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ORIGINAL PAPER

Vertical separation of power – a means of guaranteeing freedom in states governed by the rule of law

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Abstract:
The separation of powers is most often understood only as a horizontal one, between the organs or systems of organs that exercise the three functions of the state – legislative, executive and judicial. The vertical separation of powers is either neglected or metamorphosed into a technique for organizing the state form, with no direct connection to the purpose of the other separation: effective guarantee of the rights and freedoms of the subjects. In fact, its purpose is the same, and the two forms of separation are an integral part of the system of guarantees constitutionally synthesized in the concept of the rule of law. Our study draws attention to the way in which the analysis of the state form must be resituated, in order to then focus on the way in which the history of the Romanian political and constitutional system has made any discussion about tempering the unity of the state seem like a betrayal of the unity of the Romanian nation. Following the criticism of this excessive attachment to a certain restrictive understanding of state unity, we finally show how the current Romanian constitutional framework should be revised, even in the restrictive manner in which it is interpreted by the Constitutional Court, so that the vertical separation of powers can be transformed into a means of guaranteeing fundamental rights and freedoms, which contributes to the building of an effective rule of law.

Keywords: *unitary state, regionalization, separation of powers, rule of law, human rights.*

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The separation of powers is a theory concerning the limits of political power. It is based on the idea that those who hold power tend to abuse it, and that, in order to guarantee individuals' freedom in relation to such potentially oppressive power, its exercise must be organized in such a way that dividing it among several authorities enables them to restrain one another. Its purpose, however, is not-as is often misunderstood-the organization of power, but rather the guarantee of liberty, through a particular way of limiting power, one that is intrinsic. The separation of powers is therefore not a technique for exercising power, but a technique for guaranteeing the rights and freedoms of individuals. It is a means of achieving the rule of law, serving as a structural principle that constitutes this type of state. This is why the French revolutionaries established, in 1789, through Article 16 of the Declaration of the Rights of Man and of the Citizen, that "a society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution." The very existence of the state-in the form of a state in which no individual is the master of power, that is, one in which power is political-was thus linked to two principles: the guarantee of rights and the separation of powers. All modern states must be founded on these forms of limiting power. It is not an open option, but a normative requirement, without which their establishment is not possible.

Power, according to the typical understanding that emerged from the theory of its separation, is divided among the organs of the state that exercise its three essential functions - legislation, the execution of laws through acts of authority, and the resolution of conflicts between subjects - all positioned in a relationship of functional equality and mutual control, based on the central idea that powers cannot be combined. Thus, it is a horizontal separation of power, ensuring that none of the powers can be superior to the others. Power, once divided in this way, cannot be verticalized. Yet, to prevent such verticalization, it is necessary that the central power, even if separated, should not be able to establish a relationship of domination over individuals and the sub-state communities to which they belong. The horizontal separation of powers must therefore be complemented. Without this complement, as Benjamin Constant observed as early as 1793, "all the precautions we have accumulated are not sufficient to guarantee either the constituted powers against one another when they are divided, or the citizens against these powers when they unite." (Constant, 1991: 371). No matter how well it may be divided among several holders, a centralized power can still become excessive simply by being too centralized. It must be restrained through the establishment of a counterbalance - a non-centralized power that is sufficiently autonomous from it to be able to oppose it. From the very beginnings of the theory, the separation of the state's central powers (the horizontal separation) has been only one technique of limiting power, situated within a broader system. This broader system includes the vertical structuring of power, the pluralistic structuring of intermediary bodies, and the autonomy of civil society, understood primarily as the autonomy of the bourgeois economy in relation to political power. (Dănișor, 2017a: 21-33). This entire system has as its primary purpose the guarantee of individual rights.

The manner in which the vertical separation of powers is implemented gives rise to different forms of the state. Often, these forms are linked to the degree of pluralism (ethnic, linguistic, religious, etc.) within a society, based on the idea that a society that is unitary from these perspectives must necessarily be organized as a unitary state, while the presence of a certain degree of pluralism requires a form of verticalization of the separation of powers, established through decentralization, regionalization, or federalism.

In reality, however, if we consider the primary purpose of the vertical separation of powers - namely, the protection of individual rights against the excessive centralization of power - then the form this separation takes, and therefore the form of the state itself, should be linked to the manner in which these rights are safeguarded. It should be regarded as a means of achieving the rule of law, not merely as a way of exercising power, even when that power is democratically constituted.

All modern governments are centralized. "For several decades, many have sought to determine the origins and context of the organization of the modern central government […]. Beyond the inherent historical interest of such research, its importance lies in the idea that many of the problems of modern government are determined by the conditions present at the time of its creation. This also applies to the institutional origins of the governmental system. The form and institutional order established at the moment of the organization's birth constitute a predominant and determining factor in its subsequent life." (Groenveld, Wagenaar, Van Der Meer, 2010: 51-52). Now, in Europe, there have been two forms of this centralization: one that passed through an intermediate phase between the empire and the nation-state - that of the absolute monarchy - and another that emerged directly in opposition to the empire.

The absolute monarchies established in Western Europe during the transition from feudalism to modernity declared themselves independent from the Holy Roman Empire. The absolute monarch was free from any external subordination to the kingdom, including to the power of the Emperor. This independence was secured through the development of two fundamental ideas: the first, that the King recognizes no power superior to his own in temporal matters (rex qui superiorem non recognoscit); and the second, that the King is emperor within his own kingdom (rex in regno suo est imperator regni sui). Moreover, Bossuet defined the absolute nature of monarchical power precisely through its independence. According to him, a fundamental characteristic of monarchical power is that it is "absolute, which means independent." (Bonney, 1989: 58).

Internally, the absolute monarch was likewise free from any form of constraint. He did not derive his power from the feudal nobility, being above it (seigneur "par-dessus" or sovereign "fief-feux"), and the absolute monarchy was thus genetically different from an "aristocratic seigneury" (J. Bodin). Although absolute monarchs skillfully used feudal contractual rules and the techniques of incorporating territories by force, they simultaneously fought against feudalism-first symbolically, by refusing to personally perform any procedures related to vassalage contracts, and later legally, by recognizing serfs as legal subjects and thereby securing the loyalty of the common people against the very essence of the feudal system. The existence of ministers or councils did not in principle limit royal power in any way: the former were merely the King's secretaries, while the latter had only a consultative role. Royal power was therefore a potestas absoluta-that is, an undivided legislative sovereignty. The power of the absolute monarch was traditionally conceived as being above the laws (princeps legibus solutus), but it should be clearly understood that this meant being above the laws he himself made, in the sense that "the law could not be greater than the lawgiver." (Bonney, 1989: 16), but not above divine or natural laws, nor above the fundamental laws of the kingdom. It was undivided sovereignty, and not arbitrary power, that made the monarch's authority a potestas absoluta. The second method of breaking free from the logic of the feudal system was the centralization of justice in the hands of the King and his courts. This feature, particularly pronounced in England, is considered an ideal-typical characteristic of

absolute monarchies. It allowed for the unification of the kingdom's customs, thereby granting the central power an indirect sovereignty over the law.

The modern state emerged in Western Europe as a distinct form of political-legal power, when all intermediate political powers linked to feudalism were abolished. It follows that all local or territorial collectives, typically former fiefs, no longer possess autonomous power in relation to the political power of the state. Even in regionalized or federal states, the power of intermediate collectives is framed and constrained by the state.

The centralization of power entails establishing a direct political-legal link between the state and its subjects. The liberation of dependent peasants created this condition, as the central power (whether monarch or collegial government) removed the intermediate level of feudal lords from the vertical structure of power, creating a new category of subjects directly dependent on it. This direct link between the state and the citizen is ideal-typical for the modern constitution.However, this direct dependence also eliminates the protection previously provided by intermediate levels. This is why, given that the power of modern states is by nature centralized, it becomes necessary to structure it vertically in order to guarantee freedom. The vertical separation of powers is likewise ideal-typical for this type of state. Consequently, a state that does not implement some form of vertical separation of power-distributing it between a central authority and local autonomies to guarantee the liberties of citizens within these autonomies-is not a modern state.

In the cultural space of Eastern Europe, which included the Romanian lands in the 19th century, the process of centralization did not have the same meaning. Feudalism in this cultural area, including the Romanian one, differed from Western feudalism in many respects, particularly regarding the relationship between the state and the church and the dialectical interplay between the centralization and decentralization of political power.From a historical perspective, we can "hypothesize that the extent to which a society is affected by the crisis of adaptation of its feudal structures reflects the degree to which it is engaged, due to its conception of power and politics, in a process of innovation controlled through a dynamic of system differentiation, the construction of a public sphere, and the generalization of a hierarchical and bureaucratic power." Conversely, civil societies […] less affected by the feudal crisis, and more capable of self-regulation around an uncontested center, were less exposed to such a dynamic. (Badie, 1981: 333). Similarly, Eastern European society, based on Orthodox Christianity, which served as the foundation for a "political regime close to caesaropapism [a system uniting temporal and religious power]," did not pave the way for the formation of an autonomous temporal sector, nor, consequently, for the development of state rationality. (Badie, 1981: 334).

The unitary Romanian state, at the time of its formation, was situated within this second logic. It was created largely against the will of the major European powers. They accepted the union of Wallachia and Moldavia in 1859 more to prevent either from dominating the principalities exclusively than to establish a Romanian state. In the view of the great powers, the form of this union was not a unitary state. The Romanians pursued a policy of fait accompli, electing the same Ruler in both principalities and attempting to build, from that starting point, a true union-a difficult process. But we will not delve here into the history of this process. What matters for our purposes is that the unity of the state was asserted against the imperialism of the great powers. As a result, the legal characteristics of this unity were constructed against this imperialism, rather than as a result of developing an internal logic that would have taken into account the vertical structuring of power to prevent its abuse-so that local powers and central authority would

mutually constrain each other, and our freedom would be guaranteed by an additional vertical separation to complement the horizontal one.

The type of state form constructed by the Romanians was, consequently, defined legally, in an oppositional and extrinsic manner, unlike the type of state built in Western Europe, which was defined primarily in a substantial and intrinsic way, based on opposition to the feudal system and religious metaphysics. In the Romanian lands that united in 1859, there had been no Western-style feudalism. Thus, the centralization of power and the unitary character of the state were constructed in opposition to forces external to Romanian society, as a requirement for independence from a foreign power. For this reason, the unitary character of the state was perceived as an aspect of independence from the empires that had dominated the region, rather than as the centralization of political power over local autonomies. When Romanian constitutions affirm the unitary and indivisible character of the state, they are, in fact, asserting the independence of the Romanian state and the impossibility of any of the united provinces being separated from the unitary state to be attached to a foreign power.

This is the reason why Romania, even though it took as a model for its first modern Constitution of 1866 the Belgian Constitution of 1831, did not follow that model with respect to local autonomy or the political character of citizenship. Regarding the form of the state, the Romanian state was declared indivisible-a provision not found in the Belgian Constitution. The explanation is historical and circumstantial: the Romanian Constituent thus marked the union of the Romanian Principalities into a single state as irreversible. However, the legal consequences of this provision go far beyond a mere political declaration. Legally speaking, a state is indivisible when a single political power is exercised over the entire territory. This means that the legislator is prohibited from granting local communities any authority that would confer upon them any part of sovereignty. Federalism is therefore excluded, and decentralization must fit within the framework established by indivisibility. This is the legal reason why the demands of the Bessarabians, formulated on March 27, 1918, by the Sfatul Țării, that the union with Romania be established on federalist principles (Bessarabia to have its own Parliament, approving local budgets and appointing all local administrative bodies; the province to be represented proportionally to its population in the Romanian Parliament) (Badie, 1981: 318) were not taken into consideration.

It is evident that this way of normatively shaping the form of the state depends on understanding state unity as independence and inalienability-that is, through external opposition. The major differences between Romania's 1866 Constitution and its Belgian model regarding center-periphery relations result from this type of understanding. The Belgian Constitution was concerned with local autonomy. It therefore established the principles that the legislator was to respect when regulating provincial and municipal institutions:

1. Direct elections, with exceptions explicitly provided by the Constitution;
2. The assignment of competencies to provincial and municipal councils concerning all matters of provincial and municipal interest, without affecting the approval of their acts in the cases and according to the procedures established by law;
3. Publicity of council meetings within the limits provided by law;
4. Publicity of budgets and accounts;
5. Intervention by the King and the legislative power to prevent councils from exceeding their powers and to ensure that they did not compromise the general interest.

By establishing these principles, Belgium created clear relationships and precise limits in center-periphery relations.

In contrast, Romania's 1866 Constitution was elliptical in this regard, stipulating only that laws would be based on a "more complete" administrative decentralization and communal independence. The vague and imprecise provisions gave rise to a centralist regime, which steadily intensified under the laws of 1892 and 1903, with the Ministry of the Interior exercising enormous power over local authorities. Critics of the system pointed out that centralization and bureaucratization had nullified the noble principles of the Constitution (Negulescu, 1906: 321-324). However, it must be noted that these principles were scarcely regulated, since the Romanian Constituent, unfortunately, departed from the Belgian model in this regard, even though the 1859 Central Commission's draft reproduced the Belgian text exactly, and the Ad-hoc Divan had requested approximately the same principles (Filitti, 1934: 68-69).

But should we, once we recognize that European societies aiming to establish a modern constitution are different, speak of multiple modernities, or can we still subsume this diversity under common principles? I believe that the shared evolution of these political-legal spaces, which experienced different historical realities, can be discerned if we operate a second type of contextualization, alongside the historical one: cultural contextualization. Romania shares with Western Europe a modern culture. Understanding this allows us to see why the Romanian state, although it builds its unity not against the feudal fragmentation of power but against imperialism, must still pay attention to processes of local autonomy and decentralization, if not even the federalization of political power. If the unity of the Romanian state was created against external powers and understood as the independence and inalienability of sovereignty and territory, should the Romanian state not also be concerned with the vertical separation of powers to guarantee freedoms? I believe it should, and the Romanians' desire to build a modern state demonstrates this. However, for this separation of powers to be effectively realized, we must overcome the idea that any discussion of local autonomy, regionalization, or federalization is a discussion about the alienation of national sovereignty. It therefore becomes essential to first reframe the understanding of unity.

In the view of Romanian historiography, the unity of the state is seen as a necessary consequence of the unity of the people: a people that is unitary in terms of ethnicity, language, culture, etc., must be organized into a unitary state. In this understanding, the issue of minority protection is seen as a matter of tolerance. The dominant people-the one organizing the state in a unitary form-tolerates a certain degree of diversity. In such a vision, the state is considered "ours," belonging to the Romanian ethnicity, while other ethnicities are tolerated, regarded as so-called "cohabiting nationalities." However, they are not the foundation of the state; only the "Romanian" people constitute its foundation. This perspective is shared by a significant portion of Romanian jurists.

This type of understanding promotes a spiritualist collectivism that is entirely incompatible with the individualist ideas of modernity. According to these ideas, all people are equal. Politically speaking, this means that they are citizens, independent of their identity affiliations-ethnic, linguistic, religious, and so on. The foundation of the modern state is the community of citizens, not any ethnic, linguistic, or religious community. In this vision, the unity of the people means its indivisibility; that is, from a legal perspective, the prohibition of creating different legal regimes for individuals based on their membership in primary identity groups-the very groups that would form the basis

of the people's unity in the historical view described earlier. Legally, the unity of the people means the equality of all its citizens, regardless of ethnicity, language, religion, or other similar affiliations.

The historical perspective, therefore, comes into conflict with the legal perspective regarding the concept of the unity of the people. From a legal standpoint, the unity of the people does not necessarily imply the unitary character of the state. The fundamental difference arises from the fact that the historical view is centered on the autonomy of the group in relation to an external opponent, whereas the legal view is centered on the protection of equality and, more broadly, on the protection of individual rights and freedoms.In the historical perspective, unconditional loyalty to the unitary state is promoted, with any attempt to question it equated to an attack on national identity. In the legal perspective, however, unconditional commitment is directed toward the protection of individual freedoms and equality before the law as guarantees of these rights, with the absence of vertical separation of powers being regarded as an attack on liberty. In Romania, the first perspective has always been privileged over the second. Consequently, constitutional norms regarding the form of the state and equality before the law have often been interpreted by jurists through a historical lens, which has generated numerous problems, given that the two perspectives are fundamentally contradictory.

In 1923, when Greater Romania was drafting a new constitution, political federalism seemed inconceivable to the Romanian people and political class. This was natural to some extent, considering the historical circumstances of the creation of the Romanian state, as mentioned earlier. The autonomy of the historical Romanian provinces, which had separated from neighboring empires to unite with Romania, was conceived only in opposition to external powers, and the union was meant to be marked as irreversible.Yet the need for federalism was reflected in the design of national representation, which was conceived more in terms of what was called integral federalism. Thus, the 1923 Constitution recognized, alongside different political collectivities, representation for "sectoral" collectivities: economic, social, cultural, etc. (Héraud, 1976: 171). Article 70 of the new Constitution stipulated that "members of the chambers of commerce, industry, labor, and agriculture, gathered in separate colleges, elect from among themselves one senator from each category and for each electoral district. These special electoral districts are established by the electoral law, their number not exceeding six," while Article 71 provided that "each university elects, from among its members, by vote of its professors, one senator." Thus, although Article 1 of the Constitution maintained attachment to the unitary form of the state, stating that "The Kingdom of Romania is a national, unitary, and indivisible state," the Romanian constitutional system did not entirely exclude federalist ideas. The diversification of representation criteria was complemented by representation of territorial communities in the Senate, as Article 69 stipulated that "members elected to county councils and members elected to urban and rural communal councils, gathered in a single college, elect, by equal, direct, and secret obligatory vote, one senator from each county." However, the new Constitution of Greater Romania did not dare to adopt political federalism, even though the Bessarabians, as we have seen, had requested it, and the Romanian Prime Minister had promised to respect this demand even before the union was voted on in the Sfatul Țării. This reflects a misunderstanding of this form of federalism, perceiving it as a threat to national unity.

Regarding regionalization, it has always clashed in Romania with the ethnic understanding of relations between the center and local communities. Whenever it is discussed, the issue of local autonomy is transformed from one concerning the vertical

distribution of competencies into one concerning the ethnic autonomy of the Hungarian minority, which is a majority in part of Transylvania. This is why neither the Romanian majority nor the Hungarian minority understand that local autonomy is a guarantee of individual freedom, serving as the vertical expression of the principle of separation of powers. The fear of ethnic autonomy for the Hungarian minority may be understandable, but its consequences far exceed the historical conflict between Romanians and Hungarians in Transylvania, profoundly affecting the understanding of the public sphere and, from there, the universal protection of rights and freedoms. The unitary form of the state does not, in principle, prevent regionalization. Several European unitary states have introduced such regional structures. Romania does not do so because it has not been clearly understood that this moderation of centralism is a guarantee of freedom for everyone, not only for the Hungarian minority.

The only remaining option is that of decentralization. In 1866, in the Constitution adopted to address the systemic problems created during the reign of A.I. Cuza, this decentralization was not very well regulated, as noted above. In 1923, an opportunity arose to develop it further. One could argue that the Romanian state had an obligation to do so, given that, along with the newly annexed territories, it also incorporated significant national minorities. The question, then, is whether the new Constitution adequately and normatively framed such decentralization.

Decentralization must be implemented in two ways. The first involves the transfer of certain competencies from the central government to territorial units for the benefit of organs elected by these units, which operate with a degree of autonomy from central authority. The second involves the real participation of local communities in the formation and exercise of central power. We have seen that some senators were elected indirectly by local councilors, which satisfied the second requirement. However, the first requirement was far from being fulfilled. Article 108 of the 1923 Constitution remained as deficient in terms of decentralization as its 1866 counterpart, leaving regulatory competence in this area to the legislator, since it merely stated that "county and communal institutions are regulated by law." It is true that the Constitution stipulated that "these laws shall be based on administrative decentralization," but it provided no details regarding this decentralization. The only constitutional guarantee was the election of members of county and communal councils. The consequence was that the Romanian state did not experience real decentralization during the interwar period.

Unfortunately, this misunderstanding regarding the real stakes and consequences of choosing the form of the state persisted even in 1991. The post-communist Romanian Constitution declared the unitary form of the state irrevocable, eliminating any possibility of discussion about introducing any form of political federalism. It removed the influences that theories of integral federalism had on the 1923 Constitution, eliminating the diversity of representation criteria, excluded the representation of local communities in the Senate by establishing direct voting for senators, and listed administrative-territorial units exhaustively, making the introduction of regionalization a matter of constitutional revision-a particularly difficult procedural challenge. It also did not define decentralization or local autonomy. The 2003 revision did not resolve any of these issues. Moreover, although it introduced a competence for the Constitutional Court to resolve constitutional legal conflicts between public authorities, it did not open the way for local authorities to refer matters to the Court-something that would have been natural if central powers violated constitutionally guaranteed local autonomy. Under these circumstances, local autonomy remains merely an illusion.

To make it a reality, the constitutional framework would need to be revised, starting from the idea that local autonomy is a technique of the rule of law-that is, a means of limiting power to guarantee freedom, not a technique for exercising power. The question, then, is how the vertical separation of powers should be detailed in Romania's contemporary Constitution, which establishes the rule of law as a constitutional principle that subordinates the democratic technique of exercising power. (Dănișor, 2017b: 9-28).

We will now show how the constitutional texts regarding local public administration and the participation of members of these communities in the formation and exercise of central power should be revised, following the structure of the 1991 Constitution.

The current text of Article 120, titled "Basic Principles" (of local administration), is as follows:

1. Public administration in administrative-territorial units is based on the principles of decentralization, local autonomy, and the deconcentration of public services.
2. In administrative-territorial units where citizens belonging to a national minority have a significant proportion, the use of the minority language shall be ensured in writing and orally in relations with local public administration authorities and with deconcentrated public services, under the conditions provided by the organic law.

We propose that the organizing principle of local administration should be that of free self-government. Article 120 should be formulated as follows: "Local communities shall govern themselves freely, under the conditions of the law." Formulated in this way, the text would truly enshrine a principle, since a principle is a limit on power, including the normative power of the state. It would be a constitutive principle, meaning "a normative idea that we place at the foundation of our social existence, to constrain society to be what we are able to tolerate it being. Consequently, constitutive legal principles refer to the (re)construction of society through norms, just as the principles of knowledge refer to the (re)construction of reality through reason. In the case of understanding reality, principles function to halt the infinite regression of explanation, cause by cause, by instituting a primary cause, one that has no further cause. […] In the case of establishing normativity, each norm has a cause, until, to avoid legislating infinitely, we must stop at some norms that have no further cause, that are self-caused, that produce themselves from themselves. These norms, which we claim to be self-produced, are constitutive legal principles. They are the foundation of legal action over social reality and the human integrated within it, and at the same time, they are its limits. […] Their legality does not derive, in our eyes, from anything external to their 'existence,' but from the fact that they 'stop' society, placing a maximum boundary, a frontier of what society can compel us to do. Principles thus become, from a foundation situated at the base of the social, an upper limit of it, beyond which we react against society, momentarily breaking the fabric that binds us, in order to restore it to its foundation, to reposition it 'rightly.' […] By ensuring the reasonableness of the constraints society may impose, constitutive legal principles provide the minimally necessary protection for individuals so that they can exist as autonomous beings relative to the society they are obliged to integrate into. From the individual's perspective, principles transform from norms of constraint into rights against normative constraint"** (Dănișor, 2025: 35). Such a principle is precisely that of the free self-government of local communities, as it limits the normative power of the central political authority in order to guarantee individual rights.

A guarantee of the free self-government of local communities (Nica, 2005: 114–116) lies in the fact that it "is fundamentally a freedom of the citizens. This freedom of administration is the necessary complement to freedom of association and freedom to engage in enterprise, in order to ensure a balance between equality and liberty in a democracy" (Benoit, 2022: 117–121; Nica, 2005: 114–116). Considering this freedom as a fundamental freedom of individuals (and not of groups), it would benefit from specific judicial protection and could be reconciled with the prohibition of collective rights by the unity of the people.

Decentralization, as a technique for exercising power, must be regulated within this framework. It involves transferring administrative responsibilities to territorial communities through organs elected by these local communities, which operate with a degree of autonomy-up to a certain point-in administrative matters, relative to central authorities. The most effective method of granting autonomy is, without doubt, the direct universal election of the deliberative and executive bodies that administer these communities.

In order for genuine local autonomy to exist-understood as freedom of administration-local elections must be political in nature, not merely administrative. This means that all constitutional principles regarding the universality, equality, secrecy, and free expression of the vote apply to local elections. Additionally, provisions concerning political pluralism are also applicable. The political character of local elections is particularly significant when local representatives constitute the intermediate electoral body for choosing members (or some members) of the upper chamber of Parliament, as is the case in France, or as was the case in Romania under the 1923 Constitution. In such a system, the Senate, unlike the other chamber, becomes a forum for representing local communities and a guarantee of their autonomy.

The current constitutional regulation appears detailed regarding local public administration authorities, but we believe it is excessive to constitutionally determine exactly which authorities exist, just as it is excessive to constitutionally specify which administrative-territorial units exist. Regulation would be more flexible if the Constitution set out only the principles, which, in our view, should be: establishing the local authorities through which local autonomy is realized by a law adopted with a qualified majority of the two chambers of Parliament sitting together; the election of authorities by the local communities; the participation of these communities in regulating the electoral system for local elections through their representatives in the Senate; and prohibiting Government intervention in the electoral system while strictly limiting the Government's ability to affect the existence of the authorities through which local autonomy is exercised.

A constitutional text based on these ideas could be formulated as follows:

1. The authorities of public administration through which local autonomy is exercised shall be established by a law adopted with a two-thirds majority of the members of Parliament and shall be elected by the citizens of the respective local communities.
2. The competence to regulate local elections belongs to the Senate. The Government is prohibited from issuing ordinances in the field of local elections.
3. The dissolution or removal from office of the authorities of public administration through which local autonomy is exercised may be requested by the Government, through a motivated decision, to the local communities that elected them, if the Government finds serious violations of the law that have led to repeated annulments by administrative courts of the acts of the respective authority. The Government's decision may be challenged before the administrative courts.

And since free self-government is an individual right, not a collective competence, citizens should be able to participate in setting the local agenda and in local decision-making. We believe that a constitutional article in the section on local autonomy should explicitly address citizen participation, with the following formulation:

1. The law shall establish the conditions under which voters in an administrative-territorial unit, through the right to petition, may request the inclusion on the agenda of the unit's deliberative bodies of a matter within their competence.
2. Under the conditions provided by law, draft normative acts or public policies of local interest may, at the initiative of the competent deliberative bodies, be submitted to the decision of the voters of the administrative-territorial unit through a referendum.

For local autonomy to be a reality, local communities should be represented in the Senate. As the jurists responsible for drafting the constitutions of 1991 and 2003 proposed, senators should be elected indirectly by the elected members of local councils. The text could be formulated as follows:

1. The Senate ensures the representation of local communities.
2. The members elected to councils representing local communities, assembled in a single electoral college, shall elect, by equal, direct, secret, and freely expressed vote, a number of senators for each county proportional to its population, under the conditions established by the electoral law.

For free self-government to be effective, local communities must have sufficient organizational, legal, and financial instruments to ensure a degree of decision-making autonomy. The legal means of free self-government include: the existence of an autonomous local regulatory authority, contractual freedom, financial autonomy, and functional autonomy.

In a decentralized unitary state, local authorities possess their own regulatory power. The principle of free self-government does not imply the existence of an independent normative power of local authorities, separate from the regulatory authority of Parliament or the central administration. The regulatory competence of local authorities is granted by the legislator, either explicitly or implicitly. The legal order remains unified, and the regulatory power of local authorities merely allows them to adopt general and impersonal measures that are subsidiary to the law and to the acts organizing its implementation issued by the central administration. The scope of local regulatory power may vary depending on the precision of the enabling law and any intervention by the regulatory authority of the central administration. However, and this is essential, the constitutional guarantee of local autonomy imposes certain limits on the legislator. The legislator cannot affect the autonomy of local communities by law except under specific conditions-namely, for reasons of general interest that cannot be satisfied by local means and only under strict conditions of proportionality. To ensure that the relative regulatory autonomy of local communities does not become a mere illusion, it is preferable that the legislator be required to regulate the normative sphere of local community organs, defining areas in which only local communities, through their elected bodies, may issue regulations. In other words, matters concerning local communities should be regulated, through administrative acts and within the limits of the law, by those who best understand the needs of these communities-their elected representatives. The legislator, in turn, must be constrained by a constitutional obligation to establish such areas of administrative regulation reserved for the organs of local communities.

Based on these premises, the Constitution of Romania should include, in the section on local public administration, a new article entitled **"**Regulatory Autonomy**"**, with the following provisions:

1. The normative competences exercised autonomously by local public administration bodies shall be regulated by law.
2. The law shall determine the areas in which the competence to adopt normative administrative acts belongs exclusively to the bodies of local public administrations.

The principles of normative hierarchy assume that a lower-ranking normative act can be repealed or amended by a normative act superior to it in the normative hierarchy. This rule is moderated by the constitutionalization of the principle of normative autonomy of local communities, which implies that a normative act issued by the central authority cannot repeal or amend a normative act of local community authorities if it expresses local normative autonomy, as this is constitutionally guaranteed. By infringing on the administrative regulatory domain of local communities, Parliament or the Government would violate constitutional provisions. Consequently, there should be a procedural mechanism to control the respect of the limits of the repeal or derogatory powers of the Legislature and the Government in relation to the autonomy of local communities. We believe this mechanism could be formulated as follows:

1. Parliament is the sole legislative authority in the field of local autonomy. The domains of local autonomy can only be regulated through organic laws. The Government may not adopt acts that regulate local autonomy or restrict its exercise.
2. Public administration authorities responsible for implementing local autonomy may refer to the Constitutional Court to rule on the constitutionality of laws regulating local autonomy or those that they consider restrict its exercise.
3. Resolution of conflicts of competence between the Government or the central specialized public administration and the public administration bodies responsible for implementing local autonomy falls within the jurisdiction of the High Court of Cassation and Justice.

In the absence of such a constitutional provision guaranteeing local autonomy, all principles of organizing a decentralized unitary state in which local autonomy is constitutionally guaranteed remain ineffective. In fact, under the current state of the Romanian constitutional system, this competence-regulating mechanism is often lacking or insufficiently defined from a normative perspective. Once constitutionally guaranteed, local autonomy must first be protected against possible abuses by the legislative power. The Legislator must itself respect the constitutional principle of local autonomy. However, for this principle to become effective, an independent body must be able to resolve legal conflicts between the Legislator and territorial communities. Logically, this body should be the one that controls the constitutionality of laws, that is, under our current constitutional system, the Constitutional Court. The problem is that at present the Court resolves constitutional legal conflicts only between central powers, not between these powers and territorial communities. According to Article 146(e) of the Constitution, the Court may be referred by the President of Romania, the Presidents of the two Chambers, the Prime Minister, or the President of the Superior Council of Magistracy. Bodies representing autonomous territorial communities cannot use this constitutional mechanism to obtain protection of local autonomy against possible violations by legislative acts. Regarding the

control of compliance with the division of spheres of competence between the executive and local administrations, this competence should belong to ordinary courts, since it is a matter of legality once the competences of local administrations are delegated by law. Of course, under the current administrative litigation system, local administrations can obtain annulment of central administration acts, but the means are indirect. They should be made direct.

Local autonomy must be translated into functional autonomy of the organs of local communities. While the state's deconcentrated services are placed under its control through a territorial representative of the executive power (in Romania, the prefect), the services of decentralized local public administration authorities must be organized and operate independently of the Executive or its representatives. This means that, in a decentralized unitary state, the organization and functioning of the services of local public administration authorities through which local autonomy is exercised is determined by those authorities themselves, within the limits of general principles regulated by law.

Since the tendency of the central authority in unitary states is to limit the autonomy of territorial units by intruding into the organization and functioning of public services, in order to prevent possible abuses, the organization and functioning of local community services should be left within their competence, with the legislator establishing only the general framework through law. This would prevent situations in which the legislator or government specifies personnel or local service needs without taking into account the actual, specific requirements of the respective communities.

Another method used by the central authority to limit the functional autonomy of local administrations is the establishment of mechanisms through which one territorial administrative unit is subordinated to or placed under the tutelage of another territorial administrative unit. The principle of local autonomy in a decentralized unitary state prohibits the use of this procedure. If the exercise of a competence requires the joint action of several territorial administrative units, they may, by law, be authorized to organize the modalities of their joint action. Local communities themselves are competent to decide the manner of their collaboration. The legislator only authorizes and frames this competence but cannot impose or restrict collaboration, except under conditions of necessity and proportionality, which are, if not formally, at least materially constitutional.

Building on these guiding principles, we believe that a new provision should be introduced in the Constitution of Romania, entitled "Functional Autonomy", which would provide:

1. The organization and functioning of the services of local public administration authorities through which local autonomy is exercised shall be decided by those authorities themselves, within the limits of general principles established by law.
2. The establishment of any subordination or tutelage of one territorial administrative unit over another is prohibited. If the exercise of a competence requires the joint action of several territorial administrative units, they may, by law, be authorized to organize the modalities of their joint action.

Local autonomy also implies financial autonomy. This means that the respective local communities must have resources that allow them to fully exercise their competences and enjoy a broad margin of discretion in how these resources are used. Local authorities do not possess genuine fiscal power, as they cannot create taxes or levies except when authorized by the legislator. The state determines the resources of local communities, whether these are transferred from the central budget or constitute the communities' own resources, since even the latter are established by local councils only within the limits and

conditions set by law. However, the fiscal power of the legislator is not without limits. The law must always determine the share allocated to local administrations from taxes and levies of any kind (Constitution of the Republic of France, art. 72-2). This is because, if the state is the one controlling fiscal matters, it must not excessively centralize financial resources only to redistribute them from the center to territorial units, as this process tends to turn into political pressure on the organs of local communities through which they exercise their autonomy, influencing the use of public funds based on the interests of the ruling parties rather than the actual needs of the local communities. The legislator creates taxes and levies, fiscal policy being its exclusive competence, but it must normatively frame the power of the central administration in order to guarantee local administrations the level of resources necessary for their functioning, in accordance with the needs of the communities they govern. The allocation of resources between the central and local administrations through law is a minimal method of ensuring the financial autonomy of the latter.

To guarantee local communities that the state does not abuse its power to redistribute public revenues, the financial resources of territorial administrative units derived from taxes and levies collected directly by them, in accordance with the law, must represent a significant portion of their overall own resources. At the same time, the state is obliged to regulate mechanisms that ensure equal opportunities for territorial administrative units with respect to the generation of their own resources.

Another method by which the central authority tends to limit local autonomy is the transfer of responsibilities from the central power to territorial units, or the creation or expansion of the competences of local administrations without providing the necessary resources for their effective exercise. Therefore, any transfer of competences from central authorities to territorial administrative units must be accompanied by the allocation of resources equivalent to those previously devoted to their exercise by the central public administration authorities (Constitution of the Republic of France, art. 72-2). Any creation or expansion of the competences of local public administration authorities that results in increased expenditures for territorial administrative units must be accompanied by the determination, by law, of the financial resources necessary for their effective exercise (Constitution of the Republic of France, art. 72-2).

On the other hand, local financial autonomy is affected by the tendency to impose mandatory expenditures on local administrations through law or acts of the central administration. In this way, the structure of local budgets is decided from the center, and the resources they have autonomously to meet local interests become insufficient. Therefore, the determination of the structure of local budgets must be left within the competence of local administrations, with the legislator merely establishing its general principles.

Based on these principles, we believe that the Constitution of Romania should include an article explicitly guaranteeing the financial autonomy of local community administrations, which could be formulated as follows:

1. The state is obliged to provide territorial administrative units with the resources necessary for exercising local autonomy, which they may use freely. The law establishes only the principles governing the exercise of this freedom.
2. The law must determine the share allocated to local administrations from taxes and levies of any kind.
3. The financial resources of territorial administrative units derived from taxes and levies collected directly by them, in accordance with the law, must represent a significant portion of their overall own resources.
4. Any transfer of competences from central authorities to territorial administrative

units must be accompanied by the allocation of resources equivalent to those previously devoted to their exercise by the central public administration authorities.

5. The creation of any new competences or the expansion of the competences of local public administration authorities that results in increased expenditures for territorial administrative units must be accompanied by the determination, by law, of the financial resources necessary for their effective exercise.
6. The state is obliged to regulate mechanisms that ensure equal opportunities for territorial administrative units with respect to the generation of their own resources.

Another aspect of local autonomy is the ability of authorities representing local communities to contract freely. The state's role should be limited to supervising the legality of contracts, without influencing the terms of the contracts or imposing contractual partners on local administrations. For this reason, we believe that the Constitution of Romania should explicitly guarantee the contractual autonomy of local community administrations. The provision could be formulated as follows:

1. Local public administration authorities may freely conclude all contracts necessary for the lawful fulfillment of their mission.
2. The law establishes the mechanisms for supervising the legality of these contracts.

As we believe has emerged from the analyses above, only a consistent modification of the current constitutional framework can make the vertical separation of powers an effective technique for limiting power, turning it into a means of guaranteeing fundamental rights and freedoms, and contributing to the realization of the rule of law, which, according to Article 1(3) of the Constitution of Romania, is a constituent principle, that is, a fundamental limit of norm-setting, without which the state as a political power cannot exist. The revision proposals analyzed above fall within the framework outlined by Article 152 of the Constitution, as interpreted so far in the jurisprudence of the Constitutional Court of Romania, that is, a unitary state that cannot be regionalized. However, it should be noted that this jurisprudence narrows the notion of a unitary state, which is not expressly imposed by the Constitution, meaning that the proposals we have advanced could, if the frame of reference is changed-broadening the concept of a unitary state beyond mere decentralization-be extended.

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