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## **Crowd Sourced Legislation and Politics: The Legitimacy of Constitutional Deliberation in Romania**

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### **Abstract**

Constitutional reform is a tedious process that requires long periods of time, a relatively broad consensus among the political actors, and often needs popular approval. In spite of these, Romania changed its constitution once (2003) and witnessed several unsuccessful revisions. The most recent attempt, in 2013, has introduced the deliberative dimension in the form of a constitutional forum. This article investigates the legitimacy of this deliberative practice using a tri-dimensional approach: input, throughput, and output legitimacy. Our qualitative study relying on direct observation and secondary data analysis concludes that while input and throughput legitimacy were achieved to great extent, the output legitimacy was low.

**Keywords:** constitution reform, deliberation, legitimacy, Romania.

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### **Introduction**

The adoption of new constitutions in the beginning of the 1990s has been among the first institutional reforms undertaken in Eastern Europe after regime change. Setting the rules of the game was equally important to countries embarking on their paths to democratization and to constituent republics resulted after the disintegration of Czechoslovakia, the USSR, or Yugoslavia (Elster 1991; 1993). However, this extensive wave of constitution writing or rewriting<sup>1</sup> had rarely produced long-lasting documents. Drafted under the influence of the previous regime's legacies they could hardly anticipate the rapid structural changes and various types of challenges (political, economic and social). For example, as a response to the

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<sup>1</sup> Usually the rewriting meant a substantial revision of the constitutions adopted during communism. For example, Hungary revised in 1989 to a great extent the 1949 constitution and introduced nine amendments one year later. For details, see (Pogany 1993).

authoritarian past, many constitutions placed emphasis on sovereignty and independence (especially in the post-Soviet region), and were against the transfer of powers to international organizations. One decade later, when some of the East European countries initiated the process of accession to the European Union (EU), such provisions had to be altered (Kellermann, de Zwaan, and Czuczai 2001; Albi 2005). In addition to external constraints, other constitutional reforms were made to support democracy, to improve the functioning of institutions and to increase the legitimacy of post-communist regimes. All these resulted in a dynamic process of constitutional changes for more than two decades (Ginsburg and Dixon 2011).

Romania is an illustrative case of this dynamic with respect to the number, content and procedure of constitutional revision. In almost 25 years of post-communism the country initiated several procedures to amend its fundamental act, adopted in 1991. The only successful revision took place in 2003 and was driven by the country's process of EU accession. The main changes targeted the introduction of articles related to the EU and NATO accession, the right of EU citizens living in Romania to vote in local and European elections, removed the obligation for conscription, and included a series of political and administrative reforms (including the extension of country president's term in office to five years). It was a top-down approach triggered by the general consensus among political elites regarding the necessity for constitutional change. The reform was approved in a binding referendum that had to meet a 50% participation quorum. The more recent revision was scheduled 10 years later and envisaged mainly as effect of the major institutional problems visible throughout the years (Gherghina and Miscoiu 2013). Although emerged in the circle of political elites, the 2013 initiative to revise the constitution made recourse to popular participation. The consultative tool designed to crowd-source the constitutional amendments was suggestively called Constitutional Forum and was coordinated by one of the largest non-governmental organization (NGO) in the country: Pro Democracy Association.<sup>2</sup> In essence, the Forum sought

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<sup>2</sup> The idea of such a Forum is not new in Romania: the 2003 constitutional reform was preceded by a similar forum in 2002 but the attempt lacked visibility and political support, while people's participation was limited. Back then the involvement of civil society in changing the constitution was compromised by the absence of dialogue and cooperation between the government and the civil society representatives and experts.

to organize meetings with citizens throughout the country and gather their suggestions for constitutional revision. While the part of the process involving consultations was over, the entire initiative has been interrupted at the beginning of 2014 due to the departure from government of the main supporter, i.e. the National Liberal Party (PNL).

The 2013 initiative deserves attention for at least two reasons. First, it emerged in the context of changing civic engagement in Romania. For more than one decade after the regime change the civil society was generally weak, highly dependent on donor funds, and with low capacity to mobilize attention from international community (Howard 2003; Bădescu, Sum, and Uslaner 2004; Carey 2004; Nicholson of Winterbourne 2006). Starting with the EU accession of the country and continuing later with the hard times during the financial crisis in Europe, civil society gained strength and citizens' activism increased significantly (Parau 2009; Burean and Bădescu 2014). As a part of this recent development, constitutionalism was taken beyond the state and civil society was asked to provide input. While the reasons for such a decision from the political elites can be contextual, the entire process is worth a closer look. Second, it is one of the few deliberative constitutional revisions in Europe. In this sense, while deliberations in Iceland and Ireland received high attention and coverage, the Romanian case remains under-studied. Its investigation may reveal particular approaches to the issue of constitutional deliberation that could be used in further studies. Following these arguments, our article analyzes the Constitutional Forum in 2013 as an example of deliberative practice and assesses its legitimacy according to criteria outlined in the literature. To this end, the qualitative analysis combines direct participatory observation (one of the authors was the Forum's local coordinator) and desk research. The findings of our study complement and nuance the conclusion reached by Blokker (2014) that the recourse to the people serves an instrumental purpose being more apparent than real and thus rarely meets the requirements of normative democratic theory.

The first section presents the theoretical linkage between constitutional change and deliberative practice. It also reviews the literature on legitimacy and outlines the framework used for analysis with an emphasis on three dimensions: input, throughput, and output legitimacy. Next, we describe the reasons for constitutional change in Romania and briefly

introduce the key features of the deliberative Constitutional Forum in 2013. The third section analyzes the extent to which the Forum deliberations met the dimensions of legitimacy. The conclusion summarizes the main findings and discusses their implications.

### **Constitutional Change, Deliberative Democracy, and Legitimacy**

A constitution fulfils key legal and political functions in a state. From a legal perspective, it is conceived as the supreme norm that frames and shapes ordinary law making. In providing the preconditions for democracy, i.e. conditions to be met before majoritarian decision-making (Dworkin 1995; Blokker 2014), the constitution acts like a buffer zone that isolates the contextual factors (e.g. a specific parliamentary majority, the personalization of power) and does not allow them to interfere with the democratic principles. On political grounds, it sets the broad principles for political decision-making by means of establishing the functions of institutions, rights and duties of citizens, and limits to the interference of the state in areas of private life (Freeman 1990; Ackerman 1993; Dworkin 1995). Constitutions can fulfil these crucial functions only if they are respected.

Following this line of thought, the fundamental law, i.e. the constitution, must be forged through procedures that ensure the broad participation of citizens, the subjects whose basic rights are directly affected by it (Fossum and Menendez 2005). There is a consensus in the literature that the best form of popular involvement in constitutional design is through deliberation. The essence of deliberation can be summarized as “producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants” (Chambers 2003, 309). This brief definition outlines the set of procedural conditions to be met by participants engaged in deliberation that makes it much more than simple discussion: inclusiveness, communication, and the willingness to be persuaded and change pre-formed preferences in the face of a better argument (Gutmann and Thompson 1998; Dryzek 2000). Deliberation as the most adequate procedure leading to a well-ordered constitutional democracy has been endorsed by Rawls (1999) who placed at the core of his argument the conception of public reason. The role of public debate and scrutiny in constitution-making has been also emphasized by Habermas

(1996; 2001) who argued that its legitimacy stemmed from rich quality debates before taking a decision. The discussions that take place in the public sphere based in civil society have the capacity to legitimize the institutional will-formation and to translate citizen opinions into good political outcomes (Caluwaerts and Reuchamps 2015). Along these lines, the notion of popular constitutionalism presupposes an active role of the citizens in shaping the constitution in the sense of (re)gaining its popular foundations and willingness of the people to prevail (Ackerman 1993; Thomas 2008).

Evidence from the last decade reveals the existence of a real turn in the direction of deliberation. In their attempt to apply these normative conceptions a number of European countries has recently used deliberative democracy to reform their constitutions. Two of the well-known examples are those of Iceland and Ireland. Iceland had an inclusive constitution revision that included two national forums of 950 and 1,500 randomly selected people, a constitutional assembly of 25 people, and a non-binding national referendum (Olafson 2011; Filmore-Patrick 2013; Landemore 2013). Ireland established a Constitutional Convention – with the first working session at the beginning of 2013 – that included ordinary citizens and elected politicians as equal members.

### *Assessing the Legitimacy of Deliberation*

In his study about the general concept of EU legitimacy, Scharpf (1999) differentiates between input and output legitimacy. Input legitimacy refers to the citizens' political participation and representation, while output legitimacy reflects the institutional performance to govern effectively for the people (i.e. problem-solving). A third dimension of legitimacy, namely throughput, has been recently added by Schmidt (2013) who argued that this is essential to understand what happens between input and output legitimacy. With an emphasis on procedures, this dimension aims to capture mechanisms such as accountability, transparency, openness and inclusiveness of the governance process. This additional dimension is in line with the conceptions at the core of deliberative democracy. The central argument here is that outcomes are legitimate not only when they involve all those who are affected by them

(Habermas 2001; Dryzek 2001; Fossum and Menendez 2005)<sup>3</sup>, but also if the way in which this involvement happens guarantees substantial participation and equal access to the final decision. As a result, all three components – input, throughput and output legitimacy – are important for the legitimacy evaluation of a constitutional deliberative practice. Let us identify the ways in which an assessment can be made for each of them.

Input legitimacy focuses on the nature of participation and representation. In this respect, a crucial component is the inclusiveness of participation. While not all subjects can take part, it is important that members of different groups in society are reached and provided equal access to deliberative procedures (Young 2000; Geissel 2013). This idea is usually implemented in the form of grassroots participation complemented by (at least partial) random sampling. Such procedures are meant to create the linkage between the mini-public (those who participate in deliberation) and maxi-public (the entire citizenry). In principle, the diversity of people is likely to produce a diversity of opinions but will also ensure that no relevant groups are excluded from discussions. Equally important to the issue of who participates is the mandate of the deliberative practice. It is relevant to know how broad is the scope of action (i.e. what can participants decide upon) and what form it can take. The dynamics of the constitutional deliberative practice can be influenced by the way in which the agenda is set and by the possibilities people have to change it. There is a major difference between an open agenda where people can discuss and decide about the vast majority of issues and a closed agenda where institution sets clear limitations to what people can discuss and decide (Caluwaerts and Reuchamps 2015; Suiter and Reuchamps 2015).

Throughput legitimacy reflects the concerns of input legitimacy from a procedural perspective. Inclusive representation and equal access to participation are not sufficient if they do not take place in a substantial manner, i.e. equal voice to all participants. While fairness of representation can be ensured through random selection and / or stakeholder inclusion, the equal voice is guaranteed by the mechanisms of deliberation, e.g. small groups, group composition, moderators (Smith 2009). This notion broadly corresponds to that of popular

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<sup>3</sup> This formulation should not be taken *ad litteram* because, with the exception of small communities, the deliberation of all those subject to a decision is not possible (Goodin 2000). This is precisely why Dryzek (2001) argues that part of the output legitimacy is the justification of outcome to those who were not directly involved.

control from the literature on democratic innovations and refers to the meaningful participation of citizens at different stages of the decision-making process (Geissel 2013). The transparency of the deliberative process is a crucial element for reasons related to internal and external dynamic (Smith 2009; Talpin 2012; Schmidt 2013). First, it guarantees the openness of procedures and communication between participants who become aware about the rules of the game, how far deliberation can go, and what the role of moderators is. Second, transparency makes smoother the linkage between the participants involved in deliberation and the broader public. The latter will be more likely to accept an outcome (see output legitimacy below) if they are familiar with procedural aspects related to the mini-public involved in deliberation (e.g. its structure, agenda, how decision is taken etc.). Transparency – and the related dimension of publicity (Andersen and Hansen 2007) – can be achieved through regular media reports, live streaming or TV broadcasting of discussions, or an interactive website attached to the constitutional deliberative practice.

Output legitimacy refers to what happens with the result of deliberation. The implementation strategy is established beforehand and thus participants know if their decisions are binding, submitted to a referendum for approval or play a consultative function for an institution. In the particular case of constitutional deliberations, it is important the extent to which the changes suggested during deliberations are transformed into policy outcomes. Accordingly, two dimensions of output legitimacy evaluation are the effectiveness and the efficiency of the deliberative procedure. Effectiveness assesses the extent to which the problems signaled initially were solved through the deliberative procedure (Gastil and Levine 2005; Geissel 2013). Efficiency weighs the costs of deliberation against its benefits: a deliberative practice is considered efficient if it bears higher benefits than the costs for people and institutions (Smith 2009).

This extensive body of research reveals the existence of basic standards to be met in each of the input, throughput, and output phases of legitimacy. Using these dimensions and indicators the empirical section of this paper shows the various types of legitimacy achieved by the Constitutional Forum in Romania. The analysis will present both the design (what was planned before deliberation) and what happened in practice. Before the analysis, it is useful to



understand the context in which this deliberative practice emerged. The following section provides a brief summary of the recent political developments leading to constitutional change and sheds light on the reasons behind citizen involvement.

### **The Context of Constitutional Reform in 2013**

The debate around constitutional revision in Romania was not over after the 2003 amendments and remained on the political agenda, although not in pole position. The arguments to justify a comprehensive constitutional reform have been often outlined in public discourses over the last decade. The state has to be reformed in order to better govern society. But society does not withhold, at its turn, the discontent towards the manner in which politicians mean the “state”. And, consequently, the demands for a more precise definition and application of rights and liberties, and of citizen control over institutions, manifest in parallel. Meanwhile, the political conflicts of the recent period (two votes of no confidence in one term – in October 2009 and in April 2012, two impeachments of the President – in April 2007 and in July 2012, the “making” of majority beyond the result of the scrutiny etc.) revealed the necessity for change. Moreover, the effects of the economic crisis have heightened the consequences of various sized, but repeatedly produced, political crises. In brief, despite its detailed provisions, the Constitution was sometimes ambiguous about the roles of state institutions (Gherghina and Miscoiu 2013) and, as a result, was subject to countless interpretations each time political tensions arise. Without addressing the causes of the problems, these will not vanish but persist.

In light of these developments, a relative consensus regarding the necessity for constitutional change emerged at the level of political elite. 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. In a first phase, the president of the country initiated two referendums – held simultaneously with the 2009 presidential elections – aimed at reforming the structure of Parliament. With the background of the 2007 impeachment attempt and the repeated discourse about state modernization (Vesalon 2011), this initiative was not surprising. A second phase was represented by the formation of a new parliamentary majority in 2011 that

determined the country president to nominate a prime-minister from its ranks at the beginning of 2012. The political alliance between the social-democrats (PSD), liberals (PNL) and conservatives (PC) – called the Social-Liberal Union (USL) – passed two votes of no confidence against the governments supported by the party of the country president in February and April 2012. In its attempt to gain control over state institutions the new parliamentary majority forced changes at the limit of the constitution (Gherghina and Soare 2015) and initiated an impeachment procedure against the president. The allegations referred to violations of the constitution, interferences in government affairs, the violation of the neutrality of justice, the breaking of the separation of powers principle, and overstepping his prerogatives in relation to the legislative. After the failure of the referendum called to validate the impeachment procedure the USL leaders have sought about changing the constitution to avoid future institutional conflicts in general and to diminish the personalization of power in the case of the country president in particular. This plan has been facilitated by their landslide victory in the 2012 legislative elections – less than half a year after the impeachment procedure – and the existence at the beginning of the 2012-2016 legislative term of a parliamentary majority able to undertake constitutional changes, i.e. more than two thirds of the legislature.<sup>4</sup>

The decision to involve citizens in the process of constitutional revision was determined by two reasons. The first was the willingness of the civil society to get involved in the constitutional reform. Building on the experience and relative success of the Constitutional Forum organized before the 2003 change, representatives of the Pro Democracy Association argued in favor of popular involvement. Their position reflected both the normative components presented in the theoretical section of this paper (e.g. subjects should be able to decide upon the fundamental act influencing their lives or improving the quality of decision-making) and instrumental arguments. For example, since any new Constitution must be approved by a binding popular referendum, people have to be informed about its content. In this sense, public debates and deliberation can be informative. The second reason behind the deliberative practice was related to the USL popularity throughout the entire year 2012.

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<sup>4</sup> For the first time after 1990, a political alliance secured more than two thirds of parliamentary seats (in both Chambers of Parliament), a majority that allows constitutional revision.

Although unsuccessful in the attempt to remove the country president from office<sup>5</sup>, the USL mobilized an important share of the electorate to vote in referendum. The success in the local (summer) and legislative elections (winter) confirmed the broad electoral support. To illustrate responsiveness to popular desires, the USL leaders took the decision to initiate public debates in the aftermath of the parliamentary elections. As a result of these factors, 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 Creation and Functioning of the Forum*

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 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.

The Romanian Parliament started in early 2013 the procedure to revise the Constitution and followed the plan by establishing the deliberative body and the parliamentary committee. In its first meeting, the Joint Commission of the Chamber of Deputies and the Senate for the drafting of the revision Bill of the Constitution of Romania 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.

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<sup>5</sup> The referendum failed due to insufficient turnout (46.24%). Out of the total number of citizens who cast a valid vote, almost 90% said "yes" to impeachment.

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 Democracy coordinated the Forum for two reasons: 1) its honorary president (Cristian Pîrvulescu), political scientist and civic activist, has notoriety among political leaders, academics, journalists and members of the wider society and 2) it has 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 (Pro Democracy Association 2013).

Referring to the substantive part of the deliberative process, 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.

### Assessing the Legitimacy of the Constitutional Forum

Let us now turn to the legitimacy dimensions of this deliberative practice. Table 1 summarizes the qualitative assessments in this section and provides an overview of the characteristics to be further discussed. Each of the following sub-sections analyzes the way in which the features of the Forum match each type of legitimacy from the first column. The detailed descriptions will also nuance the qualifications of achievements presented in the third column as a dichotomous variable (achievement vs. non-achievement).

**Table 1: Summary of the Output Assessments for the Constitutional Forum**

Types of Legitimacy	Features of the Constitutional Forum	Achieved
<b>Input</b>		
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
<b>Throughput</b>		
Inclusive participation	Extensive opportunity to participate (including an online platform), equal voice	Yes
Transparency	Transparent procedures, clear structure of debates	Yes
<b>Output</b>		
Effectiveness	Solutions were provided but not made it into policy	No
Efficiency	Hard to assess in the absence of benefits	No

#### *Input Legitimacy:*

According to the theoretical framework presented in the previous section the two dimensions used 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. In addition, each local organizing committee had the full liberty to invite the most relevant actors that belonged to the above-mentioned categories.<sup>6</sup> Politicians were not invited to deliberation as they have anyway the last word via parliamentary debates. This extensive cohort of experts, journalists and civil society representatives was complemented by citizens interested in constitution revision. The debates took place in local communities selected on the basis of opportunity and availability criteria in such a way that both large cities and smaller towns were covered, and all historical regions were represented.

The Forum had three dimensions: territorial, thematic and academic. On the territorial axis, the local organizing committee invited the specialists in the field of regionalization, local administration and territorial reform. The academic axis was exclusively composed of scholars

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<sup>6</sup> To provide a comparative framework for the debates hosted by the Forum, constitutional experts from Germany, Italy and Canada were invited to attend a number of meetings, while in May (towards the end of the Forum) a conclusive debate was organized with the participation of experts from the Venice Commission.

and students and targeted general issues regarding the constitutional review. The thematic axes triggered particular aspects of the constitutional reform that were of local, regional or sectorial interest. For example, a panel on minority issues was organized in Targu Mures (a mid-sized city in Transylvania), where the Hungarian ethnic minority is almost half of the city's population. In the final report, there was a balance in terms of number of recommendation from each of the three tracks.

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. In this context, the input legitimacy benefited greatly from a consistency between the ex-ante design established before the actual deliberation and the practice of deliberation, i.e. the plan was carefully implemented with no major deviations.

### *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 sent 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 (Pro Democracy Association 2013).

To enhance transparency, publicity and virtual participation, the Forum committee established an online platform.<sup>7</sup> 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 112 topics related to particular constitutional revisions were initiated. In total, 316 users registered to the online platform and posted approximately 700 comments about the topics. The platform had 11,000 visits (with an average of 234 visits/day) from people located in 25 countries (since the platform was only in Romanian, it is very likely that the vast majority of visitors were Romanians) (Pro Democracy Association 2013, 48-49). The debates and the online platform generated more than 400 proposals for constitutional revision out of which 50 referred to complete revision (Pro Democracy Association 2013, 9).

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<sup>7</sup> The platform was available at [www.forumconstitutional2013.ro](http://www.forumconstitutional2013.ro) and could be accessed until February 2014.



In terms of publicity and presentation to the broader public of the discussions within the Forum<sup>8</sup>, the presence of journalists in deliberations increased the media coverage of the event. News about the topics approached in various local deliberations made it often in the local newspapers and sometimes in the central ones. Most of the news had an informative character meant to familiarize the public with the type of debates that take place. It is important to note that there was no ex-ante design regarding the publicity of debates. The organizers of the Forum did not establish a collaboration with media outlets beforehand. However, during deliberations several press releases were issued.

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. In the final report, the suggested changes were included in the order of the constitutional articles without any filtering. The central committee of the Forum only merged the similar proposals ensuring that all overlaps were eliminated and removed those suggestions that did not address constitutional changes. The transparency for the outer public (visibility) has been also achieved although there were no initial partnerships with media outlets.

### *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

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<sup>8</sup> 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.

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: the PSD, with a majority in committee, feared that the constitutional revision could be used by Antonescu, the PNL chair of the committee, as a platform for his 2014 presidential candidacy. Consequently, the PSD decided to condemn the constitutional revision process as a whole and the subsequent step was to weaken the revision draft. Furthermore, after the PNL left the USL and the government coalition in April 2014 the entire project of constitutional revision, and implicitly the outcomes of deliberation, was abandoned. While this has to be, in theory, discussed by the Parliament, there is no longer the two thirds majority to support it 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 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. Even if the discussion about constitutional revision has been postponed for the moment, the documented solutions from deliberation can serve as a solid basis for the time when the initiative will be picked up again.

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 latter can be divided into several categories. First, there were organizational costs for the organizers of the deliberation process. The NGO in charge with the debates (Pro Democracy) made extensive use of resources and mobilized its territorial branches, partner

NGOs, academics, and journalists in the attempt to have a meaningful debate. The recruitment of participants required extensive resources even though it did not take the form of a representative mini-public. The set-up and maintenance of the online platform is another cost that cannot be neglected on the side of organizers. Pro Democracy financed this project through a wide range of partnerships with donor organization and key actors interested in supporting the development of democracy. The main partners were the Friedrich Ebert Foundation, which financed more than half of the regional meetings of the Forum, the Soros Foundation and the Foundation for the Development of Civil Society, as well as a limited number of business donors (private enterprises and holdings). Second, all participants had resource related costs since debates and discussions did not take place always during the week-end and most of them had to leave work to participate. There was preparation involved (see the previous discussion about the items they had to send beforehand) and thus all participants were engaged in the deliberation process for a longer period of time. Third, there were costs for the involved political actors. On the one hand, the PNL as main political supporter of the constitutional deliberation, pushed the topic on the political agenda and thus ignored other issues. In doing so, it played the card of crowd sourced revision to illustrate its openness to the voices of citizens. This approach was likely to form the basis for the presidential campaign of its candidate in the presidential elections at the end of 2014. When they left the coalition government, this important point for them was removed from the agenda by the PSD; accordingly, they were left without one of their main campaign tools.

## **Discussion and Conclusions**

This paper analyzed the Constitutional Forum in Romania as an example of deliberative practice and assessed its legitimacy according to several indicators presented in the literature. Our qualitative analysis revealed the existence of input legitimacy due to a high power of agenda setting and an open representation of participants. Unlike many deliberative practices that try to have a mini-public representative for the broader society, the Forum in Romania focused on representatives of the civil society, experts, and journalists. These three categories were complemented by ordinary citizens who joined the deliberative body due to their interest

in the topic. The throughput legitimacy was ensured through extensive possibilities to participate (both in local and online debates) and equal access to voice for all participants. The increased transparency of the deliberative process and publicity to create the linkage with the outside world complete the image of a legitimate process. However, our study also revealed that the output legitimacy was low due to interruption of the process. Being a top-down initiated revision, the deliberation had only a consultative purpose and the political factor decisively influenced the outcome. Political quarrels between initiators and the approaching presidential elections put the project of constitutional revision on hold and postponed the implementation of deliberation.

The main findings validate some of the points highlighted in earlier research that indicated the existence of trade-offs between the three dimensions of legitimacy: input, throughput, and output. This high number of obstacles and challenges makes it difficult for a deliberative process to achieve all of them. The developments observed in the Romanian case are in line with this observation. The relatively high degree of input legitimacy characterized by extensive agenda-setting and open participation contributed to the quality of deliberation (throughput legitimacy). At the same time, none of these two dimensions could not guarantee the effectiveness and efficiency of results (output legitimacy). The latter failed to reach legitimacy because other important factors were involved, i.e. the political one. The influence of political actors on the outcome was definitive and overshadowed a well-designed and relatively well implemented deliberative practice. In this sense, the Romanian experience reinforces existing research about the consultative role of deliberations by providing a compelling example.

While we agree with Blokker (2014) that the recourse to the people served an instrumental purpose, our findings reveal that in Romania the process was real with respect to deliberation. The input and throughput legitimacy of the deliberative Constitutional Forum show how citizens, subjects of the constitution, were actively and effectively involved in the problem identification and solving process. Since the scope of deliberation was limited, their say on the final decision – taken on political grounds – can hardly be assessed. The widespread public debate around the constitution revision has been unprecedented in any domain of civic

involvement in Romania. The large participation and extensive interest shown by civil society, academics, journalists, and ordinary citizens indicate the feasibility of this alternative to decision-making led by institutions of representative democracy. Under the circumstances presented in the paper, the legitimacy of deliberation got lower where non-deliberative factors intervened.

Further research can go in this direction and investigate the extent to which the political factor negatively influenced the effectiveness and efficiency of deliberation. Our analysis was limited to the assessment of output legitimacy and did not delve into what happened after the proposals of the Forum were abandoned. The absence of transparency and publicity in the post-deliberation phase can represent a possible explanation for the failure to implement the deliberative outcome. Another avenue for research can be an in-depth examination of the types of legitimacy. The picture presented in the paper has been painted with broad strokes and a closer look may reveal important details. For example, information may be an important component of both input and throughput legitimacy. Earlier studies on deliberative practices have shown that the knowledge participants possess and how this knowledge changes through deliberation can play a crucial role in the outcome. Initial levels of information are reflected in the questionnaires filled by many participants to the Constitutional Forum, while changes in information can be captured through qualitative interviews with participants. Moreover, comparative research can try to draw lines between the Romanian constitutional deliberation and similar cases in Europe (e.g. Iceland, Ireland, or Hungary) that display a similar intertwining of the crowdsourced legislation and politics.

**List of references:**

- Ackerman, Bruce. 1993. *We the People, Volume 1: Foundations*. Reprint ed. Cambridge: Belknap Press.
- Albi, Anneli. 2005. *EU Enlargement and the Constitutions of Central and Eastern Europe*. Cambridge: Cambridge University Press.
- Andersen, Vibeke Normann, and Kasper M. Hansen. 2007. "How Deliberation Makes Better Citizens: The Danish Deliberative Poll on the Euro." *European Journal of Political Research* 46 (4): 531–56.
- Bădescu, Gabriel, Paul Sum, and Eric M. Uslaner. 2004. "Civil Society Development and Democratic Values in Romania and Moldova." *East European Politics and Societies* 18 (2): 316–41.
- Burean, Toma, and Gabriel Badescu. 2014. "Voices of Discontent: Student Protest Participation in Romania." *Communist and Post-Communist Studies* 47 (3-4): 385–97.
- Blokker, Paul. 2014. "Constitutional reform in Europe and recourse to the people". Paper prepared for the IX<sup>th</sup> World Congress "Constitutional Challenges: Global and Local", The International Association of Constitutional Law, Oslo, 16-20 June.
- Caluwaerts, Didier, and Min Reuchamps. 2015. "Strengthening Democracy through Bottom-up Deliberation: An Assessment of the Internal Legitimacy of the G1000 Project." *Acta Politica* 50 (1): 151–70.
- Carey, Henry F. 2004. *Romania since 1989: Politics, Economics, and Society*. Lanham: Lexington Books.
- Chambers, Simone. 2003. "Deliberative Democratic Theory." *Annual Review of Political Science* 6: 307–26.
- Dryzek, John S. 2000. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*. Oxford: Oxford University Press.
- . 2001. "Legitimacy and Economy in Deliberative Democracy." *Political Theory* 29 (5): 651–69.
- Dworkin, Ronald. 1995. "Constitutionalism and Democracy." *European Journal of Philosophy* 3 (1): 2–11.

- Elster, Jon. 1991. "Constitutionalism in Eastern Europe: An Introduction." *The University of Chicago Law Review* 58 (2): 447–82.
- . 1993. "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea." *Public Administration* 71 (1-2): 169–217.
- Fillmore-Patrick, Hannah. 2013. "The Iceland Experiment (2009-2013): A Participatory Approach to Constitutional Reform", DPC Policy Note, no. 2.
- Fossum, John Erik, and Agustin Jose Menendez. 2005. "The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union." *European Law Journal* 11 (4): 380–410.
- Freeman, Samuel. 1990. "Constitutional Democracy and the Legitimacy of Judicial Review." *Law and Philosophy* 9 (4): 327–70.
- Gastil, John, and Peter Levine, eds. 2005. *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the Twenty-First Century*. San Francisco: Jossey-Bass.
- Geissel, Brigitte. 2013. "Introduction: On the Evaluation of Participatory Innovations – A Preliminary Framework." In *Participatory Democratic Innovations in Europe. Improving the Quality of Democracy*, edited by Brigitte Geissel and Marko Joas, 8–31. Opladen: Barbara Budrich.
- Gherghina, Sergiu, and Sergiu Miscoiu. 2013. "The Failure of Cohabitation: Explaining the 2007 and 2012 Institutional Crises in Romania." *East European Politics & Societies* 27 (4): 668–84.
- Gherghina, Sergiu, and Sorina Soare. 2015. "A Test of the EU Post-Accession Influence: Comparing Reactions to Political Instability in Romania." *Democratization* (forthcoming).
- Ginsburg, Tom, and Rosalind Dixon, eds. 2011. *Comparative Constitutional Law*. Cheltenham: Edward Elgar.
- Goodin, Robert E. 2000. "Democratic Deliberation Within." *Philosophy & Public Affairs* 29 (1): 81–109.
- Gutmann, Amy, and Dennis Thompson. 1998. *Democracy and Disagreement*. Cambridge: Belknap Press.
- Habermas, Jurgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press.

- . 2001. "Constitutional Democracy, A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (6): 766–81.
- Howard, Marc Morje. 2003. *The Weakness of Civil Society in Post-Communist Europe*. Cambridge: Cambridge University Press.
- Kellermann, Alfred E., Jaap W. de Zwaan, and Jeno Czuczai, eds. 2001. *EU Enlargement: The Constitutional Impact at EU and National Level*. The Hague: T.M.C Asser Press.
- Landemore, Helene. 2013. "Inclusive Constitution-Making: Epistemic Considerations. on the Icelandic Experiment". Paper prepared for presentation at the ECPR General Conference, Bordeaux.
- Nicholson of Winterbourne, Emma. 2006. "Civil Society and the Media in Romania." In *The EU and Romania. Accession and Beyond*, edited by David Phinnemore. London: Federal Trust for Education and Research.
- Olafson, Jon. 2011. "An Experiment in Iceland: Crowdsourcing a Constitution". Unpublished manuscript.
- Parau, Cristina Elena. 2009. "Impaling Dracula: How EU Accession Empowered Civil Society in Romania." *West European Politics* 32 (1): 119–41.
- Pogany, Istvan. 1993. "Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy." *International and Comparative Law Quarterly* 42 (2). Cambridge University Press: 332–55.
- Pro Democracy Association. 2013. "Raportul Forumului Constitutional 2013" (The Report of the Constitutional Forum), available at [www.variantacojocar.ro/ConstitutiaPoporului/Raport\\_FC.28.05.13.pdf](http://www.variantacojocar.ro/ConstitutiaPoporului/Raport_FC.28.05.13.pdf), last accessed 24 July 2014.
- Rawls, John. 1999. *The Law of Peoples*. Cambridge: Harvard University Press.
- Scharpf, Fritz. 1999. *Governing in Europe. Effective and Democratic?* Oxford: Oxford University Press.
- Schmidt, Vivien A. 2013. "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput.'" *Political Studies* 61 (1): 2–22.



- Smith, Graham. 2009. *Democratic Innovations. Designing Institutions for Citizen Participation*. Cambridge: Cambridge University Press.
- Suiter, Jane, and Min Reuchamps. 2015. "The Constitutional Turn in Deliberative Democracy in Europe." In *Constitutional Deliberative Democracy in Europe*, edited by Min Reuchamps and Jane Suiter. Colchester: ECPR Press (forthcoming).
- Talpin, Julien. 2012. "When Democratic Innovations Let the People Decide. An Evaluation of Co-Governance Experiments." In *Evaluating Democratic Innovations: Curing the Democratic Malaise?*, edited by Brigitte Geissel and Kenneth Newton, 184–206. London: Routledge.
- Thomas, George. 2008. "Popular Constitutionalism: The New Living Constitutionalism." In *Constitutional Politics in a Conservative Era*, edited by Austin Sarat, 73–105. Bingley: Emerald Group Publishing Limited.
- Vesalon, Lucian. 2012. "State Modernization as a Neoliberal Populist Discourse in Romania", DISC Working Paper Series, no. 22.
- Young, Iris Marion. 2000. *Inclusion and Democracy*. Oxford: Oxford University Press.