

**THE IMPOSSIBLE DISMISSAL OF A PRESIDENT:
ROMANIAN POLITICAL DESIGN**

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Abstract: This text is of recent attempts to overthrow the president of Romania. The goal is to narrate the events from the perspective of the Romanian Constitution, the attempt to dismiss the head bringing the legal and political facts that occurred in the country.

Keywords: Constitution of Romania; dismissal; political project.

The ambiguity of the Romanian political system (TĂNĂSESCU, 2008) continues to increase in an unstable political climate, but the position of the Romanian President only grows in importance on the political and institutional scene. Between the obligation of *political neutrality* that the Constitution imposes on him, and the fairly *important role* that it awards to it, the institution of Head of the State remains a great unknown, its actual configuration being highly dependent on the personality of the individual who happens to be in that position.

Thus, the Constitution prohibits the President to be member of a political party, but the sympathies or personal options of the President, even publicly expressed, do not fall within the scope of this prohibition. According to the Constitutional Court

[...] the Constitution does not forbid the President to maintain links with the political party that supported him during the elections, or with other political parties. Such a ban would not be in the spirit of the Constitution, since the President is elected by universal suffrage, on the basis of a political program, and has a duty towards the electorate to accomplish his program. It is obvious that in order to make this program become reality the President can interact with the political party of which he was a member, or with any other political party that could support him for the implementation of this program (Advisory Opinion n° 1/2007).

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In that sense, it may be interesting to recall that during the electoral campaign for the European Parliament organized in 2007 the charisma of President Traian Băsescu has been intensively used by the Democratic Party, although he was no longer a member since 2004: their posters showed pictures of all candidates nominated by the party surrounding a large empty frame in the middle, where it was written “busy elsewhere”. One knowledgeable commentator of the Romanian political scene and fine connoisseur of realities in comparative law, Professor Tudor Draganu (1998, p. 234) stated already in 1998 that the obligation of political neutrality imposed on the Romanian President

[...] will forever be doomed to remain dead-letter. Although after the elections, formally he is no longer the leader of the political party with the support of which he was elected, the President will always remain the invisible guide of that party, at least with regard to important political issues. In addition, if he wishes to have the support of that party during the presidential or parliamentary elections that follow after the end of his term, the President of Romania will inevitably be put in the position to explicitly show his special relation with that party and to behave as a true army commander.

On the other hand, the role of the President of Romania is not insignificant. According to a member of the technical committee for drafting the Constitution:

The President personifies the Romanian State; he is the symbol of the nation as a whole because of his direct election by the people. By exercising his powers he ensures balance and a smooth running of activities for all public authorities, in accordance with the principle of separation of powers.

Such a vision on the role and mission of the Head of the State is not totally disconnected with the Romanian institutional legacy, whereby an individual should be able to impose his own will on any other institution or public authority. Besides, nothing prevents such a Head of State to operate in a democratic environment. The Romanian Constitutional Court seems to confirm the point of view according to which the President is an “actor” or a “player” when it says that “the constitutional powers and democratic legitimacy that stems from his direct election by the people imposes on the President of Romania an active role; therefore, his presence in politics cannot be reduced to a mere symbolic or protocol function” (Advisory Opinion n° 1/2007).

Article 80 of the Romanian Constitution was inspired by the French Constitution of 1958. Just as in the French case, the institution of the Head of State is configured with a certain degree of uncertainty, since the notions of *mediator* and *guarantor* do not easily fit together within the same political institution. And just as in the French case, the meaning of the constitutional text cannot be fully deduced by simple exegesis, but is rather the result of the use that each President makes of the powers imparted on him. But unlike the French Head of State, which is provided with important means of action by the Constitution and who in practice has always been strong

enough to successfully absorb all available authority throughout the entire constitutional architecture, the Head of the Romanian State is considerably weaker, especially with regard to the instruments at his disposal. The constitutional reform of 2003 has not changed much with regard to this reality.

However, his influence on the overall political scene remains untouched.

Before the constitutional reform of 2003, the term of office of the President was identical to that of parliamentarians. In 2003, in order to separate presidential from parliamentary elections and to cancel the role of “trailer” that a charismatic President could play for the political party that would have supported him, the term of office of the President has been extended to 5 years. However, presidential elections tend to be more important in the eyes of the electorate than parliamentary ones. Empirical evidence has been provided by the 2004 elections. Parliamentary elections had given somewhat ambiguous results: a relative majority of seats went to the electoral coalition formed by the Social Democratic Party (center-left) with tiny Humanist Party (left), but the government was formed by a coalition of center-right political parties, which brought together the National Liberal Party (liberal) and the Democratic Party (popular), in alliance with the Democratic Union of Hungarians in Romania (ethnic quasi-political party). And because the President of Romania had been elected with the support Liberals and Democrats (with a majority of 5.126.794 votes out of 10.112.262 participants to the elections), the position of Prime Minister went to the head of the Liberal Party. *En passant*, it should be noted that the success of Mr. Traian Băsescu was all the more commendable since he was not a candidate in the presidential race from the beginning of the electoral campaign.

But the most striking evidence of the importance and priority that presidential elections take in the collective mind came during 2008 parliamentary and 2009 presidential elections. In 2008 again the relative majority of parliamentary seats went to the Social Democratic Party (center-left), which together with the Democratic Party (People) held more than 75% of votes in Parliament. For this reason and despite the rivalry between these two parties, in 2008 they agreed to create a governing coalition. But the success of the candidate endorsed by the Democratic Party in the 2009 presidential elections triggered the creation of a new government towards the end of 2009, supported by the Democratic Party, the Democratic Union of Hungarians in Romania and the representatives of national minorities in the Chamber of Deputies. Indeed, the re-election of Mr. Traian Băsescu was expected according to his own statements, but had been perceived by the electorate as an extreme situation (5.277.068, *id est* 50,34% of the electorate voted for him, whereas 5.206.747, *id est* 49,66% voted for his counter candidate); he practically won with the support of the Constitutional Court and the vote of Romanians living abroad, whom he particularly courted during an electoral campaign that took place heavily in Spain, Italy and Moldova as well.

Doubting his own score, on the very evening of the election Mr. Traian Băsescu claimed massive electoral fraud; one day later, the count confirmed him in the position

of Head of State so no more complaints were heard. But the losing candidate, Mr. Mircea Geoana complained in front of the Constitutional Court that, according to the results announced, too many votes were canceled, while, according to his own calculations, in some of the polling sections organized abroad (notably in the Embassy of Romania in Paris) the frequency of voting was higher than one voter every 7 seconds... In a decision which to many Romanians reminded of *Bush v. Gore* 531 US 98 (2000) of the US Supreme Court, the Constitutional Court decided to check the cancelled ballots in the second round of voting (138,476, *id est* more than twice the number of votes separating the two candidates) and found out that only 2247 were canceled erroneously; consequently, the presidential elections of 2009 have been validated and Mr. Traian Băsescu has been declared the winner.

For fear of a hyper-presidentialist (BERNAL PULIDO, 2012) drift, the framers of the Constitution have provided two types of responsibility for the Head of State: a political one (impeachment) which has as its final stage a vote of the electorate on the dismissal of the President (article 95 of the Romanian Constitution) and a legal (criminal) one, which supposes a jurisdictional procedure under which Parliament acts as prosecutor and the High Court of Justice and Cassation as judge (article 96 of the Romanian Constitution). In this context it should be noted that the Constitution does not clearly identify the “serious facts that ignore the Constitution” on the basis of which an impeachment may be started. Consulted on three occasions (1994, 2007, and 2012) with respect to the ambiguity of this text, the Constitutional Court provided explanations in a vicious circle: whether it is an action or no-action, a fact which ignores the Constitution is “serious” only with regard to the legal act it infringes upon (Advisory Opinion n° 1/1994). In any event, “the active role that the President decided to play in the political and social life of the country cannot be characterized as a conduct contrary to the Constitution” (Advisory Opinion n° 1/2007), although “for his statements, which are political opinions, the President of Romania is responsible, from a political and moral point of view, only to the electorate and civil society” (Advisory Opinion n° 1/2012).

The fact that an impeachment procedure has been initiated already three times within merely twenty years of application of the Constitution, each time in a more aggressive way, testifies of a serious deterioration of the general political climate and points to serious dysfunctions in the political system in Romania. If in 1994 the negative advisory opinion issued by the Constitutional Court regarding President Ion Iliescu was followed by Parliament, in 2007 and in 2012 the situations were different.

Often accused of populism that much he was popular at the beginning of his term, during the eight years he performed as President, Mr. Traian Băsescu has managed to alienate not only the majority of the political class, but also many of his former allies in the civil society. A first impeachment procedure was successful in Parliament on April 19th, 2007. Without taking into account the advisory opinion¹ rendered by the Constitutional Court and rather following a report made by a committee

¹ The Constitutional Court held that, if the impeachment refers to violations of the Constitution committed by the President during his term, given their content and consequences, they cannot be qualified as “serious”, but the final decision rests with Parliament because the procedure involves rather a political liability (Advisory Opinion n° 1/2007).

of inquiry², the Parliament suspended the President with 322 votes for, 108 against, and 10 abstentions (20 MPs were absent).

The “serious facts” which brought to this situation were numerous and can be summarized as follows:

- Numerous acts that violate the Constitution in the sense that the President wanted to become the main player in politics despite constitutional provisions that require him working with other public authorities (such the attempted hijacking of real political significance of the 2004 legislative elections, the systematic blocking of Parliament – by trying to replace the presidents of the Chamber of Deputies and the Senate – and the attempt to force the resignation of Prime Minister in 2005).
- Numerous other acts not less serious showing that the President tried to use state institutions to its advantage (such as interference in the activity of the Ministry of Justice or the creation of a new information agency directly subordinated to him).
- Allegations of attempts to protect state-capture and mafia-interests in profitable sectors of the economy (based on media campaigns with a great impact on the population).
- A general accusation of transforming the political crisis into the main tool of governance because it was the only way in which President Traian Băsescu could erect himself as “savior” of the country.

In a referendum held on May 19th, 2007, the population has validated President Traian Băsescu with a majority of 74.48% of voters (6.059.315 out of 8.135.272 persons who participated to the polls). The participation rate was 44.45% of the entire voting population. On May 24th 2007 the President re-confirmed resumed his official duties.

It is appropriate here to mention a little detail, which at that time looked almost insignificant, but which was to become extremely important at the referendum held in 2012. During March 2007 Parliament tried to revise the law on the referendum and make impossible the organization of any referendum within six months before any poll. The measure was designed to thwart any such initiative of the President, who had announced his plans to hold a consultative referendum on the change of the electoral system (from proportional representation to first past post). The Constitutional Court invalidated the draft-law (Decision n^o 147/2007) by means of an *a priori* control, which prevented it from ever coming into force. However, during the campaign for the referendum, the Parliament managed to adopt another amendment to the Referendum Act, which, in essence, was meant to declare valid a re-

² A part the opinion of the Constitutional Court, the Parliament also relied on an inquiry committee it has established out of 15 MPs (parliamentary groups have been proportionally represented, but no representative of the Democratic Party, the “presidential” party was present). In its report the committee said that President Traian Băsescu had violated the Constitution. When informed, the President initially denied all charges, then publicly stated that if Parliament voted his suspension he would resign “within 5 minutes” in order to allow for an early presidential election in which he wanted to be present as candidate, only to be recalled that there is a constitutional prohibition of more than 2 presidential terms which made him withdraw previous declaration and only state that he would accept the outcome of the referendum. The media have speculated that such contradictions between public statements probably took a toll of a few hundreds of thousands of votes.

ferendum on the impeachment of the President in case that less than half plus one of the electors enrolled on the electoral lists would participate to the poll, thus replacing the absolute majority needed until then with the simple majority needed after 2007. The Constitutional Court validated this Act (Decision n° 420/2007), which allowed the confirmation of the President even with a participation rate of 44.45% of the electorate.

A second impeachment procedure has been successful in Parliament on July 6th, 2012. Taking into account the advisory opinion rendered by the Constitutional Court, which this time could be read as partially favorable to the dismissal of the President³, the Parliament suspended the President with 256 votes for and 114 votes against; out of the 432 members that both Houses count only 374 were present and two votes were canceled.

This time also the charges were numerous; they only referred to the second presidential term of Mr. Traian Băsescu and can be summarized as follows:

- democracy and the rule of law have suffered a strong erosion because the entire political action was concentrated in an arbitrary and unconstitutional way in the hands of one person, who dictates to other powers in the State;
- the most important decisions have been taken outside the democratic framework of the exercise of power, the President acting as Prime Minister, and providing guidance to Parliament and the judiciary;
- the political discourse of the President managed to offend the people, and eventually had a dramatic impact on the social policies of the State in the sense of a reduction of the social protection;
- the President has tried to revise the Constitution according to his own wishes and persisted in this action although the Constitutional Court struck down certain provisions of the reform⁴ nevertheless sent to Parliament.

In the referendum held on July 29th 2012 out of a total population of 18.292.464 enrolled on the permanent electoral lists 8.459.053 participated in the referendum (*id est* 46,26% of the population registered), from which 7.403.836 (*id est* 87,52% of the participants) voted "Yes", 943.375 (*id est* 11,16%) voted "No", and 111.842 (*id est* 1,32%) canceled their vote. Normally, if the precedent set by the referendum of 2007 would have been followed, the President should have been removed.

But on July 10th 2012, during the campaign for the referendum and regarding a parliamentary initiative meant to revise the Referendum Act, the Constitutional Court issued Decision n° 731/2012, which interprets this last legal act in the sense that the referendum is valid only "if the participation is at least half plus one of the total number

³ This time the Constitutional Court held that the facts put forward against the President are real conflicts with other participants in the political life, and that Mr. Traian Băsescu has not exercised "with maximum efficiency required the function of mediation between the powers of the state and between the state and society" (Advisory Opinion n° 1/2012).

⁴ In its Decision n° 799/2011 of the Constitutional Court had identified some provisions in the constitutional bill initiated by the President that suppressed human rights, which is contrary to the "eternity clauses" of the Romanian Constitution, but the President forwarded the bill to Parliament in the state, without revising the text according to the decision of the Constitutional Court.

of persons registered in the permanent electoral lists". In other words, for the same type of referendum and on the basis of the same Constitution, the same organic law on the organization and conduct of the referendum in 2007 it was constitutional with a quorum equivalent to the simple majority of voters registered and in 2012 it is a constitutional with a quorum equivalent to the absolute majority of voters registered.

Many political and legal disputes ensued about the consistency and the predictability of the constitutional case law, on the democratic nature of a referendum whose validation depends on those who do not participate in the political life of the *polis* (the President suspended has asked voters not come to the polls in order to defend democracy), on the (too big) number of voters registered in the electoral rolls (because the census of the population conducted in 2010 had provided quite concerning preliminary results, according to which the population of Romania was reduced below the psychological threshold of 20 million inhabitants), on the procedural regularity of the referendum (about 500 criminal investigations for suspicions of electoral fraud have been opened), and, finally, on the subtle difference introduced in 2008 through an amendment to the Law on parliamentary elections (the common law on elections in Romania) between permanent electoral lists and the special lists for Romanians living abroad.

On August 2nd, 2012 the Constitutional Court was expected to provide an answer as to whether the referendum was valid or not, but instead it has announced that, given the conflicting information provided by the National Institute of Statistics, the Ministry of Administration and Home Affairs, and the Permanent Electoral Authority with regard to the content of the permanent electoral lists, it has to require from the Government the up-dated permanent electoral lists on the basis of which the referendum actually took place, and it postponed its decision until September they 12th 2012.

Also on August 2nd 2012 in a judgment (n^o 3/2012) upon several complaints with regard to the irregularity of the conduct of the referendum, the Constitutional Court ruled that permanent electoral lists cannot include Romanians living abroad, and therefore "their number cannot influence the legal quorum of participation in the referendum", but it also declared that all voters, irrespective of the list where they are registered, shall be taken into consideration in the organization of the referendum. However, the fact that the Constitutional Court is supposed to rule upon two different aspects (compliance with the rules on the organization of the referendum and validation of referendum results) according to two different criteria (procedural rules on the conduct of the referendum and standards of validity of a referendum) seems to not have been taken into account.

Following severe social and political turbulences caused by such an interpretation of the law on the referendum, the Constitutional Court has advanced the date of its decision on August 28th, and then again on August 21st 2012, when it declared the referendum compliant with the procedure, but it found that participation was lower than the threshold required (absolute majority of registered voters), which made the referendum invalid. Therefore, the precedent set in 2007 has not been followed with

regard to the validity of the referendum, although *de facto* the effects with regard to the situation of the President suspended are the same: instead of being dismissed by the referendum, he can resume his duties.

However, uncertainty continues to hover not only on the nature of the Romanian political system (semi-presidential or presidential), and the proper role that the President of Romania should play within the institutional architecture of the State, but (since 2012 onwards) also on the standards used to assess the validity of a referendum:

- Should the participation rate be an absolute or simple majority?
- Should it have as referential the law on the referendum or, as the Constitutional Court has suggested in its judgment n° 3/2012, the law that sets the rules for the election of the authority concerned by the plebiscite?
- What should be the role of the Constitutional Court with regard to an expression of direct democracy: can it get involved only in assessing procedural aspects or can it also control the scope and validity of decisions thus taken?

Many questions for which the answers may not have to wait too long as a future procedure for dismissal of the President of Romania is already under preparation according to the statements made by some Romanian politicians...

A IMPOSSÍVEL DEMISSÃO DE UM PRESIDENTE: PROJETO POLÍTICO ROMENO

Resumo: Este ensaio trata das recentes tentativas de derrubada do presidente da República da Romênia. O objetivo é narrar os acontecimentos sob a ótica da Constituição romena, da tentativa de demissão do presidente trazendo os fatos políticos e jurídicos acontecidos no país.

Palavras-chave: Constituição da Romênia; demissão; projeto político.

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