

COUNTRY REPORT

ROMANIA



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Introduction¹

In Romania, deliberative democracy is far from being properly developed. In the following pages, we will briefly analyze the few deliberative sequences aimed to lead to constitutional reforms, with a more particular emphasis on the 2013 momentum, which was for many the sole exercise that could fully qualify as a deliberative democracy practice. For contrast, we also discuss the 2018 constitutional referendum that is a key moment for any critical analysis of deliberative mechanisms and especially of their failure.

The 2013 Constitutional Reform Attempt²

The 2013 initiative deserves attention as it emerged in the context of changing civic engagement in Romania and as it is one of the few deliberative constitutional revisions in Europe. The debate around constitutional revision in Romania was not over after the 2003 amendments and somehow remained on the political agenda. There were demands for a more precise definition and application of rights and liberties, and of citizen control over institutions. There was also an obvious need to constitutionally and institutionally prevent further political conflicts (such as two votes of no confidence in one term – in October 2009 and in April 2012, and two impeachments of the President – in April 2007 and in July 2012).

After the presidential elections of 2009 and the parliamentary elections of 2012, the constitutional revision moved up from the stage of intention to that of action. This plan has been facilitated by the existence at the beginning of the 2012-2016 legislative term of a parliamentary majority (composed of the Social-Democrats and the National-Liberals) able to undertake constitutional changes, i.e. more than two thirds of the legislature.

The decision to involve citizens in the process of constitutional revision was determined by the willingness of the civil society (and notably that of the Pro Democratia Association) to get involved in the constitutional reform and the USL's will to illustrate responsiveness to popular desires, by initiating public debates in the aftermath of the parliamentary elections. So, the political elites decided to have a process of constitution change in Parliament based on proposals from citizens. The latter were expected to meet and debate in an organized framework (the Constitutional Forum) and all their proposals were voted on by the Parliamentary Committee in charge with the revision.

The crowd-sourcing of constitutional change in Romania had an *a priori* well-defined status: deliberations were aimed to produce proposals that were later submitted for approval to a parliamentary committee. Thus, the final word belonged

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² An extended version of this analysis can be read in: Sergiu Ghiergina and Sergiu Mişcoiu, "Crowd Sourced Legislation and Politics. The Legitimacy of the Constitutional Reform in Romania" in *Problems of Post-Communism*, 63:1, 2016, 27-36

to political parties in Parliament where the Forum had a strong supporter in the government coalition (the Liberals). Accordingly, the role of the deliberative body was not to draft a constitutional revision, but to gather proposals from civil society organizations and citizens, and to prepare an exhaustive report that served as basis for the work of the parliamentary committee. The parliamentary committee was supposed to vote one by one the amendments and to complete them with those coming from the members of Parliament (MPs). The final draft had to be adopted by the committee, by the Parliament (with a qualified majority of two thirds) and finally to be submitted to the popular referendum.

In early 2013, the Romanian Parliament voted to set up the Constitutional Forum as an autonomous and consultative structure, meant to organize debates and consultations with society members regarding the revision of the Romanian Constitution. Complementary, it set up a parliamentary committee with the task to discuss proposals emerged from the deliberative practices of the forum. The president of this committee was one of the two USL leaders, Crin Antonescu, also president of the PNL and of the Senate. While the parliamentary committee and the Forum were supposed to act together towards the achievement of a common goal, i.e. constitutional revision, the first signs of disagreement appeared soon after. The Forum coordination team asked for minimum six months to deliver a report and the parliamentary committee decided to grant them only two and half months, including the public consultations and proceedings' synthesis (February-May 2013). The main consequence of this precipitation was the insufficient time to prepare some of the public debates and to draft a perfectly coherent and consistent final report.

The Pro Democractia Association coordinated the Forum for two reasons as it had an extensive network of local organizations all over Romania, being the only NGO able to organize representative debates on constitutional reform at a national level. The latter feature was very important because debates were supposed to be organized throughout the country. In spite of the limited time frame, the idea of local level debates was extensively implemented in practice: more than 50 debates were organized at local level in March-May 2013 where more than 1,200 people participated.

There are several key differences between the list of proposals resulted from the Constitutional Forum and the final project of Constitutional revision adopted by the Parliament. First, in terms of ideology, the MPs were more conservative than the participants in the Constitutional Forum. More precisely, they limited the amendments related to the extension of the notion of discrimination (especially to sexual minorities), refused to include strict and explicit provisions concerning the separation of the state and the church, and to allow marriage for same-sex couples. Second, in terms of social rights, the MPs were closer to classical liberalism than the participants in deliberation. For example, they denied the opposable right to have a home, refused to introduce the Children's Ombudsman, and maintained the limited constitutional provisions regarding employment and health guarantees. Finally, the Parliament was oriented more towards the vertical division of power between executive and legislative than ordinary citizens were during deliberation. For

example, the direct election of the President was maintained and the active and decisive role of the President in the nomination of the Prime Minister was not amended significantly.

The legitimacy of the 2013 Constitutional Forum

Types of Legitimacy	Features of the Constitutional Forum	Achieved
Input		
Agenda mandate	Extensive, no limits to changes	Yes
Inclusive representation	Oriented towards civil society organizations, open to experts and interested citizens (no representative sample)	Partial
Throughput		
Inclusive participation	Extensive opportunity to participate (including an online platform), equal voice	Yes
Transparency	Transparent procedures, clear structure of debates	Yes
Output		
Effectiveness	Solutions were provided but not made it into policy	No
Efficiency	Hard to assess in the absence of benefits	No

Input Legitimacy:

The two dimensions we can use to assess the input legitimacy of the constitutional deliberative practice in Romania are the mandate (how much participants could change) and the nature of representation (how inclusive was the selection of participants). To begin with the agenda-setting powers there were no formal obstacles regarding the constitutional articles that could be discussed by participants. They were free to debate and propose changes on every article of the existing constitution (valid since 2003) with the exception of those provisions that cannot be modified by anyone. These are stipulated by Art. 152 of the Constitution and include the national, independent, unitary and indivisible character of the Romanian state, the republic as form of government, the territorial integrity, independence of justice, political pluralism, and the official language of the country. One indicator of the freedom enjoyed by participants in suggesting revisions is that some of these proposals were not constitutional. More precisely, some changes emerged during the Forum and approved by the parliamentary committee were declared unconstitutional by the Constitutional Court.

In terms of composition, the Forum aimed to have large participation. However, it did not provide equal access to a representative sample of citizens but was organized to allow access of academic and professional experts in law, political science or economy and of representatives from NGOs, professional associations, media, trade unions and local government. The selection of participants was not random but rather open and exhaustive. Invitations were sent to all the NGOs registered in the official register, to all the members of the departments of political

science, sociology and law from the local universities, and to all journalists dealing with domestic politics. The Forum had three dimensions: territorial, thematic and academic.

In brief, the constitutional deliberation in Romania had a medium level of input legitimacy that was achieved through extensive agenda-setting mandate and partial inclusive participation. The latter was not representative for the broader citizenry (no random sampling was used at any stage), had an inherent self-selection bias (only interested participants joined), and had a limited reach in terms of grassroots participation. Instead, it aimed at including large segments of civically engaged citizens, i.e. academics, journalists, civil society.

Throughput Legitimacy

We look at two dimensions – equal participation opportunities and transparency – to evaluate the throughput legitimacy (quality of deliberation) of the constitutional deliberative forum in Romania. One week prior to each debate the invited participants were asked to send a filled form including a maximum number of three specific changes accompanied by their motivations. After collecting the proposals, the local Forum committee merged the amendments with similar topics. The structure and timing of each debate were very clear and communicated to participants in advance: after a 10 minutes introduction, each amendment was presented by its proponent in three minutes and discussed for a maximum of other 10 minutes. As much as possible, all speakers were allowed to intervene for one minute and there were rare cases when participants had no possibility to finish their arguments. Each meeting had a moderator who made sure that at the end of debate all mentioned amendments with their arguments and counter-arguments were stored and send to the central Forum committee. The latter merged all similar proposals and produced the final report.

The broad range of topics debated during the Forum may be considered an indicator for the plurality of opinions. Some of the broad categories discussed in the context of constitutional revision were the: environmental issues, the statute of magistrates, the role and functions of the Constitutional Court, the constitutional provisions of the functions of the Parliament, the President and the Government, constitutional provisions on consulting and petition mechanisms, the role of the Ombudsman, the right of association, of protest and freedom of speech, national security and the role of state institutions on this matter, fundamental rights and liberties, European citizenship, civil society, minorities' rights in the Romanian Constitution framework: equal opportunities, gender equality, minorities' rights, the prerogatives of central governmental authorities in relationship with the EU, institutional transparency and citizens' right to information in relationship to the authorities, social rights issues, the judicial, the role of social partners in the constitutional array, the right to education and the autonomy of universities. Throughout the debates, the importance of constitutional consultation and civic and democratic education was highlighted on several occasions.

To enhance transparency, publicity and virtual participation, the Forum committee established an online platform.³ Participation via the online platform was open to every citizen and the moderators did not allow bad language, personal attacks, discrimination of any kind, or advertisement messages. The online platform has proven quite successful since it had 11,000 visits (with an average of 234 visits/day) from people located in 25 countries. The debates and the online platform generated more than 400 proposals for constitutional revision out of which 50 referred to complete revision. In terms of publicity and presentation to the broader public of the discussions within the Forum⁴, the presence of journalists in deliberations increased the media coverage of the event.

All these details indicate a high quality of constitutional deliberation. The transparent procedures were possible through the use of a moderator who kept track of proposals, ensured mutual respect among participants, and promoted the use of arguments in the dialogue.

Output legitimacy

As previously explained, the participants to the Romanian Constitutional Forum knew beforehand that their decisions will play a consultative function for the parliamentary committee in charge of constitutional revision. The changes suggested during deliberation had in a first phase a good chance to become policy outcomes. Immediately after the end of deliberations (May-June 2013), the parliamentary committee studied and decided about the suggestions: it kept some, it rejected others and added some new ones. Representatives of the Forum were always invited to meetings of the parliamentary committee and were asked to present arguments to support the suggested modifications. The discussions during such meetings were open and transparent although there was no real agreement between the Forum representatives and the MPs. The draft issued after these discussions included to a large extent the proposals originating in the debates of the Forum especially on rights and freedoms, child protection, checks and balances. However, in a second phase the final vote of the parliamentary committee weakened the result of deliberation. Several key-amendments, including the most progressive ones (e.g. the permission of same sex marriage) were removed. This shift had political causes (i.e. the disputes between PNL and PSD) and soon there was no longer the two thirds majority needed to support the Constitutional reform and no immediate incentive to adopt and submit to public referendum.

In light of these developments the effectiveness of the deliberative procedure relative to the final policy outcome is very low. While the debates addressed the problems of the current constitution, the solutions provided did not make it further than the drawers of the parliamentary committee in charge with

³ The platform was available at www.forumconstitutional2013.ro and could be accessed until February 2014.

⁴ In this context we refer to publicity in a procedural way as means of providing transparency to deliberation. If publicity plays an informationa role, i.e. informing the public about the content of deliberation, then it can be seen as part of the output legitimacy.

revision. Nevertheless, if we account for effectiveness relative to the output of deliberation, the conclusion is significantly nuanced. The existence of an extensive report summarizing the key problems addressed during the Forum and the pursuit of deliberation arguments in front of the MPs are relevant outcomes. With respect to the second dimension of output legitimacy, the interruption of the process made difficult to assess efficiency because there are no benefits to be weighed against the costs.

The 2018 ‘Family’ referendum

On the 6th and 7th of October 2018 Romanian citizens were called to vote in a national referendum in order to decide whether they support the modification of article 48 of the Constitution. The referendum itself was the last element in a long (and, to date, unique) effort aimed at constitutional revision based on a national citizens’ initiative. The purpose was to secure the constitutional consecration of the notion of the ‘family’ being exclusively formed ‘through the marriage of a man with a woman’, instead of the existing formulation that only mentions ‘spouses’, and thereby making any future endeavor to legalize same-sex marriage anti-constitutional. Such marriages were already forbidden by the Family law, which stipulates in art. 258 that ‘spouses are hereby to be understood as referring to a man and a woman joined by marriage’.

The referendum was ultimately invalidated, as the electoral threshold was not met, and by a large distance. While according to the law, valid referenda need an electoral participation over 30% (reduced several years ago from the even more demanding threshold of 50%), the actual participation in the two days of the referendum was less than 21,10%. This low percentage of participation was mainly due to the fact that active opponents of the constitutional reform boycotted the referendum as the most effective strategy for having it dismissed, as well as from a wider social indifference to the issues raised by the opposing sides. Therefore, even with exceptional 2-days duration, the referendum failed to obtain the required electoral threshold and hence validation by the Constitutional Court.

The electoral threshold of 30% is calculated from most likely outdated and hence inflated projections of the actual number of electors, as Romania uses for referenda and elections the default electoral registry, with no requirement for regular, active citizen registration. These lists are often criticized for being irreconcilable with the present demographic reality. The electoral authority maintains this registry by adding every year newborns and removing deceased persons, but otherwise is indifferent to the upwards of 3 million citizens living abroad, with full nominal electoral rights but with little electoral presence. This means that for an estimated resident population of 19,5 million, the electoral registry affirms the existence of close to 18 million electors. The viability of the electoral registry is crucial when measuring electoral participation and mandatory thresholds and is frequently an object of heated debate. But to date, no party has actively searched to change the default method of keeping the electoral registry. Precisely because of this structural difficulty to achieve the electoral threshold for valid referenda, the political parties supporting the constitutional ‘family’ referendum extended the vote for two days at

the beginning of October 2018, as was the case for a previous (barely validated) constitutional referendum in 2003. Despite the longer duration, only 3.8 million electors (21,10%) showed up, while the threshold was 5,7 million. The result was 91% in favor of the modification, yet the referendum itself was invalidated by the Constitutional Court because of insufficient participation and the constitutional reform process blocked.

The constitutional process ending with the failed ‘family’ referendum of 6-7 October 2018 had started a few years earlier as a citizens’ initiative that garnered more than 3 million signatures. It was spearheaded by the ‘Coalition for the Family’ movement, a constellation of conservative NGOs and churches. In fact, despite the ultimate failure precisely for lack of electoral participation, the earlier stages of the constitutional reform process were exceptionally participative, as a bottom-up initiative rather unrelated to political parties. The signatories of the initiative were mostly affiliated to churches and religious NGOs, but still, the number of citizens endorsing the initiative for constitutional revision remains impressive. No similar initiative has received as much support and for this reason, it is difficult to deny the participatory interest of the citizens.

Yet this initial participation was exclusively within the religious and conservative circles. In fact, when the official procedures for registering the citizens’ initiative became public, the very idea that 3 million people had signed it was virtually unknown to the wider public. There had been no countermovement while the 3 million signatures were being collected, and no meaningful participation of opponents. Only after the constitutional revision process moved in its parliamentary phase did the various stakeholders start to activate.

The political parties themselves tried to factor in the apparent success of the citizen initiative and associate themselves to the effort, but their actual role was rather limited to facilitating the parliamentary filter and helping with the generous 2-day referendum duration in order for the electoral participation to reach 30% threshold. In an important sense, there was no polarization among political parties on this topic - with the exception of the USR, a small new anti-corruption party with 8% of the parliamentary mandates, which alone strongly disputed the constitutional revision. Aside this exception, all main parties openly supported the constitutional reform and confirmed their proximity with the referendum’s moral and political patrons – the nation-wide heavyweight Orthodox Church and the locally relevant neo-protestant churches – especially Pentecostal and Baptist.

At the same time, the political parties significantly delayed the parliamentary track of the constitutional revision process, keeping the proposal in parliament without debate for almost 2 years. The majority coalition main political party – PSD – opted to fast-track it only when the social and political pressure from the Coalition for the Family became irresistible, but never actually voiced resistance to the substance of the project. Rather, the PSD was keen on ensuring that the timing of the polarizing referendum could help sideline the growing public opposition vis-à-vis its own governing record – especially given the national and international outcry concerning the ‘justice reform’ aimed at nullifying the criminal charges against the

PSD leader, Liviu Dragnea. To relieve the public pressure from its own controversial legislative proposals, PSD finally in 2018 put on the legislative agenda the constitutional revision referendum. To be clear, PSD is nominally a ‘social-democratic’ party, but its policies are socially strongly conservative. The main opposition party of the time, PNL (nominally ‘Liberal’) is also very conservative and very close to the orthodox and neo-protestant churches. Hence, no overlap was possible between the political polarization among the main parties, and the topic of the referendum.

These political parties’ incapacity to transform the referendum into direct exclusive electoral rewards contributed greatly to the lack of a developed institutionalized framework for public deliberation on the constitutional revision process: the main two parties did not see it as central to the political cleavage that defines their opposition to each other, while its fate would not significantly advantage one or the other of the parties. Neither of them could capitalize exclusively on the results.

Therefore, instead of actively engaging in deliberative experiments on constitutional revision and the institutional effort presupposed by this, the political parties were virtually absent from the public sphere on this subject and left the debate to the churches and the most conservative and committed associations. This had a profound impact on the deliberative quality of the overall process. Parties and churches operate with very different vocabularies. As long as the constitutional revision was mainly publicly advocated for by engaged religious figures, deeply polarizing, their vocabulary was one explicitly directed towards fellow parishioners, with strongly religious references, and at times difficult to understand in the absence of that religious set of references. The *raison d’être* of the referendum was often formulated in terms of a profession of faith (*mărturisire*). If you believe in the truth of the gospels, that means that you automatically believe in the need of the constitutional revision. If you are a true Christian, there is a religious duty to vote. That was the main argument for a lot of the religious figures leading the effort to drive through parliament and then validate through referendum the constitutional revision. Instead of public reasons for democratic deliberation, appeals to revealed divine truths.

The conservative NGOs and the political parties supporting the revision were relying on the assumption confirmed by the census results of the three decades after the fall of communism: an exceptionally large majority of Romanians register as orthodox (86,5%), with the rest divided between Catholic (4,6%), Protestant (3,2%), neo-Protestant (1,9%) and only 0,2% without religion. It is difficult to ignore the role of religion in public discourse in a society where almost no-one claims to be atheist. Of course, the deliberative quality of the debates around referendum for the constitutional revision of the ‘family’, a core religious concern for conservatives across the region and elsewhere, was deeply affected by this fact.

The ‘profession of faith’ argument was possible because of the main role in the public debate of the churches. As mentioned above, without a direct stake in the referendum, the political parties stepped back and left the conservative NGOs and the churches to lead the campaign. This made possible a strange polarization, in the sense

that whereas the typical polarization of the partisan landscape in Romania relies on notions such as corruption or the need to overcome the communist legacies, this electoral (referendum) campaign was on very different terms. Not the polarization centered on political parties (where local definitions of ‘left’ and ‘right’ are taken seriously), but rather one centered on religious virtue as expressed by professions of faith and proved through voting.

The result was a debate that was not ‘public’, in the sense used by public deliberation advocates. Rather, the call for orthodox persons to profess their faith by voting was addressed to the orthodox parishioners almost exclusively. The rest of the society was seen in this as either synonymous with the orthodox church membership, or inexistent, or irrelevant. No *public* arguments were made in favor of the constitutional revision, that is, addressed to citizens whose primary political affiliation is not church-based.

Of course, aside the ‘profession of faith’ argument there were a multitude of other arguments, but many of these stressed the imminent danger for the survival of the nation if same-sex marriage was permitted by the constitution. LGBT persons were commonly depicted as pedophiles, diseased, criminal, not valid partners in deliberation. Again, no public deliberation but the denunciation of the degenerate nature of certain citizens.

Further generating non-deliberative context, the opposition to the constitutional revision quickly coalesced around the strategy of boycotting the referendum. The electoral threshold was the only chance to invalidate it, given the expected result of the vote – a large majority in favor of explicitly banning same-sex marriage in the Constitution. Therefore, the tactics used to ensure the boycott were not even closely resembling public deliberation, but rather a principled as well as strategic refusal to accept the legitimacy of any discussion concerning the referendum. While in minority, this tactic was rather effective, as the end result vindicated it, and the referendum was invalidated.

The only public deliberation rudiments were present when the actors in favor of the constitutional revision, in face of mounting risks of effective boycott, argued for the democratic quality of referenda in general and the civic duty to participate. This was a seemingly principled and publicly reasoned debate, with no overwhelming appeals to religious authority. Yet it came too late in this campaign, so the (progressive) opposition to the constitutional revision did not really take it seriously and worthy of debate. After all, given the structural difficulty of organizing a national referendum and the generally low electoral participation in regular legislative, presidential or local elections, all parties and all stakeholders have successively made, over the last decades, numerous arguments both in favor and against the civic virtues of participation and of the sanctity of the right not to participate. The same voices encouraging voter turnout in massive campaigns to ‘get out the vote’ would next year encourage boycotting a referendum and vice versa.

A second, more substantial source of public deliberation was around the *Coman vs Romania* case. The Constitutional Court of Romania and the Anti-

Discrimination National Council had requested the Court of Justice of the European Union to rule on the refusal of Romanian authorities to recognize a same-sex marriage legally performed in another EU member state, in light of EU law. The Court ruled that “in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.” Moreover, the Court stated that “a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.”

This judgement of the CJEU was a significant source of public deliberation, yet at the same time was one of the reasons for the Constitutional revision process itself – namely, the concern of religious and conservative actors that the recognition of same-sex marriage would become inevitable in domestic law *via* EU case law, and that the only modality to stop this would be the constitutional revision process.

In summary, for the 2018 constitutional revision referendum, several factors contributed to the low or absent public deliberation. First, the constitutional revision was not ‘changing’ anything in practice, as the family law already stipulated a ban on same-sex marriage; second, the main parliamentary political parties could not capitalize on the emerging polarization and hence were not really interested in developing the institutional framework for broader societal public deliberation; that, in turn, led to the prominence of the religious actors and their non-public vocabulary with appeals to religious authority and revealed truths; they also systematically depicted LGBT citizens as degenerate pedophiles, not partners in deliberation; finally, the boycott became the main strategy of the opposing actors, entailing a radical de-legitimation of the whole process. The public debates around the Constitutional Court and the Court of Justice of the European Union on the matter were deliberative in nature, but ultimately marginal.

The deliberative legitimacy of the 2018 referendum

Types of Legitimacy	Features of the Constitutional Forum	Achieved
Input		
Agenda mandate	Single-issue – constitutional revision of article 48	No
Inclusive representation	Privileged conservative NGOs close to the	No

	mainstream political parties; progressive organizations and interested citizens has little representation	
Throughput		
Inclusive participation	Few opportunities to participate	No
Transparency	No transparent procedures	No
Output		
Effectiveness	Low participation invalidated the referendum	No
Efficiency	Hard to assess	No