création du parti avec le même nom que le pouvoir en place. Le 23 janvier 1990 Doina Cornea annonce son retrait du CFSN. Ana Blandiana refait le geste de Doina Cornea, en renonçant à sa participation au CFSN le 30 janvier. Doina Cornea, la première à se retirer du CFSN, est aussi président du CFSN au niveau local, position à laquelle elle ne semble pas renoncer, considérant cette organisation comme tenant d'une « conception démocrate », à laquelle participe aussi son fils, Leontin Iuhas. Liviu Antonesei parlera de ces retraits « perçus comme une sorte de choc au sein du FSN[60] ».

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L'année 1990 est marquée par de nombreuses manifestations organisées avec et pour le soutien des partis politiques qui se présentent en héritiers des partis politiques traditionnels, disparus par suite de l'installation du communisme, mais aussi par des contre-manifestations organisées pour légitimer la position du pouvoir installé pendant les événements de 1989, à la défense des politiques installés en décembre 1989. À cela s'ajoutent des manifestations organisées par des associations civiques qui véhiculent des messages anticommunistes ayant comme cible les nouveaux dirigeants politiques issus largement de l'ancienne nomenklatura.

Au cours de la manifestation du 12 janvier 1990, consacrée aux victimes de décembre 1989, on formule des revendications qui seront reprises sous diverses formes par des représentants du courant intellectuel de « l'anticommunisme » après 1989. Le pouvoir installé en décembre 1989 est pour la première fois contesté ouvertement dans la rue. Les manifestants demandent que les anciens communistes n'aient pas accès aux postes de direction, que les anciens dirigeants du PCR soient jugés publiquement et que le PCR soit déclaré hors la loi. On sollicite aussi que le nombre des victimes des événements de décembre 1989 soit précisé et l'élucidation de l'énigme des « terroristes ». Les manifestants scandent « À bas le communisme ! », « À bas la Securitate ! ». Les principaux représentants du pouvoir installé, confrontés aux contestations de la rue, engagent des discussions avec les manifestants. En réponse à leurs revendications, le Conseil du Front du salut national (CFSN) émet trois décrets dont un instituant la mise hors la loi du Parti communiste et un autre qui visait l'organisation d'un référendum sur la réintroduction de la peine de mort. Ces deux décrets n'obtiennent pas la « ratification » par le CFSN, décision expliquée lors d'une séance du CFSN du 17 janvier 1990, « communiqué » du CFSN rendu public deux jours après. Un décret-loi institue au même moment « le transfert dans la propriété de l'État de la totalité du patrimoine

[58] Au même moment on décide de proroger la date des premières élections postcommunistes, demande venue aussi de la part de l'opposition (Peter Siani-Davies, *op. cit.*, p. 356). Iliescu se souvient qu'Ion Caramitru lui avait suggéré de proposer l'organisation des élections en avril : « Pourquoi avril ? Dans le mois des Pâques, qu'il ait aussi la signification de la renaissance […] cette date des élections a été mentionnée dans le document politique rendu public le même soir [le 22 décembre 1989]. » (Ion Iliescu, Vladimir Tismăneanu, *op. cit.*, p. 185).

[59] *Ibidem*, p. 357.

[60] Liviu Antonesei dit qu'« ils étaient tellement déroutés qu'ils ont voulu installer Ion Caramitru comme président du Front devenu parti parce qu'il était là le seul qui n'avait pas été membre du PCR » (Dorin Popa, Liviu Antonesei, *op. cit.*, p. 41). Ion Caramitru n'était pas le seul qui n'avait pas été membre du PCR, mais une des plus connues figures intellectuelles, représentant des professions artistiques.

de l'ancien Parti communiste[61] ». Par un autre décret émis au moment même du déroulement de cette manifestation de rue est créée la Commission nationale pour la résolution des saisies des victimes de la dictature[62]. La commission sera chargée d'un dossier concernant une victime des prisons communistes, dans les années 1980, démarche à laquelle des membres fondateurs du GDS apportent leur contribution (le dossier Gheorghe Ursu, ouvert en février 1990). Elle est aussi considérée comme dépourvue d'activité significative par certains témoins de l'époque qui s'y sont intéressés de près[63].

La première manifestation des partis politiques traditionnels date du 28 janvier 1990, suivie le lendemain d'une manifestation de rue pour le soutien du pouvoir en place, installé en décembre 1989.

Le 11 mars 1990 au cours des manifestations de rue organisées à l'initiative de trois associations civiques qui regroupent des écrivains, des journalistes et des étudiants de Timişoara, est rendue publique la « Proclamation de Timişoara[64] » à laquelle adhèrent par la suite plusieurs organisations locales des partis récemment apparus, recréés, et d'autres organisations civiques. Le texte reste le « document référence[65] » de la naissance des mouvements anticommunistes dans la période postcommuniste, il sera mentionné par plusieurs intellectuels lorsqu'ils sont amenés à traiter de ce qui sera appelé « le procès du communisme » ou de leurs engagements dans le cadre des organisations civiques. Le texte de la Proclamation veut renouveler et renforcer le but de la révolution roumaine, « non seulement contre Ceauşescu mais aussi indiscutablement anticommuniste ». À part l'idée de la recherche d'une « troisième voie » récusant la « copie des systèmes capitalistes occidentaux », qui ne semble pas attirer l'attention des intellectuels ou du public, dans la « Proclamation de Timişoara » sont présentées l'idée de l'existence de la révolution « catégoriquement anticommuniste » et celle de l'« interdiction » aux « anciens activistes et [aux] anciens officiers de la Securitate » de participer à la vie politique, soutenues par plusieurs intellectuels prétendants au statut de politique. Souscrivant à ce qui lui semble être « l'idée de base de la Proclamation, à savoir que *la Révolution continue, la Révolution n'est pas achevée* », le « Groupe pour le dialogue social se propose de revenir sur ce document[66] ». Mais le GDS ne sera pas parmi les associations civiques qui adhérent à la Proclamation. La publication du GDS présente brièvement des résumés sur l'activité des initiateurs de la Proclamation et publie des textes-manifestes signés par les associations civiques qui adhérent et soutiennent les idées de la Proclamation. Les intellectuels du GDS discutent favorablement de cette initiative, mais le GDS tient à souligner l'absence de son « esprit partisan ». Dans une « déclaration » signée par le GDS[67] sont critiquées les « autorités » pour leurs stratégies destinées à profiter « des dissensions existantes ». Le GDS affirme que « dans cette Proclamation [de Timişoara] se retrouve un large secteur de la population et tout spécialement les jeunes qui ne sont pas obligatoirement associés

[61] Arrêté-loi n° 30 du 18 janvier 1990, publié dans *Monitorul Oficial al României*, 12, le 19 janvier 1990. Voir Alexandra Gabriela Ionescu, *Du Parti-État à l'État des partis. Nature et fonctions des partis politiques postcommunistes en Roumanie*, thèse de doctorat de sciences politiques sous la direction de Dominique Colas, Institut d'Études Politiques de Paris, Paris, 2007, p. 231-232 et 254-255.

[62] Arrêté-loi n° 19 du 12 janvier 1990, publié dans *Monitorul Oficial al României*, 8, le 13 janvier 1990.

[63] Gabriel Andreescu s'est occupé du cas Gheorghe Ursu comme membre de la sous-commission de recherches spéciales du CFSN (*22*, 15, le 27 avril 1990).

[64] Le 20 janvier 1990 apparaît officiellement la Société de Timişoara comme organisation civique ayant comme tribune le journal *Timişoara*, qui s'affirmera comme auteur de la « Proclamation de Timişoara », lancée le 11 mars 1990, place de l'Opéra de Timişoara.

[65] La « Proclamation de Timişoara » est publiée dans le périodique du GDS presque deux semaines après son lancement.

[66] *22*, 10, le 23 mars 1990.

[67] *22*, 13, le 13 avril 1990.

aux partis politiques, mais qui n'étant pas dépourvus de conscience politique se sentent frustrés dans leurs espérances et dans leurs attentes ». Mais aussi que « le GDS n'est pas un compétiteur aux élections, c'est pourquoi il ne peut pas être accusé d'esprit partisan » et que « ses inquiétudes ne se réfèrent pas à son propre destin électoral, mais au destin de la démocratie roumaine, qu'on laisse, par ignorance, par incompétence, ambition ou mauvaise intention, se dégrader dans un climat de soupçon, de calomnie et de guérilla psychologique télévisée ». Ainsi « la société civile risque de perdre de toute façon[68] ».

Les événements ayant débuté le 22 avril 1990 à Bucarest s'achèvent le 13 juin avec des confrontations entre les autorités et les manifestants, suivies de l'arrivée des mineurs et des violences contre les manifestants pour mettre fin à ce mouvement de rue[69]. Pour les intellectuels et pour les leaders ou membres des associations civiques, mais aussi pour des journalistes critiques du pouvoir en place, ce mouvement a constitué le cadre dans lequel ils développent et parfois leur sont reconnues leurs dispositions politiques. Même si le GDS n'est ni initiateur ni tenant (en tant que groupe) des manifestations qui ont lieu Place de l'Université, plusieurs membres fondateurs du GDS prennent la parole à la tribune de ce mouvement (Doina Cornea, Petru Creţia, Gabriel Liiceanu, Stelian Tănase[70]). En plus, certains membres du GDS se posent en ses porte-paroles, ils se présentent en médiateurs entre les manifestants et le pouvoir[71]. Bien que tous les membres du GDS n'approuvent pas ou ne participent pas à ces manifestations, à la tribune de la rue, parlant devant les manifestants situés Place de l'Université, ou par le biais du journalisme, le GDS travaille à s'ériger en représentant de ce mouvement de contestation.

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Si les nouveaux politiques fondent leur légitimité principalement sur leur contribution à la « révolution roumaine », les intellectuels du GDS, à la recherche d'une légitimité pour conquérir le grand public, sont animés par l'idée de refaire le procès de Ceauşescu ou de refaire la révolution[72].

[68] *22*, 14, le 20 avril 1990.

[69] Le GDS a contribué à la réalisation d'un « rapport sur les événements de 13-15 juin 1990 » (qui paraît dans huit numéros successifs de *22* durant l'automne de 1990) avec l'Association pour la défense des droits de l'homme – Comité Helsinki de Roumanie, travail publié sous forme de livre en France et l'année suivante en Roumanie : Mihnea Berindei, Ariadna Combes, Anne Planche, *Roumanie, le livre blanc. La réalité d'un pouvoir néo-communiste*, La Découverte, Paris, 1990 (éd. roumaine, *13-15 iunie 1990. Realitatea unei puteri neocomuniste* [13-15 juin 1990. La réalité d'un pouvoir néocommuniste], Humanitas, Bucarest, 1991, 2e édition révisée, 2006).

[70] À la tribune de la rue on retrouve aussi Ana Blandiana, écrivaine bien connue de la période communiste et plus connue encore dans les années 1980 lorsqu'elle était sous interdiction de signature, certains volumes de poésie étant interdits de publication alors que certains autres étaient retirés des librairies, mais aussi des interprètes notoires de la période communiste dont on peut citer ici un membre du GDS, Victor Rebengiuc.

[71] Doina Cornea, *Faţa nevăzută a lucrurilor (1990-1999). Dialoguri cu Rodica Palade* [Le visage inaperçu des choses. Dialogues avec Rodica Palade], Dacia, Cluj, 1999, p. 18-31. Voir aussi Andrei Pleşu, Petre Roman, Elena Ştefoi, *op. cit.*, p. 219-225.

[72] Dans deux numéros sont présentés les « Dialogues successifs entre Vladimir Tismăneanu et Stelian Tănase » sous l'intitulé « Nous sommes après la première révolution. Comment sera la deuxième ? » (*22*, 9, le 16 mars 1990 et *22*, 11, le 30 mars 1990). Au sujet des événements de 1989 en Roumanie, de la « "non-révolution" violente » et de la démission du communisme en Roumanie, voir Daniel Barbu, *Republica absentă. Politică şi societate în România postcomunistă* [La République absente. Politique et société dans la Roumanie postcommuniste], Nemira, Bucarest, 1999, p. 183-198 : « En Roumanie, la révolution a été le modèle social de la délégitimation du totalitarisme, la révolution a été le moyen par lequel les anciennes élites communistes ont procédé à la réforme des structures et hiérarchies propres, la révolution a été l'instance qui a permis aux intellectuels de s'imposer comme uniques porte-paroles de la société civile [...]. Le changement n'est pas advenu au bout d'un processus révolutionnaire, mais a été plutôt le point culminant de la crise interne généralisée » (p. 183 et 185).

Ils embrassent l'idée de l'existence d'une « révolution », mais mettent en cause la légitimité du pouvoir installé suite aux événements de décembre 1989. Auteurs de la période communiste, plus ou peu connus, et militants de la société civile dénoncent le « vol de la révolution par les leaders de second rang de l'ancien régime » ou parlent de la « trahison des valeurs de la révolution[73] ». Les intellectuels travaillent à légitimer leurs prétentions en s'appuyant sur l'apparition des mouvements anticommunistes dont ils ne sont pas les initiateurs[74]. Les intellectuels du GDS fondent leurs prétentions au statut de politique de l'après 1989 sur la révolte contre le nouvel ordre issu de la « révolution ». Ils fondent leurs revendications en prenant appui sur leurs lecteurs, lorsque la littérature enregistre une baisse d'intérêt et les tirages de la presse politique sont énormes.

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Les élections parlementaires et présidentielles ont lieu au même moment, le 20 mai 1990. Le Front du salut national (FSN), constitué en parti politique le 6 février 1990, s'impose. Le FSN obtient 66,31 % des voix exprimées à l'Assemblée des députés et 67,02 % des voix exprimées au Sénat[75].

Des 71 formations politiques qui participent aux premières élections, 27[76] sont entrées au parlement dont neuf obtiennent un mandat de député en tant qu'organisations des minorités nationales, leur entrée au parlement étant due précisément à ce statut. Trois autres formations politiques représentent des minorités nationales, mais le nombre de voix qu'elles obtiennent dépasse le quotient électoral. La loi électorale de 1990 ne prévoit pas un seuil électoral. Parmi les organisations qui participent aux élections du 20 mai 1990 on retrouve l'Association des anciens détenus politiques et des victimes de la dictature de Roumanie. Le seul candidat « indépendant » (Antonie Iorgovan) ayant participé aux élections du 20 mai 1990 en dehors des listes de parti est entré lui aussi au parlement comme sénateur. Si l'on connaît le nombre des formations politiques qui ont déposé leurs listes des candidats et les voix obtenues par chacune, on ne connaît que le nombre de voix obtenues par tous les « autres candidats indépendants », c'est-à-dire le total des voix obtenues par les trois listes des candidats indépendants. Il n'aurait existé donc officiellement aucune « liste de candidats indépendants », mais des « candidats indépendants », « autres » que celui qui s'est présenté en nom propre aux élections, comme « candidat indépendant », car on ne présente pas le nombre de voix obtenues par chaque liste. Les « autres » candidats, à savoir les

[73] Domnița Ștefănescu, *Unsprezece ani din istoria României. O cronologie a evenimentelor decembrie 1989-decembrie 2000* [Onze années de l'histoire de la Roumanie. Une chronologie des événements…], Maşina de scris, Bucarest, 2011, p. 103 ; Ruxandra Cesereanu, *Decembrie '89. Deconstrucția unei revoluții* [Décembre '89. La déconstruction d'une révolution], Polirom, Iași, 2004, p. 69-71 ; Peter Siani-Davies, *op. cit.*, p. 395-398.

[74] Mais plus tard certains membres du GDS encouragent et désirent donner leur contribution à leur organisation avec la création de l'Alliance civique. Voir *infra*.

[75] Sur les partis politiques et les scrutins postcommunistes, notamment sur les résultats des élections du 20 mai 1990 voir Alexandru Radu, *Nevoia schimbării. Un deceniu de pluripartidism în România* [Le besoin de changement. Une décennie d'un régime multipartite en Roumanie], Éditions « Ion Cristoiu », Bucarest, 2000, p. 252 et 346-348 ; Cristian Preda, *Partide și alegeri în România postcomunistă : 1989-2004* [Partis politiques et élections dans la Roumanie postcommuniste], Nemira, Bucarest, 2005 ; Cristian Preda, Sorina Soare, *Regimul, partidele și sistemul politic din România* [Le Régime, les partis et le système politique en Roumanie], Nemira, Bucarest, 2008, p. 28, 103 et 123 ; Alexandru Radu, *Politica între proporționalism și majoritarism. Alegeri și sistem electoral în România postcomunistă* [La politique entre système proportionnel et système majoritaire. Élections et système électoral dans la Roumanie postcommuniste], Institut européen, Iași, 2012, p. 75-92.

[76] Alexandru Radu, *Nevoia schimbării. Un deceniu de pluripartidism în România*, *op. cit.*, p. 9 et 16.

trois listes des candidats ont recueilli : 256 656 voix obtenues soit 1,87 % des voix exprimées à l'Assemblée des députés et 391 781 voix obtenues soit 2,81 % des voix exprimées au Sénat à l'échelle nationale[77].

La première analyse des résultats des premières élections postcommunistes est cosignée par Pavel Câmpeanu, ancien militant communiste, sociologue et spécialiste des médias de la période communiste[78]. Dans cette analyse on considère aussi les résultats des sondages d'opinion « effectués par le GDS[79] ».

Après les élections de mai 1990, le Front du salut national (FSN) bénéficie d'une majorité dans le Parlement[80]. L'opposition est faible et fragmentée. Le 11 juillet 1990, la Chambre des députés et le Sénat, réunis en séance commune, se déclarent Assemblée constituante décidant de la composition de la Commission de rédaction du projet de Constitution[81]. La commission recevra son statut permanent à la fin d'octobre 1990[82]. Elle comprend une majorité composée de membres du FSN (12), un membre du PNL et un membre du PNȚCD. Des 28 personnes désignées, trois sont des conseillers dans différentes structures alors qu'un seul n'est pas membre d'un parti politique[83]. Le seul « indépendant » est le seul sénateur élu au scrutin de mai 1990 en dehors des listes de parti (Antonie Iorgovan[84]). Trois autres sont des représentants des minorités nationales (dont deux sont membres de l'Union démocratique des hongrois de Roumanie). La commission compte, à part les spécialistes du droit juristes (13 juristes dont six sont docteurs en droit et, à une exception près, des universitaires, mais aussi quatre avocats), deux ingénieurs, deux économistes (dont un est un universitaire), deux écrivains, un historien, un psychologue et un sociologue « écologiste[85] ». Entre juin 1990 et décembre 1990, prend naissance le projet intitulé les « Thèses pour l'élaboration du projet de constitution de la Roumanie ». Une fois ce projet préliminaire rendu public (le 12 décembre 1990), les principes et la structure de la future Constitution seront débattus et ensuite adoptés par l'Assemblée constituante, entre le 12 février et le 20 juin 1991. Une fois le projet de Constitution rendu public, les débats sur les dispositions se déroulent entre le 10 septembre et le 21 novembre 1991. Soumise au vote du Parlement, la Constitution est adoptée

[77] Cf. au procès-verbal des résultats des élections du 20 mai 1990, émis par le Bureau électoral central, publié dans *Monitorul Oficial al României*, 81, le 8 juin 1990.

[78] Pavel Câmpeanu, militant communiste dans les années 1930, formé à l'école du parti dans les années 1950, constitua en 1967 l'Office d'études et de sondages à la Télévision roumaine, là où il déployait son activité depuis 1960.

[79] Pavel Câmpeanu, Ariadna Combes, Mihnea Berindei, *România înainte și după 20 mai* [La Roumanie avant et après 20 mai], Humanitas, Bucarest, 1991, p. 94-95 et 128.

[80] Les pourcentages des votes obtenus par le FSN disponibles dans les trois ouvrages consultés (dont un est une « histoire chronologique ») varient : entre 66,31 (Stan Stoica, *România după 1989. O istorie cronologică*, Meronia, Bucarest, 2007, p. 219 ; Cristian Preda, Sorina Soare, *op. cit.*, p. 123) et 66,42 (Eleodor Focșeneanu, *Istoria constituțională a României 1859-1991*, Humanitas, Bucarest [1992], 2e édition revue, 1998, p. 144) pour l'Assemblée des députés ; et entre 77,11 (Stan Stoica, *op. cit.*, p. 223) et 76,48 (Eleodor Focșeneanu, *op. cit.*, p. 144) pour le Sénat.

[81] Auquel le Parlement lui accorde le statut de commission permanente, le 29 octobre 1990 par l'Assemblée des députés et au 30 octobre 1990 par le Sénat (*Monitorul Oficial al României* n° 119 du 2 novembre 1990 cité par Teodora Stănescu-Stanciu dans son propos introductif au volume édité par l'Institut de la révolution roumaine de décembre 1989, *Constituția României 1991. Documente*, vol. V, Bucarest, 2017, p. 13).

[82] Eleodor Focșeneanu, *op. cit.*, p. 144-145.

[83] L'un est conseiller du président, un autre du premier ministre, en ce qui concerne le dernier, conseiller pour l'Assemblée des députés, son affiliation politique reste inconnue.

[84] Surnommé le « père de la Constitution », membre de la Commission juridique du CFSN, Antonie Iorgovan est alors maître de conférences à l'Université de Bucarest.

[85] Né en 1931, Nicolae S. Dumitru est maître de conférences à la Faculté de géologie de l'Université de Bucarest. Ce sociologue tout comme l'historien et le psychologue sont des universitaires ainsi qu'un autre membre de la commission.

le 21 novembre 1991 avec 414 du total de 509 des voix exprimées. Le lendemain, il est décidé que la Constitution fera l'objet d'un référendum en vue de son entrée en vigueur[86].

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À défaut d'un accord au sein du GDS sur leur participation à une classe politique postcommuniste peu renouvelée, le GDS oppose aux politiques « révolutionnaires », issus largement de la nomenklatura politique, et donc au capital politique, le capital symbolique obtenu avant 1989 par les écrivains-philosophes ou essayistes les plus notoires cumulé à un autre type de capital symbolique dont bénéficient les quelques opposants au régime communiste. Bien que certains sont cooptés dans les structures du pouvoir installé en décembre 1989, les membres du GDS sont les critiques du pouvoir et se déclarent « groupe d'opposition » et garant du respect des valeurs démocratiques[87]. Plusieurs refusent de continuer à donner leur contribution au nouveau pouvoir, mais plus nombreux sont ceux qui n'accèdent pas à l'espace proprement politique. Ensemble ils seront des critiques du pouvoir en place. Après avoir échoué de faire leur entrée en politique, refusant leur affiliation à un parti ou autre force politique, leurs attentes quant à l'entrée en politique grandissent. Ils peuvent miser, profiter de nouveaux mouvements contestataires. Leurs prétentions se développent en relation avec l'apparition des mouvements civiques (manifestations de rue et associations civiques à vocation politique) et l'apparition de nouvelles organisations professionnelles[88].

À ces nouvelles demandes apparues pendant l'année 1990 et ensuite en 1991, à cette nouvelle ouverture des possibilités, le GDS répond non pas par un engagement direct et collectif, mais par l'engagement en nom propre. Des intellectuels qui se retrouvent dans le GDS participent à la création de l'Alliance civique (AC), et par la suite à la création du Parti de l'Alliance civique (PAC). Quoique des membres du GDS sont bien nombreux à soutenir l'AC et par la suite le PAC, le GDS conserve sa place au sein du champ intellectuel. Le GDS soutient la création de l'AC et plusieurs membres du GDS en sont les responsables, d'autres membres du GDS s'intéressent de près à l'activité de la nouvelle organisation, mais ils ne sont pas tous impliqués dans cette organisation qui vise à représenter la « société civile[89] ». Si tous ne seront pas des membres de l'AC, ils s'y intéressent quasiment tous (mais seuls quelques-uns adhéreront au PAC). Dans un premier temps les intellectuels du GDS participent à la création de cette organisation civique conçue comme « modalité politique de représentation de la société civile » en renforçant l'image du GDS et des intellectuels, membres du GDS, comme organisateur et promoteur de la société civile[90]. En octobre

[86] Le référendum a eu lieu le 8 décembre 1991. 67 % des citoyens ont participé à ce scrutin et 73 % ont voté en faveur de la nouvelle Constitution.

[87] *22*, 4, le 9 février 1990.

[88] *22*, 55, le 8 février 1991.

[89] *22*, 54, le 1er février 1991. Dans la rubrique « L'Alliance civique : pro domo », Gabriel Andreescu (membre du GDS et vice-président de l'AC) reprend ses arguments sur le rôle de cette organisation civique en soulignant « l'importance de la participation du Groupe pour le dialogue social à la formation de l'Alliance civique ». Son propos vise à contrecarrer les critiques de ce mouvement que des membres de la rédaction de la revue du GDS publient dans *22* et à clarifier « la relation entre le Groupe, sa revue et l'Alliance ».

[90] Parmi les membres du GDS, c'est Gabriel Andreescu qui apparaît comme porte-parole de l'Alliance civique (AC) dans *22*. L'AC prend naissance le 6 novembre 1990 à l'initiative de plusieurs associations civiques dont l'Association « 15 novembre » – Brașov, la Solidarité universitaire, la Société « Timișoara », le GDS, la Société « Agora » – Iași, le Groupe indépendant pour la démocratie, l'Association Pro démocratie et de deux centaines de personnes. Le manifeste rendu public à sa constitution, la « déclaration de principe », porte la devise « Nous ne pouvons réussir qu'ensemble ! »

1990 peu avant la fondation de l'AC, le 7 novembre 1990, comme « formation civique avec une plus grande implication dans le politique[91] », en traitant du monde politique et de la position du GDS, présenté comme partie de l'opposition « civique », Andrei Cornea, membre fondateur du GDS, révèle l'ambiguïté des revendications identitaires du groupe, qui renferment la porosité des frontières entre le monde intellectuel et le monde politique :

> « Sommes-nous un groupe de dissidents en légalité, une société pour "social consulting" ou un "mini-parti" avec des perspectives incertaines[92]. »

L'organisation civique conçue se déclare « apolitique » tout en poursuivant des buts politiques : s'opposer au pouvoir en place. La nouvelle structure qui entend représenter la « société civile » dans ses formes diverses (mouvements de rue, associations militantes, associations professionnelles) apparaît lorsque des intellectuels tendent à se définir en rapport avec des objectifs proprement politiques.

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(Domniţa Ştefănescu, *op. cit.*, p. 103). Le manifeste de l'AC, paru dans la publication du GDS, milite pour la « résurrection de la société civile » (*22*, 43, le 9 novembre 1990). Le 15 novembre 1990, l'AC organise à Bucarest la plus grande manifestation consacrée à la célébration de la révolte de Braşov en 1987. À Braşov une autre manifestation est organisée à cette occasion par l'Association « 15 novembre 1987 ». Sur la naissance de l'AC et sur sa première direction, voir Dan Pavel, Iulia Huiu, *« Nu putem reuşi decît împreună ». O istorie analitică a Convenţiei Democratice, 1989-2000* [Nous ne pouvons réussir qu'ensemble. Une histoire analytique de la Convention démocratique], Polirom, Iaşi, 2003, p. 67 et 79.

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ENGLISH SUMMARY

Abstract:

The paper contends that the 2004 general elections – held simultaneously for the two houses of Parliament and for the President of Romania –, and more precisely the way the results were interpreted in order to form a parliamentary majority able to support a stable government reflect better than any other post-communist electoral event the very nature of the Romanian political regime. The role of the President, the rules that marshal the coalition formation, party choices and voters' behaviour were illustrated in an exemplary manner by the 2004 elections, that should be regarded as a practical guide into the constitutional makeup of the political regime at work in Romania.

Keywords: *2004 Romanian elections, Social Democratic Party, Romanian political regime, post-communist democracy, weak state*

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Abstract:

Starting from the premise that equal suffrage, one of the five fundamental principles of the European electoral heritage, refers not only to equality of votes or chances, but also to equality of electoral power, the article demonstrates that the electoral formula used during 2008-2012 for the election of the national parliament was unfair because it generated inequalities in citizens' representation. Through three case studies, the authors argue that the lack of transparency in the electoral engineering process leads to electoral formulas that citizens do not understand, thus generating a risk of delegitimizing the legislation and mistrust in the elections and their outcome.

Keywords: *electoral system, proportional representation, overhang seats, balance seats*

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Author, co-author and co-editor of more than 20 books on comparative studies and the Romanian political system, as well as author of more than 50 articles in Romanian journals in the field of political studies.

Daniel BUTI, PhD in political sciences, is a lecturer at SNSPA in Bucharest and author and co-author of more than 20 books and scientific articles regarding the post-communist Romanian political system. His research interests include comparative politics, electoral studies, party politics, democracy and public participation.

Abstract:

This article represents an extensive and coherent inquiry into the intellectual and historical nature of the concept of parliamentary immunity in Romania. Scholars as well as legal and political practitioners have long debated the normative considerations, the temporal and legal aspects of parliamentary immunity. Therefore, this study will not insist on these classical interpretations, rather it seeks to provide a legitimate account of the meanings, limits, usages and political practices of the concept of parliamentary immunity in Romania, avoiding thus, to the furthest extent possible, a conceptual misinformation, present in today's political debates.

Keywords: *parliamentary immunity, constitution, parliament, privileges, democratic regime*

Ciprian NEGOIȚĂ, PhD in political science from the Faculty of Political Science, University of Bucharest and the Institute for Political Studies, Wroclaw, Poland (2015), former fellow of the Romanian Academy. His academic concerns focus on conceptual history and the theory and practice of democracy. He published several studies in national and international journals. He is parliamentary advisor to the Senate of Romania.

Abstract:

The democratic nature of state organizations seems to require that political parties receiving the same number of votes be treated in a similar way by electoral systems. The research conducted on this subject, however, leads to contrary conclusions and reveals a certain asymmetry in the conversion of votes into parliamentary seats. The existence of these distortions, qualified as electoral bias, does not

necessarily result from political manipulation. Whatever the underlying reasons, their accumulation is, in any case, likely to come, if not determine, at least to influence the political alternation and the effects of a poll. This is why it is important to look at the ways in which votes are reversible in order to understand their mechanisms and, in doing so, to gain a better understanding of electoral phenomena.

Keywords: *equality of representation, reversibility of votes, electoral boundaries, electoral districts, electoral systems*

Guillaume FICHET, PhD in public law at Pantheon University-Assas-Paris II (2016), is deputy director at the Defender Rights (Admissibility Direction-Orientation-Access to Law) since 2012.

Hygin KAKAI, Agrégé de Science politique, Centre d'Études Sociologiques et de Science Politique, Université d'Abomey-Calavi

Abstract:

This paper is a study of a legal precedent stemming from conflicts between the provisions of the Constitution of the Russian Federation and Federal Law on Election of the President of the Russian Federation No. 19-FZ dated January 10, 2013. It studies the legal nature of the phenomenon of the Central Election Commission of the Russian Federation and its standing among government authorities. A reasoned conclusion is made that the electoral board system of the Russian Federation de facto forms the fourth electoral (shaping) branch of power along with the legislative, executive and judicial ones. The author reasonably finds that the Central Election Commission of the Russian Federation had powers to register Alexei Navalny, a Russian opposition politician, as a candidate for President of the Russian Federation. Solid evidence of similar historical precedents is provided. Absurdity of the decision to deny registration of Mr. Navalny as a candidate, as well as a weak and illogic nature of the underlying arguments are shown.

Keywords: *Navalny, Central Election Commission of the Russian Federation, election, presidential elections of Russia*

Alexey SZYDLOWSKI, PhD candidate, is electoral expert. He was associate professor at Rostove State Economics University (2009-2014), deputy dean and associate professor at Southern Federal University (2014-2017). Twice he was International Election Observer on U.S. presidential elections (2012, 2016). Electoral expert in OSCE ODIHR Data-base.

Abstract:

In order to reduce representative inequalities at the societal and legislative level, two tools emerge to ensure an equitable presence of women in politics: reserved seats and quotas. This article examines the dynamics of the implementation of both mechanisms in two specific case studies, that of the Republic of Moldova and Bosnia and Herzegovina, two countries that are not members of the European Union but which represent a priority for it. The present survey analyses from historical perspective the evolution of norms related to gender equality. Thus, a comparative approach of two essentially patriarchal societies is revealing to capture the result of the implementation of the two types of previously stated policies. The importance of the context and local particularities emerge as they are key elements in the success or failure of putting into practice two policies with a universal conceptual purpose.

Keywords: *reserved seats, quotas, gender equality, gender policies, Bosnia and Herzegovina, Moldova*

Florina CĂLIN holds a degree in Political Science and has been responsible for activities aimed to develop the Francophone community in Cluj, including event and communication management at the Francophone Business Club and co-heading of the Centre for African studies. She has been a trainee at the Council of Europe, the Electoral Assistance Division and has completed a research internship on election observation in Tunisia, in the European Parliament. She followed a specialization in Electoral Engineering at University Lumière Lyon 2, after completing a master's degree in Cluj-Paris with a double degree in European studies and public action. She has conducted a research project on different election observation missions of European Union and the International Organization of La Francophonie. Very keen on electoral observation at local level, currently, she is involved in several projects on independent electoral observation, within the Romanian and Tunisian civil society.

Abstract:

While the definition of universal suffrage itself appears to be quite lucid, its practice is not as simple. Difficulty arises from the different notions intertwined with the interpretation of universal suffrage. One instance revealing such complexity embedded in universal suffrage, citizenship, or/and identity is the extension of voting rights to Indonesian immigrants in Malaysia and to Bangladeshi immigrants in India. The paper attempts to answer the following questions: What explains the extension of voting rights to illegal migrants in India and Malaysia in the late 20th century? What explains the responses of the ruling parties and natives in the border areas towards such phenomenon? The concept of "institution" is borrowed from sociological institutionalism as an analytical framework in order to draw a comprehensive picture of the phenomenon. The paper provides two institutions – economic environment and political culture – as explanatory variables and argues that because of the political

culture and economic environment of that time, the actors such as policy makers did not particularly find incentives to implement social and political changes to restrict the access of illegal immigrants to the citizen-like rights.

Keywords: *suffrage, voting rights, minorities, immigrants, noncitizen voting, citizenship, Malaysia, India, Indonesian immigrants, Bangladeshi immigrants, sociological institutionalism*

Jieun PARK worked for A-WEB (Association of World Election Bodies) as a researcher and a program coordinator. She is now pursuing her PhD degree in Political Science at UCLA (University of California, Los Angeles). She holds a M.A. in International Relations (Seoul National University, South Korea), and a B.A. in International Relations (Australian National University, Australia). Her research interests are ethnicity, race, immigration, and politics. She worked at Korea National Diplomatic Academy, Parliament of Australia, as well as at United Nations-APCICT/ESCAP.

Abstract:

Intellectuals along with journalists – some of whom have been victims of the communist regime or have spoken against measures taken by the communist regime – stand as candidates on the "list[s] of independents" for the first election held in Romania under post-communist rule, on May 20, 1990.

While some intellectuals have joined power structures established in December 1989, several others intellectuals and journalists base their claims for elected representatives in Parliament on their discontent with the new political order that resulted from the "revolution". They call into question the legitimacy of the power installed following the events of December 1989 and refer to "the betrayal of the revolution's values".

After they failed to win any seat in Parliament, unwilling to subscribe to a party or to any other political force, they have growing political expectations. They can build on and benefit from the new protest movements. Their claims express in relation to development of civic movements (street protests and civic associations with a political vocation).

Keywords: *intellectuals, civic engagement, elections, democracy, post-communism, 1989*

Camelia RUNCEANU, PhD in sociology, École des Hautes Études en Sciences Sociales, Paris. Translator. Research interests: sociology of intellectuals, sociology and philosophy of social sciences, history of communism and post-communism, political philosophy.

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• **Workshops/conferences:** P. Paczolay, "The Principle of Stability of Electoral Law", workshop on *Codification of the Electoral Law*, an event organised by the Permanent Electoral Authority in cooperation with the Venice Commission, Bucharest, 19-20 October, 2015, p. 21.

References:

• **Books:** Dahl, R., 2006, *A Preface to Democratic Theory,* expanded edition, Chicago and London, University of Chicago Press.

• **Articles in journals:** Pildes, R. H., 2004, "The Constitutionalization of Democratic Politics – The Supreme Court, 2003 Term", in *Harvard Law Review*, vol. 118, no 28.

• **Workshops/conferences:** Paczolay, P., 2015, "The Principle of Stability of Electoral Law", workshop on *Codification of the Electoral Law*, an event organised by the Permanent Electoral Authority in cooperation with the Venice Commission, Bucharest, 19-20 October 2015.

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ISSN: 2601-8454
ISSN-L: 2601-8454