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## **THE INEFFECTIVENESS OF ELECTORAL SYSTEMS IN POST-COMMUNIST ROMANIA A SUBSTANTIVE APPROACH**

### **INTRODUCTION**

By referring in the title of this article to the “ineffectiveness” of electoral systems, I necessarily imply that the systems in question pursue a specific aim that should be effectively attained. I believe that the aim in question in democratic systems should be the advancement of the main substantive characteristic of democracy – actual representativity. As such, I think that democracy should not be merely defined as a form of government in which the electorate has the formal power to elect its representatives, but also as a form of government in which the choice exercised by the electorate is effective by being conducive to actual representativity.

In this regard, I believe that an effective electoral choice conducive to actual representativity is characterized by the following qualities and guarantees: firstly, the electorate should have a range of options; secondly, the options in question should be viable. By the viability of the options I refer to the fact that the candidates should meet certain requirements (moral, professional etc.) which should transform them into desirable options from the standpoint of the electorate. Thirdly, I believe that actual representativity cannot be attained without the willingness of the persons elected to implement the will of the electorate. In the absence of this willingness, electoral choice becomes devoid of

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content. Thus, in democratic systems, the electorate should feel that its views are truly taken into account at the level of decision-making bodies. Fourthly, as a guarantee of actual representativity, I believe that the elected persons should be held accountable<sup>1</sup>, in one way or another, if they blatantly and systematically refuse to implement the will of the electorate.

In this article, I will argue that neither of the previously mentioned qualities and guarantees that characterize an effective electoral choice in democratic systems exists in the case of Romania, largely due to its post-communist legacy.

Before proceeding with my analysis, it is also important to mention that the effectiveness of electoral systems could also be analyzed from a technical standpoint. Thus, the effectiveness of electoral systems could be translated into the capacity of the systems in question to accurately reflect electoral choice. However, even though the mathematics of electoral law is of great importance, it remains a formal approach. In this regard, even if in evolved democracies this topic deserves attention, I believe that in a post-communist state such as Romania, there are much more important substantive issues to be discussed. Therefore, even though the title may mislead the reader to a certain extent, in this article I will, from a rule of law perspective, concentrate more on the deficiencies of the constitutional system that lead to the ineffectiveness of the electoral systems than on the traits of the electoral systems themselves.

## (NOT) HAVING A RANGE OF OPTIONS

In the communist period, electoral law was devoid of any meaningful content. Electing your representatives was a mere formality, a masquerade of democracy. This was largely due to the fact that the citizens did not have a wide range of options. On the contrary, they paradoxically had only one – the communist party [Enache, Deaconu 2018: 81]. Even though the idea of choosing loses almost any significance when you only have one option, the Romanian communist regime insisted on organizing elections regularly. This practice was aimed at creating a false image of democracy for the electorate and for authentically democratic states. Sadly, the image was not at all convincing, especially for the Romanian citizens, who knew they were doing something absurd, but did it anyway out of fear of negative consequences.

Turning to the present, it would seem that nowadays in Romania there are multiple political options from which to choose. However, because the Romanian political class is largely deficient, mainly due to the fact that it is an adapt-

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<sup>1</sup> According to P.T. Young [2009: 2–3], democracy is a concept that necessarily includes some measure of accountability.

ation of the former communist class to more democratic times [Mungiu-Pippidi 2010b: 125], electoral choice remains devoid of content. In this regard, it is well-known that the former members of the communist party started or infiltrated new parties after the Revolution in 1989, socialist and liberal alike. That is why even today in Romania there is almost no ideological difference, seen in practice, between socialist and liberal parties.<sup>2</sup> Migrating to new parties, the former communist class spread its mindset to new generations, thus creating a political class well-known for corruption and not trusted by the electorate. The lack of trust led to an attitude of resignation, complacency and hopelessness, which is the main cause of Romanian citizens not being interested in politics and elections. Thus, even if electoral systems were adequate from a technical perspective,<sup>3</sup> this would be of no value, since Romanians are most of the time too disillusioned to exercise their right to vote.<sup>4</sup> In this regard, Simona Buşoi observed two main causes for the low turnout in Romania. Firstly, no candidate seems to be able to give the electorate what it wants, thus making it indifferent to the outcome. Secondly, the electorate is disillusioned and convinced that it cannot influence in anyway, either by vote, or otherwise, the current situation [Buşoi 2011: 8]. The same author underlined that “electoral absenteeism is, in many cases, a silent protest against the current state in politics, an act of signalling that politicians should take into account” [Buşoi 2011: 8].

Therefore, even though nowadays there are, formally speaking, many political options, reduced to their essence, they signify only one: the same deficient political class, originating from the communist party, dressed in different political colours. In this regard, it can be observed that the lack of viability of the existing political options leads to the actual lack of a range of options.

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<sup>2</sup> In this regard, E. Cîncea [2012: 10] observed that “the evolution of the Romanian political arena after December 1989 is quite bewildering, as it is marked by opportunistic reorientations of political parties and alliances between parties with apparently conflicting doctrines. Consequently, it seems that in Romania, political ideologies have no importance whatsoever [...]”.

<sup>3</sup> According to E. Cîncea [2012: 13], for the Romanian people it does not matter whether politicians are elected as a result of a uninominal vote or of a party list system. What counts for the electorate is that the decisions taken by the elected officials serve people’s interests.

<sup>4</sup> See A. Mungiu-Pippidi [2010b: 126] See also E. Cîncea [2012: 11]. According to this author, after the fall of the communist regime, one could perceive the enthusiasm among voters, turnout in 1990 elections being almost 86%. Since then, voter turnout has dropped significantly, which shows not only a lack of interest in politics, but also discontent with the Romanian political class.

## THE LACK OF VIABILITY OF THE POLITICAL OPTIONS AVAILABLE

In this section, I would like to expand upon the issue of the lack of viability of the political options available by presenting the main negative characteristics of the political class in Romania.

### CORRUPTION

Corruption is the first main negative characteristic of the political class in Romania which I want to briefly discuss. The corruption phenomenon in politics and administration has been so widespread since 1990 until the present day that in 2002 a National Anticorruption Directorate was established in the context of pressures coming from the European Union to solve the corruption issue in order for Romania to be accepted in the European Union [Mungiu-Pippidi 2010a: 10]. Beyond the numerous criminal investigations that led to the convictions of very famous politicians, corruption is a phenomenon that is so widespread in Romanian society that it can almost be viewed as one of its “cultural” characteristics. Without delving into the ancient historical roots of corruption in Romania, part of it can be attributed to the arrangements specific to the former communist system. In this regard, it is well-known that communist systems are highly bureaucratic, which creates in turn the necessity for a method to accelerate procedures. Sadly, the method in question has more often than not been bribery. Since the system maintained its bureaucratic quality after 1989, bribery continued to be viewed as a normal way (sometimes the only way) to solve practical problems in an efficient manner. Returning to the issue of the citizens’ trust in Romanian politicians, the corruption problem makes it almost impossible for them to believe that politicians are genuine in their activities. Most Romanians believe that politicians choose their careers only to advance their own interests, mainly by receiving bribes and obtaining other financial advantages in an illicit manner.

### INDIFFERENCE AND SELFISHNESS

Besides being viewed as corrupt, most politicians are also regarded by the electorate as indifferent and selfish. In addition to choosing their careers as a way to make money by receiving bribes and various advantages for them and

their families,<sup>5</sup> they are also indifferent to the actual needs and desires of the electorate. For example, in terms of the relationship between the members of Parliament and the electorate, even though MPs receive a monthly allowance from the state to organize local offices for maintaining contact with the people, very rarely do they actually organize such meetings. All in all, the electorate simply does not believe that politicians are genuinely interested in solving their problems, and this is the main reason for not trying to fight for their interests, including by voting.

Moreover, MPs have proved their selfishness over time by using their position to protect their own interests in a very obvious way. For example, as in other states, the Romanian Constitution provides MPs with procedural immunity. According to art. 72 paragraph (2) of the Constitution, the deputies and senators may be subject to criminal investigation or criminally prosecuted for acts that are not connected with their votes or their political opinions expressed in the exercise of their office, but shall not be searched, detained or arrested without the consent of the Chamber they belong to, after being heard. At the same time, art. 76 paragraph (2) of the Constitution states that resolutions, including those by which procedural immunity is lifted, shall be passed by the majority vote of the members present in each Chamber. However, for a long period of time, the Rules of the Senate, which have an inferior legal force to the Constitution, stated that procedural immunity is lifted by a higher majority than that mentioned in the Constitution. Even though the discrepancy between the two acts was blatant, the Senate refused to adapt its Rules to the Constitution of its own will, stating that any act is presumed to be constitutional until the Constitutional Court decides it is not.<sup>6</sup> Looking beyond such arguments brought before the Constitutional Court in bad faith, it is obvious that the Senate kept the provision in question unchanged for as long as it could in order to make the procedure regarding the lifting of the procedural immunity more difficult. The argument previously mentioned also proves an inadequate understanding of the rule of law [Selejan-Guțan 2010] on the part of MPs. They seem to perceive the rule of law in a very formalistic way, using legal rules – such as the one according to which acts are presumed to be constitutional until the Constitutional Court declares them unconstitutional – to justify their actions that run counter to the spirit of the rule of law. From this point of view, the spirit of the rule of law involves having an attitude based on good-faith when exercising public functions, which includes, in this case, respect not only for the legal rule *per se*, but also for its purpose. In this regard, the rule created by the Consti-

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<sup>5</sup> According to P.T. Young [2009: 4], the unsettled institutional environment of the transition to capitalism and democracy in Eastern Europe allowed various actors, including politicians, to take advantage of the state resources.

<sup>6</sup> See Decision no. 261/2015 § 7 of the Constitutional Court (published in the Official Gazette no. 260/2015).

tutional Court according to which acts are presumed to be constitutional until they are declared unconstitutional has the purpose of granting exclusive jurisdiction in terms of constitutionality to the Constitutional Court, eliminating any potential interferences by other institutions who might consider themselves competent to examine the constitutionality of acts and change them accordingly. Thus, the rule previously mentioned aims at ensuring legal certainty in the field of constitutionality. It cannot be used for a different purpose, which is to justify adopting and maintaining a rule that clearly violates the Constitution in order to protect personal interests. Respecting a legal rule from a formal point of view, while violating its purpose, constitutes an abuse of law. The rule of law was created especially to counteract such abuses and not only formal violations of law. From this point of view, Romanian politicians are very cunning as they prefer to respect legal rules from a formal perspective, while deviating from their legitimate purposes to advance their own selfish interests.<sup>7</sup> Such legal abuses involving distortion of purpose can hardly be proven because the formal limits of the legal rule are respected while its purpose is being violated. On the other hand, blatant violations of the formal limits of a legal rule can be more easily observed and sanctioned, which is why politicians avoid them.<sup>8</sup>

In the conclusion of this section, it is important to underline that the electorate takes notice of these abuses and their prevalence in practice greatly diminishes its confidence in politicians.

## THE LACK OF PROFESSIONAL COMPETENCE

Even though in many cases politicians are professionally competent to a certain degree despite their corruption, indifference and selfishness, there are some cases in which the lack of professional competence of some Romanian politicians is so obvious that it makes an entire nation feel ashamed. I will give as an example one of the most recent Prime Ministers of Romania: Viorica Vasilica Dăncilă. For almost two years,<sup>9</sup> this politician perplexed the entire nation because of her grammar mistakes in public discourses, her lack of logical coherence and her overt subservience to the political leader of the ruling party (PSD), Liviu Dragnea. The main reason that she was proposed for the position of prime

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<sup>7</sup> In this regard, P. Blokker [2012: 9] emphasized that “in the case of Romania, democratic politics seems largely reduced to a narrowly understood political game, captured by clientelistic political factions *that are prone to use constitutionalist language for other purposes* [...]”.

<sup>8</sup> For example, if the President of Romania started to legislate instead of the Parliament, the action in question would represent a blatant violation of the formal limits of the Constitution, which could very easily be observed and sanctioned.

<sup>9</sup> From the 29.01.2018 until the 4.11.2019.

minister was that Liviu Dragnea could not obtain that position as he had been criminally convicted and the law prohibited a criminally convicted person from becoming prime minister. However, he obtained and maintained his position as President of the Chamber of Deputies in spite of his first conviction, as the law did not prohibit such a practice.<sup>10</sup> At the same time, he chose Viorica Dăncilă for the position of prime minister, despite her obvious lack of professional competence, because he needed an acquiescent person in order to also control the activity of the Government.<sup>11</sup> The lack of professional competence was not characteristic only of Viorica Dăncilă, but also of other members of the same Cabinet. In this regard, the dumbfounding public discourse of the then Minister of Agriculture and Rural Development, Petre Daea, in the European Parliament, during which he said that “the cormorants take baths in swimming pools in Romania”, is illustrative.<sup>12</sup>

Seeing all these manipulative games and deficiencies at the highest level in Romanian politics, it is only natural that the electorate’s confidence in its representatives has radically diminished over time. In turn, this lack of confidence has led to a decreased interest in public affairs and to a low turnout when it comes to voting.<sup>13</sup>

To conclude this section, the lack of viability of the political options available, translated into the negative characteristics of the Romanian political class, constitutes an important cause of the lack of effectiveness of the electoral systems in post-communist Romania as it discourages the electorate from voting.

## THE UNWILLINGNESS OF THE PERSONS ELECTED TO IMPLEMENT THE WILL OF THE ELECTORATE

Beyond the general unwillingness of the persons elected to implement the will of the electorate, which stems from the fact that they did not choose their public function in order to represent the interests of the people, but in order to advance their own interests, there are particular cases in which the unwillingness in question manifests itself in more specific and obvious ways.

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<sup>10</sup> Liviu Dragnea was criminally convicted for the first time on the 22.04.2016 and became the President of the Chamber of Deputies on the 21.12.2016. His two-year prison sentence for an electoral offence was suspended. Later, on the 27.05.2019, Liviu Dragnea was criminally convicted again for abuse of office, this time having to serve his three-year and six months prison sentence.

<sup>11</sup> For details, see <https://www.romania-insider.com/comment-fall-romanian-leader-liviu-dragnea> (access 31.07.2020).

<sup>12</sup> See <https://www.digi24.ro/stiri/actualitate/video-petre-daea-discurs-naucitor-in-parlament-european-cormoranii-in-romania-fac-baie-in-piscine-1070007> (access 31.07.2020).

<sup>13</sup> According to M. Enache and Ş Deaconu [2018: 77], the decline in turnout caused by the electorate’s disappointments after 1990 has characterized the entire post-communist period.

Even though the persons elected do not usually know the actual will of the people regarding specific issues because they do not make any effort to find it out, there are certain cases in which they do discover it because of the nature of the electoral instrument involved. Thus, in the case of referendums, the persons elected are confronted with the actual will of the people expressed in an official manner.

In this context, it is important to note that in Romania there are two types of referendums from the point of view of their legal effect: mandatory referendums and consultative ones. Mandatory referendums are organized whenever the Parliament suspends the President from office, if he or she committed grave acts infringing upon constitutional provisions. In this case, only the electorate can remove him or her from office by way of a referendum with binding effects organized after the suspension voted by the Parliament. Secondly, mandatory referendums are organized at the end of the constitutional amendment process. In this case, the amendment of the Constitution cannot come into force unless it is approved by the electorate. Regarding consultative referendums, art. 90 of the Romanian Constitution states that the President of Romania may, after consultation with Parliament, ask the people of Romania to express, by referendum, their will on matters of national interest. Even though the aforementioned provision makes reference to the *will* of the people on matters of national interest and Law no. 3/2000 on the organization of referendums makes reference in art. 2 paragraph (1) to the *sovereign will* of the people, this type of referendum has always been considered consultative in nature in academic literature [Deleanu 2006: 578–579] and in practice. Perhaps this is due to the fact that Law no. 3/2000 does not contain provisions regarding the implementation of the will of the people expressed during such referendums. It can also safely be said that such a continuous legislative omission proves that even though the legislator uses such declamatory phrases as “the sovereign will of the people”, it does not actually intend to implement it in practice. This was also proved in the case of a particular consultative referendum. In 2009, a referendum was organized regarding the change from a bicameral parliamentary system to a unicameral one comprising a maximum of 300 parliamentarians. The turnout was sufficient and the change was approved by the people. However, to this day, the change was not implemented through a revision of the Constitution or through the adoption of statutory law. I believe that the cause is obvious, relating to the fact that if the MPs had implemented the change in question, they would have voted against their own selfish interests by reducing the size of the Parliament from 465<sup>14</sup> to 300 MPs.

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<sup>14</sup> This is the current number of MPs for the 2016–2020 legislature. The number of MPs can fluctuate as it is determined by reference to the population size.

Regarding this lack of implementation of the results of the consultative referendum, the Constitutional Court of Romania stated that the will of the people should be respected, even if this type of referendum is consultative in nature. At the same time, it observed that the Constitution does not stipulate the procedure following the organization of a consultative referendum, which does not mean that this type of referendum should have no effect. Regardless of its nature, the will of the people cannot be ignored in a democracy. Another view on the effects of the consultative referendum would reduce it to a purely formal exercise, a simple opinion poll. In this context, the Constitutional Court also stated that whereas mandatory referendums have direct effects, consultative ones have indirect effects, requiring the intervention of a public authority to implement the will of the people. Since the decision pronounced by the Court regarded a legislative proposal concerning the revision of the Constitution, it also recommended the inclusion of provisions in the Constitution specifying the legal effects of the consultative referendum and the subsequent procedure regarding the implementation of its results.<sup>15</sup> However, that legislative proposal regarding the revision of the Constitution was abandoned, not being adopted to this day, and the recommendations of the Court were not implemented by the Parliament. Consequently, the effects of consultative referendums remain unclear.

To conclude this section, it can be observed that the Parliament is reluctant to implement the will of the electorate in cases when the will in question is opposed to their interests. This situation discourages the electorate from participating to referendums, thus transforming this electoral instrument into an ineffective one.

#### THE LACK OF SANCTIONS FOR SYSTEMATICALLY REFUSING TO IMPLEMENT THE WILL OF THE ELECTORATE

I previously stated in the introduction of this article that as a guarantee of actual representativity, the elected persons should be held accountable, in one way or another, if they blatantly and systematically refuse to implement the will of the electorate.

In this context, it is important to mention that the Romanian Constitution enshrines the representative mandate in article 69 paragraph (1), stating in paragraph (2) of the same article that any imperative mandate shall be null. In other words, Romanian MPs are fully free to follow their own conscience and will during the exercise of their mandate in Parliament and cannot be sanctioned by the electorate, if they disregard its will. The only “sanction” for disregarding

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<sup>15</sup> See Decision No. 80/2014 of the Constitutional Court on the Legislative Proposal Regarding the Revision of the Constitution, <https://lege5.ro/Gratuit/gm4tgojwg4/decizia-nr-80-2014-asupra-proponerii-legislative-privind-revizuirea-constitutiei-romaniei>, §§ 282–287 (access 14.07.2020).

the electorate's will can consist in not being elected at future elections. However, given the fact that in Romania MPs are elected according to a party-list proportional representation system, the electorate cannot effectively exercise its choice not to elect certain persons in the future, as the list is drawn up by the party according to its political interests. At the same time, it is true that the electorate can choose to vote for another party, but, as stated earlier, the actual difference in quality between parties is minimal. Thus, the representative mandate encourages the indifference of the MPs in terms of implementing the will of the electorate as they cannot suffer any legal consequences for violating the most elementary principle of democracy, which is respecting the electorate's will.

Without delving into the advantages and disadvantages of the imperative mandate versus the representative one [Deleanu 2006: 107–109], I believe that the possibility of losing their mandate would motivate Romanian MPs to implement the electorate's will, as most of them function according to a fear-based mentality, which is typical for post-communist societies. However, as fear is not a long-term solution and the imperative mandate has significant disadvantages,<sup>16</sup> I believe that the authentic development of a democratic culture<sup>17</sup> would better solve the lack of actual representativity that characterizes the Romanian constitutional system. Therefore, the real “sanction” by which politicians should be held accountable for refusing to implement the will of the electorate should be their progressive natural elimination as a consequence of a new political class emerging, which fulfils the necessary quality requirements for it to become a better option for the electorate.

## CONCLUSION

In this article, I have tried to demonstrate that the effectiveness of electoral systems is closely linked to substantive issues, such as respect for democracy and the rule of law, especially in post-communist states.

In the case of Romania, the poor quality of the political class is the main factor that leads to the ineffectiveness of the electoral systems. Thus, the generalized lack of viability of the political options available, coupled with the unwillingness

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<sup>16</sup> See Report on the Imperative Mandate and Similar Practices Adopted by the Council for Democratic Elections at its 28th Meeting (Venice, 14 March 2009) and by the Venice Commission at its 79<sup>th</sup> Plenary Session (Venice, 12–13 June 2009), European Commission for Democracy Through Law, p. 3; [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)027-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)027-e) (access 22.07.2020).

<sup>17</sup> According to P. Blokker [2012: 10], one of the more challenging problems of Romanian constitutional democracy seems to be the absence of a widely diffused culture of constitutionalism.

of the persons elected to implement the will of the electorate, transforms the electoral process into an ineffective one from the standpoint of the goals of democracy.

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## Summary

In this article, I analyze the ineffectiveness of electoral systems in post-communist Romania using a substantive approach. To this end, I firstly maintain that an effective electoral choice, conducive to actual representativity, is characterized by the following qualities and guarantees: 1) the electorate should have a range of options; 2) the options in question should be viable; 3) the persons elected should be willing to implement the will of the electorate; 4) the elected persons should be held accountable, in one way or another, if they blatantly and systematically refuse to implement the will of the electorate. I then argue that neither of the previously mentioned qualities and guarantees that characterize an effective electoral choice in democratic systems exists in the case of Romania, largely due to its post-communist legacy.

**Keywords:** ineffectiveness, electoral systems, democracy, rule of law, post-communism.

## NIEEFEKTYWNOŚĆ SYSTEMÓW WYBORCZYCH W POSTKOMUNISTYCZNEJ RUMUNII. UJĘCIE PRZEDMIOTOWE (streszczenie)

W artykule analizuję nieefektywność systemów wyborczych w postkomunistycznej Rumunii, stosując ujęcie przedmiotowe. W tym celu, po pierwsze, twierdzą, iż dokonanie wyboru, sprzyjającego faktycznej reprezentatywności, charakteryzuje się następującymi cechami i gwarancjami: 1) wyborcy powinni posiadać różne możliwości wyboru; 2) możliwości te powinny być realne; 3) wybrane osoby powinny mieć wolę do implementowania woli wyborców; 4) wybrane osoby powinny być pociągnięte do odpowiedzialności, jeśli rażąco i systematycznie odmawiają implementowania woli wyborców. Twierdzą ponadto, że w Rumunii żadna z tych wymienionych cech i gwarancji nie ma miejsca, co w znacznym stopniu wynika z postkomunistycznej spuścizny.

**Słowa kluczowe:** nieefektywność, systemy wyborcze, demokracja, rządy prawa, postkomunizm.