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Methodological Challenges for Constitutional History in Central-Eastern Europe

Introduction

Contemporary foreign legal historians pretend to thoroughly know two facts about the significant legal reforms made by Romanian legislators in the nineteenth century. First, the Romanian Civil Code of 1864, the cornerstone of Romanian legal modernisation, was heavily influenced by the French Civil Code of 1804; second, the Constitution of 1866, the first modern constitution of Romania, was deeply inspired by the Belgian Constitution of 1831. While the former legal change is usually accurately acknowledged,¹ the latter is sometimes overshadowed or misinterpreted, leading to a skewed academic narrative about Romanian constitutional history.² This discrepancy may stem from a lack of genuine scholarly interest, a deficit of information, or a hegemonic epistemological approach towards the periphery. Is this preferable to complete omission?

Similar to the case of the Romanian Civil Code, the most appealing concept used to capture the interplay between Romanian and Belgian modern constitutionalism is

¹ For example, *The Oxford Handbook of European Legal History*, eds. H. Pihlajamäki, M.D. Dubber, M. Godfrey, Oxford 2018, mention the Romanian Civil Code of 1864 as 'taking the French [Civil] Code as the source of two-thirds of its articles' (p. 917).

² For example, in a chapter dedicated to 'National Identity and Constitutions in Modern Europe: Into the Fifth Zone,' Bill Kissane and Nick Sitter, state that 'new constitutions were modelled' in Greece (the 1820s and 1844), Serbia (1835), and the Romanian Principalities of Wallachia and Moldavia (sic) (1848/1849) 'on the US and Belgian constitutions'. In the Romanian Principalities' case, this constitution would have been 'shaped by bilateral Russian-Ottoman agreements after the Crimean War'. See: *Comparative Constitution Making*, eds. D. Landau, H. Lerner, Cheltenham–Northampton 2019, p. 412. The information about Romanian constitutional history is flagrantly wrong. Besides the fact that we should talk about the Romanian Principalities of Wallachia and Moldova, no new constitution was 'modelled', in 1848/1849, on US or Belgian or other constitutional sources. The Belgian influence on Romanian constitutionalism was far from certain in 1848.

'imitation'³ or 'copy'.⁴ Others prefer less patronising concepts like 'influence'⁵ or 'drawing on'.⁶ While these approaches tend to underscore Belgian constitutional exceptionalism, they may be preferable to complete omission.

Strikingly, Romania and its legal history, whether modern or otherwise, are virtually absent from foreign English-speaking and French-speaking legal-historical scholarship as a distinct research focus. Moreover, the legal history of Europe's Central-Eastern region (CEE) is either poorly addressed or entirely overlooked. One telling example may be sufficient. The comprehensive (1,192 pages) *Oxford Handbook of European Legal History* cited earlier does not feature a dedicated chapter on CEE, apart from its treatment of Ancient Greece and the Byzantine Empire. Geographically speaking, the units of analysis are: Western Europe, including England, Scotland, and France; Southern Europe, including Ancient Rome, medieval and modern Italy, the Iberian Peninsula, and Southern France; Central Europe, including the Holy Roman Empire, medieval and modern Germany; and Northern Europe, including medieval and modern Scandinavia. Russia is a notable exception, but its inclusion in a separate chapter could be partially justified by the editor's interest in mapping global legal history, following the active actors of European legal expansion through conquest, colonisation, and powerful influence. This may explain why CEE is not visible on this map of legal Europe. One may blame again the country and Western-European diffusionism, which pinpoints the central-eastern periphery as a mere passive receptor of high quality Western European law. Others may notice once more that these regions are not far and exotic enough to warrant exceptional case study. Situated at the periphery of Europe, yet part of Europe, they naturally circle around the Western centre and could be pictured, when necessary, as exemplary instances of successful Western European legal domination.

At this point, following Michał Gałędek's example,⁷ one may ask: 'Is there anything outstanding about the history of (constitutional) law in Romania?' Is the superficial interest or the silence of Comparative Legal History scholarship perhaps justified? This may sound like a strategic trap, as no Polish or Romanian legal historian needs to claim to be exceptional to write about their nation's legal history. The question may also be a cry for justice and ethics in legal historical and legal comparative scholarship or the result of a sterile inferiority complex. After all, Romanian constitutional modernisation occurred through massive imitation and borrowing under the powerful influence of Western European constitutional models and may be appreciated as a contributor to the globalisation of liberal-democratic constitutionalism before the Second World

³ J. Gilissen, *La Constitution belge de 1831: ses sources, son influence*, "Res Publica" 1968, vol. 10, p. 138; R.C. van Caenegem, *A Historical Introduction to Western Constitutional Law*, Cambridge 1996, pp. 237–238.

⁴ See: A. Padoa-Schioppa, *A History of Law in Europe. From the Early Middle Ages to the Twentieth Century*, Cambridge 2017, p. 498.

⁵ F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles 2000, p. 74.

⁶ D. Gosewinkel, *The Constitutional State* [in:] *The Oxford Handbook of European Legal History*..., p. 965.

⁷ M. Gałędek, *Remarks on the Methodology of Comparative Legal Research in the Context of the History of Law in Poland*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 99, p. 65.

War. Nevertheless, in terms used by William E. Butler and Oleksiy V. Kresin,⁸ the same question may be an invitation to 'discover the unexpected'. This is not a different way of saying that there is something outstanding in Romanian constitutional history. It is an invitation to assess a particular (albeit not necessarily unique) Romanian approach to constitutional change that needs a greater degree of interdisciplinarity than the methodological patterns currently recommended in comparative legal history and (global) legal history can provide.

Constitutional modernisation in Romania during the nineteenth century and at the beginning of the twentieth century was paralleled by the construction of the Romanian nation-state and national identity. This was primarily a matter of choice among the Romanian ruling elites, mainly former aristocrats with legal education in Western Europe, perpetuating the legal autonomy granted under Ottoman suzerainty since the sixteenth century. While a part of the Ottoman Empire, the Tanzimat (1839–1876) had no effects on the Romanian Principalities Moldova and Wallachia or unified Romania (after 1862). Temporary military, political, and administrative control by Russia resulted in the imposition of two Russian-like constitutions, that is, the Organic Regulations (1831–32–1858). European powers managed to impose, in turn, a new constitution in 1858, that is, the Paris Convention. However, the Romanian elites eventually succeeded in pursuing their path towards a nation-state and constitutional modernisation, following their own sense of identity. This identity was constructed in favour of and against Western constitutional civilisation and identity. Romanian national identity was born out of frustration, forged into the desire to become (Western) European and strengthened by the fear of losing its Eastern roots. Political modernisation by imitation of Western constitutional models expressed, in 1866, the need for a complete change in Romanian politics; the constitutional identity crisis that followed emphasised the difficulty of becoming entirely European in constitutional matters. This explains why the constitution-making process and application constitutional norms constantly became a matter of (national) identity.

This paper discusses the Romanian process of constitutional modernisation against a background of the Romanian elites' quest for identity. It tries to explain why Romanian national and constitutional identity was disputed by multiple competing narratives constructed by the Romanian intelligentsia, and it explores the best methodological tools to assess it. The paper briefly evaluates the methodological resources of comparative legal history and global legal history and calls for a greater degree of interdisciplinarity. In my opinion, social sciences may provide the proper analytical background, facilitating an approach to Romanian constitutional history comparatively (in space), historically (in time), and psycho-sociologically (in minds).

⁸ *Discovering the Unexpected. Comparative Legal Studies in Eastern and Central Europe*, eds. W.E. Butler, O.V. Kresin, New Jersey 2021.

1. The endless Romanian road to (legal) Europeanization

The most frequently recurring question of Romanian historians, philosophers, sociologists of culture, political scientists, politicians, and even lay people in recent decades has been, 'Why is Romania different?'.⁹ This acute sense of distinctiveness makes a strong case for Romanian exceptionalism, but more often than not, it also questions an insufficiency. From a comparative standpoint, it mirrors a deep and perpetual Romanian frustration of not yet being really and entirely European. Romanians' incapacity to become European could be a possible cause; nevertheless, their fear of becoming too (West) European could be a proper explanation.

From the beginning of the nineteenth century, Romanian national identity was born out of strong inferiority complexes manifested within a changing cultural comparative framework. The shocking cultural encounters with Central-Western Europe gave Romanian self-perception new spatial and temporal coordinates.¹⁰ The centre-periphery balance was recalibrated, and an unbearable sense of backwardness developed. Eventually, modernisation clearly and irreversibly meant Europeanization. Accepting the intimate connection between national identity, national culture, and national language, the Romanian intellectual elites started to strongly question established Greek-Phanariot and Ottoman cultural influences and the predominance of the ancient Greek language in Romanian education. Against this backdrop, a modern Romanian culture had to be constructed, and a Romanian-speaking educational system had to be built. Nevertheless, cultural inferiority complexes and pressing political interests made cultural, civilisational, and political modernisation urgent. Gradually, the spatial and temporal cultural gaps were formally covered through shock therapy. The quest for Western Latin roots, French culture's strong influence, and the powerful example of the Belgian people's successful nation-state building determined a process of massive imitation and borrowing, especially from French and Belgian (legal) cultures. As long as civilisation and (political-legal) institutions were easy to transfer, the Romanian elites succeeded in rapidly changing certain aspects of Romanian society. Constantly tending to imitate Western Europe's 'civilised' nations, especially the French and Belgian ones, marked a crucial identity switch towards Europeanization. A formal institutional transformation was undeniable in the last decades of the nineteenth century, while the predominant rural Romania remained untouched by modernity. Illiteracy, misery, and lack of the basic elements of civilisation were omnipresent in Romanian peasants' lives. This reality slowly and only partially changed right up to the mid-twentieth century. Inevitably, Romanian

⁹ See, e.g., L. Boia, *De ce este România altfel?* [Why is it Romania Different?], 2nd ed., București 2013; *De ce este România altfel. Avaturile excepționalismului Românesc* [Why is it Romania Different? The Avatars of Romanian Exceptionalism], ed. V. Mihailescu, Iași 2017.

¹⁰ See: A. Drace-Francis, *The Making of Modern Romanian Culture. Literacy and the Development of National Identity*, London–New York 2006, pp. 15–91.

Europeanization was an elitist, ineffective top-down phenomenon, and its adverse effects soon became apparent.

In the last decades of the nineteenth century, a coherent section of the Romanian intellectual elite became aware of the forced and somehow inconsistent process of Europeanization, a process that ignored the old commitment to the national Romanian cultural agenda. From the mid-nineteenth century, German romantic historicism and Spencerian originalism started to ideologically underpin the Romanian national agenda.¹¹ An interest in the ethno-cultural elements of the Romanian nations prompted a questioning not only of the substantial institutional architectures built on Western European blueprints but also their efficacy. As might be expected, the institutions lavishly transferred from the West did not produce overnight a radical or effective transformation of Romanian society. The endemic corruption of the state's apparatus, the abiding lucrative interests of the political elites, and the misery of the peasants (ninety per cent of the population) transformed the whole process of Europeanization into a chimaera. The conservative elites did not necessarily look for explanations in the medieval-Phanariot layers of the Romanian culture. Indeed, they did not predominantly blame Romanian society's lack of mentality. They found the causes of modernisation's failure in the forced Europeanization or, at least, in too much Europeanization. The massive imitative and borrowing processes were prone to failure because the Romanian spirit/soul was ignored.

Since the 1870s, a heated intellectual debate opposing conservatives and modernists developed in Romania and lasted until the mid-twentieth century. Many Romanian historians, economists, jurists, sociologists, ethno-psychologists, philosophers, theologians, and philologists discussed so-called 'forms without substance'¹² and offered different explanations.¹³ The necessity of a rational process of institutional cultural borrowing, made with a critical eye to protect the Romanian cultural substance, was already advanced at the end of the nineteenth century as a blueprint for the future. A Romanian nation, culture, and state built on French/Belgian culture and language were not Romanian. The Romanian national agenda was interested in making a nation-state and culture based on the objective elements of Romanian ethnicity. A small people and culture surrounded by powerful empires could not construct modernity on a foreign cultural institutional basis; this would lead to denationalisation. Against this backdrop, a general hunt for the Romanian soul/spirit/identity/way of being took place, one that expected to establish strong borders

¹¹ See: V. Neumann, *Conceptually Mystified: East-Central Europe Torn between Ethnocentrism and Recognition of Multiple Identities*, București 2004, pp. 81–110.

¹² See: M. Guțan, *Legal Transplant as Socio-Cultural Engineering in Modern Romania* [in:] *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert. Band I: Rumänien, Bulgarien, Griechenland*, eds. M. Stolleis, G. Bender, J. Kirov, Frankfurt am Main 2015, pp. 481–530.

¹³ This Romanian intellectual turmoil about the path to modernity generated multiple interdisciplinary analyses at home and abroad. For a relatively recent one, see: P.A. Blokker's PhD thesis *Modernity and its varieties. A historical, sociological analysis of the Romanian modern experience*, Florence 2004, <https://cadmus.eui.eu/handle/1814/5240> [accessed: 2024.05.17].

of distinctiveness. Conservative circles advanced different solutions, frequently pointing to Romanian 'ancestral' peasant, traditional (Christian Orthodox) culture and civilisation.¹⁴

Nevertheless, legal modernisation through Europeanization was at stake as long as no other alternative was acceptable and as long as Romanian society had no time and poor inner resources to acquire institutional modernity by itself. Removing the already imitated or borrowed Western legal norms and institutions was not a solution. This is why Romanian legal modernisation and identity should not be merely assessed against the binary analytical framework of modern liberal versus traditionalist conservative (identity) stances. The main challenge for both Romanian modernists and conservatives was how to effectively modernise Romanian society using massively imitated or borrowed institutions while preserving a Romanian national (ethnic) identity. Many found the identity-driven response in the idea of the original re-creation of legal institutions, meaning their Gabriel Tarde-like adaptation to the Romanian spirit/soul/substance.¹⁵ Theoretically, the idea was very appealing: having European legal institutions and preserving Romanian national identity simultaneously. 'Europeanization in our Romanian way' was born out of anxiety about being seen as a backward periphery and the fear of losing the Romanian (ethnic) self.¹⁶ At the political-constitutional level, this pattern became effective by placing at the core of the Romanian Constitutions of 1866 and 1923 the elements of Romanian ethnic identity and by enshrining constitutional guarantees for their protection.

Overall, the Romanians' identity-centred road towards constitutional modernity through Europeanization was always a quest for their 'Romanianity'. This is deceptive in that it was neither unidirectional (from periphery to centre, from traditional to modern, from East to West, from Romania to Western Europe) nor bidirectional (also from centre to periphery, from modern to traditional, from West to East, from Western Europe to Romania). Metaphorically, it was instead an identity-focused pendulum: it constantly advanced towards and interacted with an idealised Western Europe to perpetually press back and return to the Romanian ethnic self. This is why it was mainly a tendential constitutional identity, meaning the constant desire of the Romanian elites to belong to Western European liberal constitutional identity doubled by a perpetual inability to renounce the Romanian ethnocentric national identity. The Romanian elites constantly tended towards West European constitutional modernity, but never had the interest to fully acquire it. This explains why Romanian national

¹⁴ See: A. Drace-Francis, *The Traditions of Invention Romanian Ethnic and Social Stereotypes in Historical Context*, Leiden 2013, pp. 11–59.

¹⁵ See: R. Carp, *Responsabilitatea ministerială* [Ministerial Accountability], București 2003, pp. 192–208; A. Banciu, *Constituție și identitate la români* [Constitution and Identity in Romania], "Sfera Politicii" 2018, no. 3–4, p. 23; M. Duțu, *Un secol de știință a dreptului și de cultură juridică în România (1918–2018)* [A Century of Romanian Legal Science and Culture (1918–2018)], "Studii și Cercetări Juridice – Serie Nouă" 2018, no. 4, p. 7.

¹⁶ See: M. Guțan, *The Legal Transplant and the Building of the Romanian Legal Identity in the Second Half of the 19th Century and the Beginning of the 20th Century*, "Romanian Journal of Comparative Law" 2018, vol. 8, p. 62.

constitutional identity was simultaneously pressured to change and to preserve itself. This mirrors both Romanians' state of incertitude about themselves and their state of incertitude about Europe. In other words, the boundaries between the Romanian national (constitutional) identity of belongingness and the identity of differentiation were of primary concern and very misty.

2. The obsession with identity in Romanian constitutional history

The context mentioned above explains why Romanian constitutional modernisation as Europeanization during the nineteenth and early twentieth centuries was not merely a matter of successful/unsuccessful constitutional imitation or borrowing from Western European constitutional models. Although the proper reception and good functioning of foreign constitutional values, principles, and institutions were a deep concern among the intelligentsia, at the end of the day Romanian intellectuals, politicians, constitution-makers, and legal scholars focused on their identity-related relevance in Romanian society. The identity of belongingness, underpinning Europeanization, was balanced against the identity of differentiation underpinning the national identity. Ethnocentric (illiberal) constitutional identity set specific limits to Eurocentric (liberal) constitutional identity, making it perpetually tendential. The meeting and particular intermingling between the former and the latter from the mid-nineteenth century onwards is relevant to understanding what was at stake in Romanian constitutional modernisation process.

First, at stake was the constitutional modernisation agenda of the two Romanian Principalities of Moldova and Wallachia, and after that of an autonomous unitary Romania (between 1862 and 1878), of an independent Romania (after 1878), and of the so-called Greater Romania (between 1918 and 1940). Under the influence of (mainly) French and Belgian constitutional models, many Wallachian/Moldavian/Romanian intellectual and political elites adopted concepts, principles, values, and institutions of liberal constitutionalism. This approach was more visible after the revolution of 1848 when, particularly in Wallachia, an authentic liberal spirit was apparent. A constitution, constituent assembly, national/popular sovereignty, representative government, limitation of political power, separation of powers, a parliamentary system of government, ministerial responsibility, dissolution of parliament, the central but symbolic place of the prince in constitutional architecture, freedom, equality, human rights, in particular freedom of conscience, freedom of expression, freedom of assembly, inviolability of residence, and the census vote, the right to life, a unicameral parliament, the independence and immovability of judges, administrative decentralization, all of which lay at the heart of the revolutionary programmes and constitutional projects of 1848, the debates of ad-hoc assemblies of 1857, the debates on the 1859 constitutional project of the Central Committee of Focșani, the parliamentary debates between 1859 and 1864, the debates of the 1866

constituent assembly, and the parliamentary debates during the reign of King Carol I (1866–1914). The Romanian elites gradually adopted these values and principles as a constitutional and political response to monarchic authoritarianism, whether it involved the neo-absolutism of the Romanian princes under the Organic Regulations (1831–1858)¹⁷ or the ‘tyranny’ of Prince Al. I. Cuza (1859–1866); they were enshrined, in their overwhelming majority, in the first modern constitution of Romania, that of 1866. Although they were usually parts of a massive constitutional transplant,¹⁸ they were eventually accepted and adopted as part of the Romanian constitutional identity. It was an identity of belongingness that clearly revealed that, for many Romanian elites, constitutional modernisation meant constitutional Europeanization, that is, the adoption of constitutional and political standards of Western European liberal democracies.

It could not be more wrong, however, to assume that the constitutional identity of Romanians was reduced to these principles, values, and institutions throughout the nineteenth and early twentieth centuries. In addition to the constitutional modernisation agenda of the Romanian states/state, the national agenda left another mark on Romanian constitutional identity. Under the influence of the French Revolution, the idea of self-determination and liberation from Ottoman rule intertwined with an obsessive concern for the unification of the two Romanian Principalities and the formation of a Romanian unitary national state. Thus, constitutional modernisation based on liberal constitutionalism and the establishment of a Romanian nation-state became two sides of the same coin: constitution and constitutionalism had no meaning outside the nation-state, and the latter could only be built on the pillars of liberal constitutionalism. However, combining the two agendas was not as straightforward as it would seem. Gradually, after 1848, the national agenda was influenced not only by the values, principles, and institutions of liberal constitutionalism but also by the ideas of German romanticism and historicism. After a phase of ‘pre-nationalist civic patriotism rooted in strong Christian morals’ in the early decades of the nineteenth century¹⁹ and a genuine moment of civic nationalism in 1848 (especially in Wallachia), Romanian public discourse was captured beyond retrieval by ethnic nationalism.²⁰ The nation, understood as a historical ethnic community, became the primary ideological support of the national agenda. Inevitably, national consciousness focused on the perennial and ‘objective’²¹ elements of Romanian national identity: shared biological

¹⁷ See: M. Guțan, *A Failed Constitutional Experiment: The Monarchical Constitutionalism and the Organic Regulations of 1831–1832*, “Journal of Constitutional History” 2021, vol. 42, pp. 25–39.

¹⁸ For details, see: M. Guțan, *Transplant constituțional și constituționalism în România modernă 1802–1866* [Constitutional Transplant and Constitutionalism in Modern Romania], București 2013.

¹⁹ M.S. Rusu, *Memoria națională românească. Facerea și prefacerile discursive ale trecutului național* [The National Romanian Memor: The Making and the Discursive Changes of the Past], Iași 2015, p. 90 ff.

²⁰ See: V. Neumann, *Essays on Romanian Intellectual History*, Iași 2013, p. 41 ff.

²¹ As L. Greenfeld puts it, any national identity is a matter of self-perception and subjective projection, even related to ethnic nationalism. As such, the so-called objective elements of ethnicity are not automatically captured in the national identity and may have a different significance. See: L. Greenfeld, *Nationalism. Five Roads to Modernity*, Cambridge, Massachusetts 1993, pp. 12–13. In the

origins (Latin and/or Dacian), shared language (Romanian, as a Latin language), shared religion (Orthodox Christianity), shared cultural (legal) traditions, and territory as the cradle of the nation (the Carpathian-Danubian space). This aspect had a decisive impact on establishing the nation-state and the constitution-making process. According to Ulrich K. Preuss, building a unitary nation-state was not a 'constitutive' moment for Romanians but a true political and legal success of a pre-existing ethnic community.²² That is precisely why the constitution had a particular expressivist function for Romanians; it had to reflect an ethnic Romanian identity besides the Romanian people's values, principles, and constitutional hopes.

It is not by chance, therefore, that the Romanian constitutional debates of 1857, 1859, and 1866 focused primarily on issues closely related to elements of Romanian national identity, such as the definition of citizenship and criteria for naturalisation, freedom of religion and the place of the Orthodox Church in the constitutional architecture, as well as Romanian constitutional traditions. Since Orthodox Christianity represented the essence of national identity in Romanian self-perception, it was placed, irrefutably, at the heart of the very definition of Romanian citizenship. Discussed initially in 1857, a radical version of national identity equated the Romanian citizen with Romanian ethnicity and Orthodox Christianity, so that a more inclusive version would finally be adopted in the 1866 Constitution: the famous Article 7(2) strictly conditioned the naturalisation of foreigners on their belonging to the Christian religion. The provision was not less ethnocentric; on the contrary, in addition to an expressivist function, it also performed an exclusive and protective function. It was meant to prevent the alteration of uniformity and ethnic unity on Romanian territory by the imagined enemies of Romanians, that is, Muslims and, most of all, Jews. Inevitably, the sentiment of national uniqueness and the presence of ethnic alterity shaped the Romanian national identity of the time.²³ An increasingly malignant antisemitism,²⁴ in particular, succeeded in intertwining the obsession with preserving the national being with the social and economic frustrations of Romanians. The tendency of Jewish immigrants to present themselves as a bourgeois layer was seen as a new form of (economic) imperialism in a Romanian society dominated by poor and illiterate peasants. Without being directly connected to the Jewish issue at hand, Article 3 of the 1866 Constitution strengthened the Romanian ethnic nation against (actual) external dangers: 'The territory of Romania cannot be colonised with populations of foreign race.'²⁵ Eventually, the 1866 Constitution added Romanian ethnocentric national

case of Romanians, religious identity and linguistic identity were usually at the heart of ethnocentric national identity.

²² U.K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe* [in:] *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, eds. M. Loughlin, N. Walker, Oxford 2008, p. 227.

²³ R. Cinpoș, *Nationalism and Identity in Romania*, London 2010, pp. 41–43; L. Boia, *Istorie și mit în conștiința românească* [History and Myth in Romanian Consciousness], București 2010, p. 301 ff.

²⁴ For details, see: C. Iordachi, *Liberalism, Constitutional Nationalism, and Minorities*, Brill 2019, p. 265 ff.

²⁵ In 1866, this Article was primarily connected to the economic protection of disadvantaged social layers since, during the reign of Cuza, the problem of bringing thousands of German settlers into the

identity to the foundations of Romanian constitutional identity. In this respect, the text of the Constitution enshrined some of its essential, objective elements: a shared biological origin, the national territory, and Orthodox Christianity. The first national symbol (the flag) also squeezed its way within the framework of Article 124.

No one should understand from this process that an ethnocentric constitutional identity erased an initially assumed Eurocentric constitutional identity. The 1866 Constitution addressed the two major issues that concerned the Romanian elites at the time: first, the limitation of the prince's power, which had been manifested abusively during the reign of Al. I. Cuza; second, the expression and protection of Romanian national identity at the constitutional level. The former was solved with the help of liberal constitutionalism and a massive transplant of values, principles, and institutions from the Belgian Constitution of 1831. The mechanisms of the parliamentary regime, the rule of law, representative democracy, and the rights and freedoms of the citizens, to the degree that the conservative spirit of the time allowed, were adopted as fundamental pillars of constitutional modernisation. The latter was solved by introducing illiberal elements and adopting an ethnocentric constitutional ethos.

I believe the 1866 Constitution had two identity poles: a Eurocentric (liberal) one and an ethnocentric (illiberal) one, held in a delicate balance. A constitutional identity of belongingness (type $A = B$) was counterbalanced by a constitutional identity of differentiation (type $A \neq B$). The two were not necessarily mutually exclusive, but they were not outside any conflicting model either. On the contrary, when the Congress of Berlin (1878) conditioned the recognition of the Romanian state independence by the amendment of Article 7 of the Constitution to make it more inclusive, the adverse reactions of the Romanian political elites were powerful. The article was eventually amended for pragmatic reasons, and the ethnocentric constitutional identity lost ground to the Eurocentric one in the constitutional text.²⁶ However, the event highlighted a clear limit of the Romanians' appetite for Europeanization, and preserving Romanian national identity was a priority. Romanian elites expressed significant interest in assuming a European (constitutional) identity without accepting a decisive identity shift that would undermine the essence of the Romanian ethnocentric identity. That is to say, they were interested in being European, though in a specifically Romanian way.

In my opinion, this bipolar, Eurocentric and ethnocentric constitutional identity should not be understood as showing an interest among the Romanian people in promoting and developing a (constitutional) identity on multiple levels.²⁷ Given the

country had been raised. However, the provision acquired a strong ethnocentric meaning over time. See: M. Guțan, *Națiunea asediată: constituționalismul etnocentric românesc și migrația contemporană* [The Nation under Siege: Romanian Ethnocentric Constitutionalism and Contemporary Migration], "Revista de drept public" 2017, special issue, p. 80.

²⁶ However, the amended Article 7 allowed the naturalisation of non-Christians only individually and only by law.

²⁷ As a solution to European constitutional integration through the concept of constitutional identity, a 'constitutional identity in 3D' model was proposed. It implies the development of a nation's

obsession with Western Europe and the high degree of interest in the Romanian 'national being' within the intellectual and political elites, I argue that Romanian (constitutional) identity was not developed at both European and ethnic-national levels but in between them. This perspective calls for adequately capturing Romanian dynamic national (constitutional) identity. Romanian elites transferred the Western-European liberal constitutionalism in the text of the 1866 Constitution only as long as it made room for elements of a Romanian ethnocentric national identity. The Romanian intellectual and political elites constantly desired to adopt a Western European constitutional identity; if this did not happen, it was not necessarily due to any inherent weakness but to an existential anxiety that anchored the constitution in the Romanian national (ethnic) being. This tendency was manifested as a permanent but unsuccessful challenge to Romanian ethnocentric core identity following a need for a pro-European identity shift. Any turn towards a Eurocentric constitutional identity was usually made by looking back to the ethnocentric constitutional identity. Conversely, any return to the ethnocentric constitutional identity was made by longing for a Eurocentric one. As far as the entire process of modernisation of Romanian society is concerned, this intricate mechanism is best expressed by sociologist Vintilă Mihăilescu:

The ideology of [Romanian national] change has taken the Occident as a reference and purpose and generated a family of Occidentalist exceptionalisms having the imperative aim of filling the gaps at its core [...] As far as the ideology of perpetuation is concerned, it also took the National Being as its reference; however, it was still defined by the Occident: the autochthonous definition of this National Being, of the 'soul of the people' would not have been possible without the use of the Herderian *Volksgeist* and the whole romantic ideas woven around it. In this case, the fear of lagging behind the Occident was replaced by the fear of drifting toward the Occident, but the Occident remained the 'mirror' in which we were watching our identity. It could thus be said that, in a way, even our nationalisms were [...] Occidentalist.²⁸

'The fear of lagging behind the Occident' explains the panic of being too far from European liberal-democratic standards; it demonstrates a quest for European ideological recognition concerning Romanian ethnocentrism, and the conscious packaging of Western European liberal constitutional standards in a Romanian historical box. Historicism²⁹ helped the Romanian elites to project European 'civilised' values and institutions in Romanian traditions and Romanianize them. Romanian constitutional modernity had to be achieved in the future with the help of those

constitutional identity in a multi-centric manner, being 'shaped simultaneously in different spheres of communication', that is, individual, relational, and collective, which interact with one another. See: A. Śledzińska-Simon, *Constitutional identity in 3D: A model of individual, relational and collective self and its application in Poland*, "I-CON" 2015, vol. 13, p. 124.

²⁸ V. Mihăilescu, *Despre excepționalism și ipostazele sale românești* [About Exceptionalism and its Romanian Facets] [in:] *idem, De ce este România altfel...*, p. 58.

²⁹ See: S. Marton, *La construction politique de la nation. La nation dans les débats du Parlement de la Roumanie (1866–1871)*, Iași 2009, p. 33, n. 1. See also: M. Guțan, *Transplant constituțional și constituționalism...*, pp. 418–420.

modern European elements discovered in the Romanian past. As long as specific European liberal values and liberties were uncovered by the purposeful 'archaeology of the past'³⁰ in 'imagined' Romanian constitutional traditions, they did not contribute to constructing the modern free citizen but strengthened the positive exceptionalism of the Romanian nation and securing the existence and unity of the state.³¹ The constant use of the terms 'Romanian' and 'Romanians' instead of citizen or citizens throughout constitutional debates and in the constitutional text mirrors the primary interest in the ethnic collectivity. Even the most radical Romanian liberals of the nineteenth century were less interested in human rights than in the French-origin idea of national self-determination and nation-state building.³² Built on ethnic (collectivistic) nationalism, the state became an inalienable asset belonging to the Romanian ethnic nation.³³ Nevertheless, the quest for Romanian national constitutional identity remained tendential in perpetually having Western liberal constitutionalism as a reference. The latter was valued as the proper institutional blueprint to inspire the building of the modern unitary and indestructible Romanian nation-state.

'The fears of drifting towards the Occident' reflects the intimate link between the need for distinctiveness, the quest for national unity and ethnic purity and, last, the need to protect the ethnic nation-state from the dangerous and 'barbaric' other. It follows that opposing Europe in the sensitive affair of Jews was not a matter of anti-Europeanism but simply a matter of protecting the nation and conserving its identity. As Silvia Marton puts it, 'defining against alterity became the core mechanism to produce national identity under the impact of modernisation'.³⁴ However, European pressures on Romanian core ethnocentric identity never triggered overwhelming anti-European feelings. Western Europe was perceived as an institutional model and a decisive guarantee of the Romanian nation-state's existence. Except for the communist period, modern Romanians usually looked for their national enemies first and foremost inside their state borders. As regards external ones, Romanians felt primarily threatened by those aiming to keep Romania away from Western Europe/Occident, that is, Phanariot Greeks, Turks, and Russians.³⁵

All these factors explain why the permanent tendency of Eurocentric (constitutional) identity to occupy the core of Romanian (constitutional) identity at the expense of Romanian ethnocentric (constitutional) identity failed in 1886. The mixture of liberal and illiberal elements in the two identities within the 1866 Constitution gave birth

³⁰ M. Guțan, *Transplant constituțional și constituționalism...*, p. 253 ff.

³¹ *Ibid.*, p. 158.

³² See: G. Platon, *Liberalismul românesc în secolul al XIX-lea. Emergență, etape, forme de expresie* [Romanian Liberalism in 19th Century. Emergence, Steps, Forms of Expression] [in:] *idem, De la constituirea națiunii la marea unire. Studii de istorie modernă*, vol. 2, Iași 1998, p. 208; P. Blokker, *Modernity and its varieties...*; C. Matiuța, *Naționalism și liberalism la mijlocul secolului XIX* [Nationalism and Liberalism at mid-19th Century] [in:] *Liberalismul românesc și valențele sale europene* [Romanian Liberalism at mid-19th Century], ed. L. Brătescu, 2nd ed., Iași 2013, p. 62.

³³ S. Marton, *La construction politique de la nation...*, p. 311.

³⁴ *Ibid.*

³⁵ See: L. Boia, *Istorie și mit în conștiința românească...*, pp. 310–314, 333–341.

to a pro-European, illiberal Romanian constitutional identity. This perspective also allows us to understand that any severe unsettling of the balance between the two identity poles was always detrimental to the Eurocentric identity. An ethnocentric identity always offered Romanians more powerful emotional elements of cohesion and distinctiveness in moments of crisis than a Eurocentric identity. This paradigm may explain Romanian constitutional developments in the interwar period and during the Second World War.

At first glance, the 1923 Constitution, known as the Constitution of Greater Romania, seems to have perpetuated the balance between Romanian identity poles established in 1866 with the 1879 amendment. More than sixty per cent of the 1866 constitutional text was preserved, and many of the new provisions strengthened the commitment to West-European liberal-democratic constitutionalism, for example, male universal suffrage and *a posteriori* constitutional review entrusted to the Supreme Court. However, the elements of ethnocentric constitutional identity were preserved and amplified.

Although they had fulfilled the national agenda and although the vast majority of ethnic Romanians lived within the borders of the Romanian state, the Romanian political elites had to face an unexpected challenge. On 9 December 1919, Romania was obliged to sign the Treaty on the Rights of Ethnic Minorities. A generous set of rights and freedoms was granted to ethnic minorities, amongst them the complete protection of life and liberty, freedom of religion and expression, the right to Romanian citizenship, freedom to use their mother tongue in court, the right to establish confessional private schools and, especially for ethnic Hungarians (Széklers) and Transylvanian Saxons, the right to local autonomy concerning religious and educational matters. The fathers of the 1923 Constitution not only tackled the process of constitution-making in the same ethnocentric spirit as in 1866, but they also did their best to disregard the existing ethnic heterogeneity in the new Romanian state. The idea of expressing the 'objective' elements of Romanian national identity was accompanied by the clear notion that only the ethnic Romanian majority had the right to express its identity, proclaim its symbols in the Constitution, and establish its values and principles. Consequently, Romania was declared a 'national state' (Article 1); no foreign populations could have been colonised on the territory of the state (Article 3); the Orthodox Church was declared the 'dominant church', and the Greek Catholic Church, the other historical church of Romanians, gained priority over other religious denominations (Article 22); Romanian was proclaimed the official language of the state (Article 126).

The only concession to the 1919 Treaty was to grant Romanian citizenship to all residents of the new Romanian provinces regardless of denomination and to generally recognise their civil and political rights 'without distinction of ethnic origin, language

or religion.³⁶ Instead of widely opening the constitutional text to the rights of ethnic minorities for the sake of their identity, all these revealed limits that Romanians were not prepared to go beyond. It is no wonder that any demands made by ethnic minorities' representatives in favour of a more inclusive character of the constitution were rejected during constitutional debates. The conceptual confusion between 'Romanians' and 'Romanian citizens' was perpetuated in the Constitution despite the insistence by ethnic minorities that it be removed. Last, their demand for recognition of group rights was firmly rejected. Above all, the 1923 Constitution was built as a national constitutional cathedral of the majority ethnic Romanian community in which individual members of ethnic minorities were accepted as humble visitors. They had the same rights as Romanian citizens but were no more than shadow citizens. This approach expressed the wish of the Romanian people to build an ethnically pure national state on the historical territory of the Romanian ethnic nation.³⁷ A Eurocentric constitutional identity, although present, was strongly counterbalanced and overshadowed by the need of the Romanian people, more imperative than ever, to assert and protect the elements which distinguished them in terms of national and constitutional identity. Instead, the foundation was laid for an ethnocracy sustained by a powerful, illiberal constitutional ethos that was inherently authoritarian.

Paradoxically, despite everything that had been said about the liberal exceptionalism of the 1923 Constitution, it was, in legal terms, one of the essential factors that triggered an identity-centred dynamic that favoured and strengthened the ethnocentric constitutional identity of Romanians in the coming decades, at the expense of an identity based on the values and principles of Western European liberal constitutionalism. From a cultural, social and political point of view, the interwar period was not one of joy and celebration but of anxiety. Given the cultural diversity of Romanian people living in historically Romanian provinces, Romanian national identity was uncertain and not well-defined, and therefore susceptible to collapse. This 'fragmented [cultural] nature of the unitary national state'³⁸ needed cultural and educational policies meant to remove regional identities and to build a clear, unified concept of national identity.³⁹ The obsession with ethnocentric identity was

³⁶ For comparison, the 1921 Constitution of Poland, Section V, not only recognised ethnic minorities as a constitutional subject but also preserved important provisions of the Treaty regarding minorities signed by Poland with the main Allies on 28 June 1919. In turn, the 1920 Constitution of Czechoslovakia dedicated a whole section (VI) to the protection of national, religious, and racial minorities, adopting the provisions of the Treaty regarding minorities signed with the main Allies on 10 September 1919. See: A. Theodoresco, *La nouvelle constitution de la Roumanie*, "Bulletin mensuel de la Société de Législation Comparée" 1926, no. 4–6, p. 337.

³⁷ The banner welcoming the visitors of the Romanian National Pavilion at the 1939 New York World's Fair was quite relevant here: 'Romania has more than 20 million inhabitants, fully united in language, tradition and culture'. See: I. Livezeanu, *Cultură și naționalism în România Mare* [Culture and Nationalism in Greater Romania], București 1998, p. 9.

³⁸ *Ibid.*, p. 347.

³⁹ See: M.S. Rusu, *Memoria națională românească...*, p. 197 ff.; K. Verdery, *National Ideology and National Character in Interwar Romania* [in:] *National Ideology and National Character in Interwar Eastern Europe*, eds. I. Banac, K. Verdery, Yale 1995, p. 126 ff.; A. Momoc, *Capcanele politice ale sociologiei*

spurred by the continuous unease among Romanian political elites about internal and external dangers threatening the unitary character of the Romanian national state. The city-under-siege mentality linked the traditional ethnocentric nationalism to new ideological and political extremisms (Orthodoxism, Legionarism, Fascism), which glorified a national (Christian) identity and advocated the subordination of the state and its law to the struggle for the unity and purity of the Romanian nation⁴⁰ in its ethnic sense. In particular, the Christian-Orthodox essence of Romanian national identity, favoured and popularised by numerous Romanian intellectuals, created a public discourse that undermined Western European values and underpinned the authoritarian public policies of the Romanian state.⁴¹

This identity-based turn towards ethnic Romanians should be primarily assessed against the Romanian ethnocentric nationalist background of the nineteenth century and the particular geopolitical context in the aftermath of the First World War. Some ideological influences from fascist Italy and Nazi Germany undoubtedly played a role. Still, the climax of Romanian ethnocentric identity in the interwar period had powerful internal roots directly connected to the building of a unitary Romanian state and the survival of the Romanian ethnic nation.⁴² Unfortunately, political-constitutional practice in interwar Romania did not itself make a strong case for Western liberal democracy and gave room for sound critiques from the monarchy, some political circles, and academia.⁴³ Against the backdrop of endemic bureaucratic corruption, manipulation of parliamentary and local elections, the money-focused agenda of political parties, the authoritarian behaviour of prime ministers, and the global economic crisis, it is not surprising that this ethnocentric, antisemitic, and xenophobic discourse managed to dominate the period, and eventually to become the official ideology of the state. This ideology uniquely lay at the basis of the 1938 Constitution and the constitutional ethos of the dictatorial Antonescu regime⁴⁴ against the background of a profoundly illiberal and authoritarian constitutional architecture. The close connection between authoritarianism, ethnocracy, law, and nationalist ideology was fully exposed in infra-constitutional law of the time. The *Decree-Law n° 2650 on the legal status of Romanian Jews* of August 8, 1940, clearly outlined the basic principles of the Romanian

interbelice. Școala gustiană între carlism și Legionarism [The Pitfalls of Interwar Political Sociology: The School of Gusti between the Carlism and Legionarism], București 2012.

⁴⁰ It is unsurprising that the interest in eugenics studies reached an unprecedented level in interwar Romania. See: M. Turda, *Eugenism și modernitate. Națiune, rasă și biopolitică în Europa (1870–1950)* [Eugenics and Modernity. Nation, Race and Biopolitics in Europe (1870–1950)], Iași 2014, p. 122.

⁴¹ H.-C. Maner, *Parlamentarismul în România 1930–1940* [Parliamentarianism in Romania 1930–1940], București 2004, p. 303 ff.

⁴² I. Livezeanu, *Cultură și naționalism în România Mare...*, p. 361.

⁴³ See: M. Guțan, *Administrative (Authoritarian) Monarchy – A Paradigm for the Constitutional Realism in Modern Romania?* [in:] *Iustitia et Pax. Gedächtnisschrift für prof. Dr. Dieter Blumenwitz*, eds. G. Gornig, B. Schöbener, W. Bausback, T.H. Irmscher, Berlin 2008, p. 1169.

⁴⁴ Marshall Ion Antonescu was Romanian prime minister between September 1940 and August 1944. The young King Michael I proclaimed him 'Leader of the State'. His pro-Nazi beliefs made him a faithful ally of Adolf Hitler.

constitutional order: the law of blood; the (ethnic) Romanian nation as the founder of the national state; and the legal distinction between a biological Romanian and a Romanian citizen. The complete equation of Romanian constitutional identity with an ethnocentric national one, against the backdrop of aggressive populism and nationalism, xenophobia, and antisemitism, made Romania one of the states that perpetrated the Holocaust. This is the clearest historical example of abandoning an essentially liberal Eurocentric identity (of belongingness) and the harmful exploitation of a Romanian ethnocentric identity (of differentiation).

3. Competing Romanian constitutional identity narratives

The storyline of Romanian constitutional modernisation in the nineteenth and early twentieth centuries (until the beginning of the communist era) reveals an earnest confrontation of ideas backing up the direction and content of the constitutional reforms. They gelled distinct narratives about Romanian national and constitutional identity, narratives that competed for recognition and prevalence in Romanian society.

The dominant one was especially endorsed by the constitution-makers of 1866. The bargaining between the unconditioned imitators of civilised Western Europe's constitutional values and defenders of Romanian ethnic national identity concluded in a bipolar constitutional identity. While the desire to replicate as much as possible the constitutional means (institutions and practices) and goals of Western constitutional models gave the process of constitutional modernisation a tendential dynamic between the poles (from the ethnocentric identity of differentiation to the Eurocentric identity of belongingness); an obsession for expressing and protecting the national (ethnic) soul made the Romanian constitutional Europeanisation endlessly tendential. The desire to imitate the civilised West long after 1866 witnessed the need on the part of some Romanian intellectuals to achieve a radical change in constitutional identity, even if the parliamentary monarchy and democracy they wanted to transfer from Western Europe did not function well. They naively thought that the desire of a few to identify themselves as European from the constitutional and political point of view would automatically trigger top-to-bottom influenced Western European constitutional and political behaviour on the part of the many. The idea of imitation was less present in the 1923 constitution-making process, but Western European constitutional models remained the beacons of Romanian constitutional modernisation.

The second narrative about Romanian constitutional identity was born not long after the constitutional moment of 1866 out of deep dissatisfaction with the complete and unconditional embracing of a Eurocentric identity of belongingness. Its proponents, mainly conservative politicians and intellectuals, saw no problem following Western European constitutional modernity; instead of imitation, however, they accepted only the idea of borrowing. They rejected the idea of transforming the Romanians into French or Belgians; their primary interest was in the reception

and adaptation of Western European democratic-liberal constitutionalism to the Romanian ethnic soul/spirit/culture. 'Constitutional Europeanisation in our way' became their motto far beyond the beginning of the twentieth century. Embodied in a mild parliamentary-political version and also in a harder one among sociologists, ethno-psychologists, and philosophers of culture, this identity-based narrative had a real challenge in establishing how much constitutional-cultural change was needed so that a European identity would not suffocate the Romanian ethnic one and how strong the domestic cultural resistance must be so as the Romanian ethnic identity would not eclipse the European one. It was not a real competitor to the previous narrative but rather a variant. Its main shortcomings came from the same quest for true Romanianity against European (constitutional) identity and from valuing adaptation of foreign constitutional models *per se*.

The third narrative about Romanian constitutional identity had its roots in the forceful reaction against constitutional modernisation as Europeanisation, which developed in the second half of the nineteenth century. Its proponents saw the key to Romanian constitutional and political change only in Romanian constitutional traditions and the cultural resources of the Romanian peasantry. Born out of the ethnocentric nationalism of the century, the anti-European identity-centred narrative was nourished in the interwar period by the illiberal and xenophobic aims of Fascism and Orthodoxism. In propitious political, geopolitical, and cultural contexts, it succeeded in replacing the previous official narrative established in 1866. The bipolar Romanian constitutional identity and the tendency towards European constitutional identity were replaced by the constitution-makers of 1938 with a fully ethnocentric constitutional identity. This narrative reveals the perils of the Romanian tendential identity as a back-and-forth between the Eurocentric and the ethnocentric; in specific contexts, Romanian constitutional identity may be reduced to its hard ethnocentric core.

All these narratives about Romanian constitutional identity were constructed by the Romanian intelligentsia, the majority of them former aristocrats with liberal and/or conservative beliefs, competing for the attention of a small number of literate people in specific political, geopolitical, social, religious, and cultural contexts. They reflected not only the identity-driven character of any constitution-making process, but also the perpetual indeterminacy of Romanian national and constitutional identity, its endless attempt to strike a balance between the traditional and modern, between self and European other. In the Romanian case, political identity was not begot in a founding moment, as this did not properly exist;⁴⁵ however, the Romanian constitution-making process cannot be reduced to merely expressing a pre-existing ethnic national identity in the constitutional text of 1866. Romanian constitutional identity has been constantly built and rebuilt afterwards by competing epistemic communities, concomitantly against the Romanian ethnic self and West-European constitutional identity.

⁴⁵ See: U.K. Preuss, *The Exercise of Constituent Power...*, p. 227.

4. Which methodology

Any methodological approach to the constitutional modernisation process in Romania during the nineteenth and early twentieth centuries could be anchored either in comparative legal history or global legal history. There are multiple reasons why the analyses should go beyond merely national legal history. Romanian constitutional modernisation involved a massive transfer of ideas, values, principles, concepts, and institutions from Western European constitutional models, especially the French and Belgian ones. Any purely Romanian exercise in national legal history, ignoring or underestimating this reality, is highly sterile. However, from my point of view, it is not easy to find proper methodological tools to approach the complex Romanian process of constitutional modernisation in the period studied, either in comparative legal history or global legal history.

As Heikki Pihlajamäki puts it, ‘the periphery is constantly measured against the centre’ and ‘that is forcing “peripherals” to look at our legal past with comparative glasses on.’⁴⁶ This comparative approach is not an option in the Romanian case. As long as Romanian constitutional identity was at stake, it was inescapably defined against the centre. For this reason, the centre cannot be ignored, blamed, or suppressed. It essentially determined the Romanians’ struggle to define their constitutional self, no matter whether it was imitated or contested. What Romanian elites understood as Western European constitutional identity was always balanced against Romanians’ perception of their national and constitutional identity. Nevertheless, it is vital to establish the proper comparative historical approach. At first glance, the toolkit offered by legal transplant studies seems to be adequate for research. The comparative legal historian may question the causes, models, actors, mechanisms, quantity, and items of the 1866 constitutional transplant. A textual comparison between the Belgian and Romanian constitutions may be also necessary. An analysis of the effects may imply a contextual-cultural approach. It may measure the success or failure of the constitutional transplant against the envisaged constitutional goals of Western origin and Romanian general culture and legal culture’s capacity to adapt/integrate the foreign constitutional items. Others may be interested in measuring the level of constitutional *mixité* in the post-transplantation Romanian constitutional system and culture, for example, the percentages of Romanian, French, and Belgian constitutional items and their degree of intermingling.

These approaches may help one understand the differences between the Belgian and Romanian constitutions and constitutionalism of the nineteenth century. They may help to understand the stunning discrepancy between the foreign constitutional items transferred from Belgium and the Romanian legal culture analysed by the proponents of ‘the forms without substance theory’. They may elucidate the problematic reception of liberal constitutionalism’s values and principles, the sham parliamentary regime

⁴⁶ H. Pihlajamäki, *Comparative Contexts in Legal History: Are We All Comparatists Now?* [in:] *The Method and Culture of Comparative Law*, eds. M. Adams, D. Heirbaut, Oxford–Portland, Oregon 2015, p. 126.

which developed after 1866, and the irritation of many with regard to the foreignness and inadequacy of the new constitutional setup.⁴⁷ However, legal transplant studies have limited resources to fully explain the role of imitation and complex identity-centred dilemmas and competition in modern Romanian constitutional history. As I have discussed elsewhere, the concept of imitation used in comparative law underpins an epistemologically biased 'country, Western, and innovation' process of legal diffusion⁴⁸ and may be seen as a form of non-coercive (scholarly) hegemony.⁴⁹ It is usually used to capture the transfer of a large quantity and a high fidelity amount of legal items from Western legal models to the periphery.

This fuzzy concept of imitation must be replaced with one capable of rendering the intimate relationship between the constitutional imitator and the constitutional model, the complex identity crisis which triggers the need for constitutional change, the obstinate reproduction of the constitutional model's means (ideas, concepts, institutions, texts, practices) and goals, and the perpetual tendency to replicate these means and goals regardless of any concrete constitutional or political achievements. Finally, one must consider the identity crisis that backfired on the constitutional model. Besides, a proper analytical background is needed to assess the competition and intermingling between the multiple narratives about the Romanian national identity and constitutional identity present in the period discussed. The Romanian road towards constitutional and political modernity was far from a triumphal march of Europeanization. Many domestic goals were at stake, and other constitutional identity-centred narratives not only challenged the official one but succeeded in replacing it in the interwar period.

From a global legal-historical perspective, it is evident that Romanian constitutional modernisation is part and parcel of European constitutional modernisation. Romanian constitutional history cannot be grasped outside the birth, development, and spread of West-European liberal constitutionalism. However, it is essential to establish clearly what this assertion means. Should Romania be defined in terms of the strategy of leaving Eurocentrism behind, or must it be approached in the context of Western-European constitutional expansion? In the first case, Romania can become irrelevant again; in the second case, it may count as Western Europe's partner in constitutional entanglements.⁵⁰ Globalization and its methodological prioritisation of the local⁵¹ may do justice to Romanian constitutional history. It may help uncover the utmost relevance of identity in determining and implementing modern Romania's constitutional law.

⁴⁷ For details, see: M. Guțan, *The Challenges of the Romanian Constitutional Tradition. II. Between Constitutional Transplant and (Failed) Cultural Engineering*, "Journal of Constitutional History" 2013, vol. 26, pp. 217–240.

⁴⁸ See: M. Guțan, *The Concept of Imitation and Its Epistemological Relevance in Comparative Law and Comparative Legal History*, "The Journal of Comparative Law" 2024, vol. 19(1), pp. 259–310.

⁴⁹ See: V. Corcodel, *Modern Law and Otherness*, Cheltenham–Northampton 2019, p. 12 ff.

⁵⁰ T. Duve, *Entanglements in Legal History. Introductory Remarks* [in:] *Entanglements in Legal History: Conceptual Approaches*, ed. idem, Frankfurt am Main 2014, p. 3 ff.

⁵¹ T. Duve, *Global Legal History: A Methodological Approach* [in:] *Oxford Handbook: Topics in Law*, 2017, <https://doi.org/10.1093/oxfordhb/9780199935352.013.25> [accessed: 2024.05.17].

Using the lens of ‘translation’ may also have particular significance in grappling with the capacity of the Romanian constitutional imitator to transfer the model’s ‘systems of significance’ and effectively identify itself with it, but a wider epistemological frame is needed. Both the refusal of creative reproduction of constitutional models and interest in their original creative replication in relation to the delicate issue of identity need careful assessment.

All these issues suggest the necessity of fresh methodological inquiries. More interdisciplinarity, primarily, may provide a properly working concept of (constitutional) imitation in comparative legal history, one capable of highlighting that imitation is not a simple diffusion of legal innovations or a trigger of legal globalisation, but a complex psycho-sociological attitude towards the constitution-making process and constitutional change, constitutional models, constitutional means, outcomes, and goals, and, last, an identity crisis. Social sciences, especially diffusion studies and developmental psychology, may help this endeavour. With their help, constitutional imitation can be understood as a perpetual voluntary and intentional attempt to reproduce at home the means (texts, institutions, and practices), outcomes and, possibly, the goals of one or more constitutional models. It usually starts with a stringent need for (constitutional) identity change. It may end in political and social frustration of identity and in despair. This approach can transform comparative constitutional history into research in space (comparative), time (historical), and minds (psychological). Research into minds would not be limited to a jurisprudential approach focused on educated legal doctrinaires. It would examine the deep social, intellectual, and psycho-social turmoil positioning individuals (politicians, legal scholars, intellectuals, people in business, etc.) in the balance between the constitutional self and the constitutional other. As Katharina Isabel Schmidt puts it, this would transform ‘the people involved in creating legal meaning’ into a central focus for analysis.⁵² I agree with Schmidt’s idea that ‘foreign concepts and ideas (and institutions, I may say) help jurists in one place to construct and reconstruct their legal identities;⁵³ however, what is at stake is not only ‘to provide national legal imaginations with innovative content’ but also the faithful replication (imitation) of foreign concepts, ideas, and institutions. This is moving the accent from ‘the jurisprudential mentality’ to psychology. Global legal history may also benefit from this interdisciplinary work. It sheds new light on the (limits of) globalisation of constitutional law and constitutionalism in the nineteenth and twentieth centuries.

Finally, the same interdisciplinary approach may help to avoid essentialism in constitutional history. The constitution-making process is about mediating competing identities. However, searching in Romanian constitutional history for a unified national and constitutional identity is misleading. The constant plurality of competing identity-

⁵² K.I. Schmidt, *From Evolutionary Functionalism to Critical Transnationalism. Comparative Legal History, Aristotle to Present* [in:] *The Oxford Handbook of Legal History*, eds. M.D. Dubber, C. Tomlins, Oxford 2018, p. 284.

⁵³ *Ibid.*

centred narratives conducive to constitutional and political change can be grasped with the help of constructivist sociology and psycho-sociology.⁵⁴ This highlights that, in Romania, liberal-constitutional modernisation as Europeanisation was not a unidirectional, unquestioned, and fully accomplished process.

Conclusions

Romanian constitutional history of the nineteenth and early twentieth centuries can only be approached comparatively. Romanian constitutional modernisation occurred through intense imitation and borrowing from Western European liberal constitutional models. Legal transplant studies within the methodological framework of comparative legal history and the study of the globalisation of liberal constitutionalism within global legal history certainly help one to grasp the Romanian case. The increasing interest of such approaches in the 'peripheral' and 'local' recalibrates the epistemological balance between constitutional diffusion and reception. Thus, they can reveal the special place of (national) identity in the Romanian process of constitutional change in the period studied. The intimate links among the need to change social and political identity, imitation of the West, the fear of the West, and the identity crisis that followed gave the Romanian process of constitutional modernisation as Europeanisation a perpetual dynamic, tendential (from East to West) character. Not only the bipolar identity-focused narrative of the 1866 makers of the constitution was at stake, but also the competing narratives that challenged either the imitation of the West or interest in the West. All these narratives had a more or less powerful impact on Romanian constitutional normativity, constitutional thinking, and constitutional-political practice between 1866 and 1940. Despite their methodological resources, comparative legal history and global legal history need a greater degree of interdisciplinarity to understand the whole picture. The social sciences, especially diffusion studies, developmental psychology, social psychology, and constructivist sociology offer valuable methodological guidance. Thus, Romanian constitutional history may be approached comparatively (in space), historically (in time), and psycho-sociologically (in minds). The research focus is on Romanian elites and their interest in borrowing or imitating foreign constitutional ideas, concepts, institutions, and practices to construct and reconstruct their national and constitutional identities.

The Romanian case of constitutional modernisation may encourage further inquiries about the presence of CEE as a distinct unit of research in comparative legal history and global legal history. CEE may be of interest to comparative constitutional history not only as an imitator, receptor, and adaptor of Western constitutionalism and constitutional models, but also as a constructor of identity in reaction to them.

⁵⁴ See: M. Guţan, *Constitutional Identity as Competing Historically Driven Narratives: Central and European Perspectives* [in:] *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*, eds. C. Cercel, A. Mercescu, M.M. Sadowski, New York 2023, pp. 137–163.

From the perspective of global legal history, CEE may prove that Western Europe was not as influential as it was once thought to be. CEE is characterised by a purposive in-betweenness not fully explored historically or comparatively. A fascination with Western constitutional/legal modernity was and still is counter-balanced by a fear or suspicion of that same Western modernity. Despite the need to reach Western European constitutional modernity, CEE nations have always had a propensity to defend their Polish-ness, Hungarian-ness, Bulgarian-ness, etc., rendering the constitutional modernisation as (Western) Europeanisation unaccomplished. This is a very interesting research hypothesis that needs further investigation. It may prove that CEE's 'internalised marginality' or 'internalised irrelevance'⁵⁵ vis-à-vis Western Europe is, to a certain degree, a matter of self-preservation.

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⁵⁵ See: M. Milanov, *The Region Without Qualities. Fiction, International Law and Internalized Irrelevance of Central and Eastern Europe* [in:] *Law, Culture and Identity in Central and Eastern Europe...*, p. 63.

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Summary

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Methodological Challenges for Constitutional History in Central-Eastern Europe

This paper discusses the Romanian process of constitutional modernisation against the background of Romanian elites' quest for identity during the nineteenth and early twentieth centuries. It considers why Romanian national and constitutional identity was shaped by multiple competing narratives constructed by the Romanian intelligentsia and it explores the best methodological tools to assess this process. This article briefly evaluates the methodological resources of comparative legal history and global legal history and strongly emphasises the acute need for greater interdisciplinarity. Social sciences may provide a necessary analytical background, facilitating an approach to Romanian constitutional history, comparatively (in space), historically (in time), and psycho-sociologically (in minds).

Keywords: Romanian constitutional history, comparative legal history, global legal history, tentential constitutional identity, imitation, interdisciplinarity.

Streszczenie

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Wyzwania metodologiczne historii konstytucyjnej w Europie Środkowo-Wschodniej

W artykule dokonano pogłębionej analizy rumuńskiego procesu modernizacji konstytucyjnej w kontekście dążenia rumuńskich elit do uformowania tożsamości w XIX i na początku XX w. Autor dąży do rozwikłania problemu, dlaczego rumuńska tożsamość narodowa i konstytucyjna została ukształtowana przez wiele konkurujących narracji skonstruowanych przez rumuńską inteligencję – w tym celu analizuje najlepsze narzędzia metodologiczne do oceny tego procesu. W opracowaniu skrótkowo oceniono metodologiczną bazę porównawczej historii prawa i powszechnej historii prawa oraz mocno podkreślono pilną potrzebę większej interdyscyplinarności. Nauki społeczne mogą zapewnić niezbędne tło analityczne, ułatwiając podejście do rumuńskiej historii konstytucyjnej w sposób porównawczy (w przestrzeni), historyczny (w czasie) i psychosocjologiczny (w umysłach).

Słowa kluczowe: rumuńska historia konstytucyjna, porównawcza historia prawa, powszechna historia prawa, tendencja tożsamości konstytucyjnej, imitacja, interdyscyplinarność.