AMENDMENTS TO LAW NO.47/1992 REGARDING THE ORGANIZATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT - IMPLICATIONS REGARDING THE DISPOSITIONS OF THE CONSTITUTION OF ROMANIA

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Abstract
In 2010, Law no. 47/1992 regarding the organization and the functioning of the Constitutional Court has suffered some amendments, some of which we believe indirectly affect the provisions of the Constitution of Romania of 1991, revised and republished in 2003. This survey aims at expounding these modifications and at presenting their implications on the constitutional text, raising some legitimate questions for law professionals. Therefore, we will approach the question of suspension from office of the President of Romania, a procedure stipulated in article 95 of the Constitution, as well as the ways in which the stages of the suspension procedure provided therein suffer an alteration because of the amendments to Law no. 47/1992.

Keywords: *Constitutional Court, suspension, referendum, unconstitutionality, revision of the Constitution*

Introduction

This study aims at presenting certain aspects regarding the procedure of suspension from office of the President of Romania, in accordance with the provisions of article 95 of the Constitution.

Thus, in its two sections, this study will deal with the theoretical notions of the proposed subject matter and will provide interpretations as a result of the recent legislative modifications in the field caused to the organic law of the Constitutional Court.

Also, in the final part of this study, we aim at making a synthesis of the relevant conclusions as a result of the analysis we are going to conduct.

1. Procedure of suspension from office of the Romanian President, according to the provisions of the Constitution of Romania

The President of Romania, according to article 84 par. (2) phrase I of the Constitution, "the President of Romania shall enjoy immunity". By interpreting this text, we can say that the President of Romania, unlike the members of the Parliament, cannot be held responsible for any acts other than the opinions he expresses while executing his commission.

The Constitution expressly establishes two exceptions from the immunity rule, detailed in terms of substance and procedure in article 96 on *"suspension from office"* and article 96 on *"impeachment"*.

Also, in this context, we notice an indirect regulation of the liability of the President of Romania for his legal acts, based on article 21 on the "free access to justice" and on article 52 on the "right of a person aggrieved by a public authority".

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However, for the purpose of this survey, we are interested in the content of article 95 of the Constitution that regulates what the administrative law doctrine calls the "administrative-disciplinary liability of the President of Romania or his political liability".

There are authors[2] who believe that the political liability of the President of Romania actually consists of two distinct phases.

The first phase could be called the *political liability per se*, that the head of state assumes according to article 95 par. (1) of the Constitution, towards the Chamber of Deputies and the Senate.

The second phase materializes into liability towards the people, completed through the referendum organized for the dismissal of the President.[3]

This type of liability is connected to the parliamentary initiative, to the position of the authority exercising the constitutional jurisdiction, and finally to the vote of the people.

The procedure of holding accountable for grave acts by which the President infringes upon the constitutional provisions may be initiated by at least 1/3 of the number of deputies and senators, which means, according to the Constitution, a "proposal of suspension from office". This proposal must be well-founded since the President is suspected of having committed grave acts by which he infringed upon the constitutional provisions.

Considering the wording of article 95 par. (2), it follows that the one third of parliamentarians who are entitled to initiate the procedure of holding the President politically accountable relates to the total number of parliamentarians, not to the members of one of the chambers. The list of parliamentarians shall be lodged with the secretary general of the chamber and the lodging date shall officially mark the initiation of the procedure for impeaching the President in view of his suspension from office. The Secretary General shall submit a copy of the list and the reasons of intimation to the President. The chamber with which the proposal of suspension from office shall be officially recorded shall be determined based on the weight the deputies or senators have on the list.

In any case, the Secretary General of the chamber the proposal was recorded with must inform the other chamber, as soon as possible, about the content of the proposal of suspension from office, since the competence of debating and voting on this proposal devolves upon both chambers reunited in a joint session.

The following step in this procedure is to notify the Constitutional Court to issue the consultative opinion. The administrative law theoreticians classify this opinion into three categories, namely: facultative, consultative and compliant. In our case, it would be a consultative opinion, whose features are as follows: the issuing body must request the opinion, but is not forced to give in to it.

Only after receiving the opinion of the Constitutional Court one may pass on to discussing the proposal of suspension from office, the content of the opinion being a substantial reference criterion. Please note that the opinion of the Constitutional Court is consultative in nature, as the Parliament is forced to request it; however, upon casting their votes, the Parliament may decide differently than the Constitutional Court. Therefore, the Constitutional Court may find that the acts of the President of Romania are not serious infringements upon the Constitution, thus issuing a negative opinion; however, the Parliament may decide to suspend the President, despite of the Constitutional Court's opinion. The basic idea is that we are under a form of political liability, so that the Parliament has its

[2] Refer to Claudia Gilia, *Manual of Constitutional Law and Political Institutions*, (Bucharest, Hamangiu Publishing House), p. 212 et seq.; Verginia Vedinaş, *Administrative Law,* 4th Edition revised and updated, (Bucharest, Universul Juridic Publishing House, 2009), p. 317-320; Dana Apostol Tofan, *Administrative Law*, Vol. 1, 2nd Edition, (Bucharest, C.H. Beck Publishing House, 2008), p.143 et seq.; Ion Corbeanu, *Administrative Law. University Course.* 2nd Edition revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010); p.257-260, Marta Claudia Cliza, *Administrative Law. Part I,* (Bucharest, Pro Universitaria Publishing House, 2010, p.106-111. etc.

[3] Ioan Alexandru, Mihaela Carausan, Sorin Bucur, *Administrative Law*, Lumina Lex Publishing House, Bucharest, 2005.

own political filter when it comes to qualifying the President's acts as serious infringements upon the Constitution and when they cast their vote for or against.

However, the wording of the Constitution leaves it up to the President to appear before the Parliament or not, as it provides for no obligation to that effect. The consultative opinion of the Constitutional Court must be notified to the President, who may be invited to provide certain information before the Constitutional Court before issuing the opinion.

The Parliament debates the proposal of suspension from office of the President according to the procedure established in the Regulation of the joint sessions, and the majority[4] of the deputies and senators must vote for the proposal of suspension from office.

We may wonder why in this situation the majority of parliamentarians must vote, and not 2/3 of the parliamentarians (as for the criminal liability set forth under article 96). The explanation consists in the different nature of the facts with regards which one form of liability or the other is engaged. The political liability is engaged for generic acts qualified as a serious infringement upon the constitutional provisions, whereas criminal liability is engaged for a particularly grave act which is generically established by the criminal legislation and which determines the final conviction of the President, which makes the procedure of dismissal by referendum to become useless.

In legal terms, the acts for which the suspension procedure is triggered are administrative defaults of the President while executing a political commission. That is particularly why the suspension measure, which triggers the interim, must be subject to approval by the people by means of referendum, as the President is elected by casting of a universal, direct vote.

The referendum[5] for the dismissal of the President must be organized within 30 days after the vote of the Parliament and the obligation to organize it devolves upon the Government.

Since the referendum evokes the idea of direct democracy, a potential refusal by the people to vote the dismissal of the President would equate to a withdrawal of the trust placed in the Parliament, and such a withdrawal of the trust[6] should entail the election of a new Parliament.

The 3-month period set forth under article 63 par. 2 of the Constitution for the election of a new Parliament should start on the referendum date. On the contrary, if at the referendum the people voted for the dismissal of the President, then the position will become vacant and within 3 months the Government will organize presidential elections.

The referendum is the primary legal form of manifestation of the national sovereignty, it evokes direct democracy, and in case of article 95 of the Constitution it will also appear as a means of solving the political conflict between the Parliament and the President, both being authorities legitimated by popular vote. [7]

2. Considerations on the amendment of the Law on the Constitutional Court, caused by Law no. 177/2010

According to article 142 par. (1) of the Constitution, the Constitutional Court is *"the guarantor for the supremacy of the Constitution"*.

Title V of the Constitution[8] is dedicated to the Constitutional Court, regulating its structure, the qualification for appointment of the judges of the Court, their statute, the powers of the

[4] Meaning an absolute majority.

[5] The referendum conducting procedure is detailed in Law no. 3/2000 on organizing and conducting the referendum, published in the Official Gazette no. 84/2000, updated.

[6] In this case, we are witnessing a void in the regulation of the Constitution of Romania because one could consider dissolving the Parliament *de jure*; however, according to article 89 of the Constitution, this is subject to very restrictive conditions counting to six.

[7] A. Iorgovan, *Treatise of Administrative Law*, vol. I, 4th Edition (Bucharest, All Beck Publishing House, 2005), p. 334.

[8] Ioan Deleanu, *Constitutional Justice*, (Bucharest, Lumina Lex Publishing House),p.183.

Constitutional Court and the decisions issued based on such powers. Law no. 47/1992, the organic law of the Constitutional Court, was enacted based on this constitutional regulation.

According to the provisions of article 146 point c) of the Constitution, the Constitutional Court has the following powers, among others: *"to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators"*.

Recently, Law no. 177/2010 amended and supplemented Law no. 47/1992 on the organization and operation of the Constitutional Court, of the Civil Procedure Code and of the Criminal Procedure Code of Romania, published in the Official Gazette no. 672 / 04 October 2010.

The last[9] amendment of the organic law of the Constitutional Court brought **two essential changes** with regard to this public authority:

a) the measure of the *de jure* suspension from office, which used to be triggered while settling the plea of unconstitutionality and which was regulated by article 29 par. (5) of Law no. 47/1992 was eliminated by abrogating this piece of legislation;

b) the competence of the Constitutional Court was supplemented with the power of adjudicating on the constitutionality of the decisions issued in the plenary sessions of each Chamber of the Parliament and of the decisions issued in the plenary sessions of the two Chambers reunited, by amending article 27 par. (1) of Law no. 47/1992.

Thus, article 27 par. (1) establishes the Constitutional Court' power to adjudicate also on decisions issued in the plenary sessions of the reunited Chambers of the Parliament, having the following content:

"The Constitutional Court adjudicates on the constitutionality of the regulations of the Parliament, of the decisions issued in the plenary sessions of the Chamber of Deputies, of the decisions issued in the plenary sessions of the Senate, and on the decisions issued in the plenary sessions of the two Chambers reunited of the Parliament, upon notification by the president of either of the two Chambers, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators."

For the purpose of this survey, we are going to look into this legal text and analyze it in terms of its implications on the procedure regarding the political liability of the President of Romania, a procedure set forth in article 95 of the Constitution.

This addition to article 27 par. (1) aims at subjecting all the decisions of the Parliament of Romania, namely of the plenary session of the Senate, of the Chamber of Deputies and of the Reunited Chambers to a check in terms of constitutionality.

The difference from the procedure applied until the publication of Law no. 177/2010 in the Official Gazette is that, before this amendment, only decisions dealing with the Regulations of the Chambers were subject to a check in terms of constitutionality, whereas from now on all the decisions of the Parliament are to be subject to such check.

As regards the impact of the amendment[10] of Law no. 47/1992 on the procedure for the suspension from office of the President of Romania, there are several aspects to bear in mind:

- Until the amendment in 2010, the Constitutional Court was only checking the reasons why the President of Romania was suspended from office, having the duty to establish whether they were grave acts of infringement upon the Constitution or not. In such case, the opinion was a consultative one, as we have already specified in the first part of this survey. Regardless of the findings of the Constitutional Court, the reunited Chambers may suspend the President without any restraints, as this is a political kind of decision upon which the Constitutional Court could not intervene. We would

[9] Verginia Vedinaş, *Several Considerations on the Unconstitutionality of Law no. 177/2010 enacted by the Senate on 24 August 2010* (RDP no. 3/ 2010, Bucharest) p.100.

[10] Elena Emilia Ştefan, *Manual of Administrative Law. Part I. Seminar Exercise Book,* (Bucharest, Pro Universitaria Publishing House, 2010) p.77.

like to remind our reader that earlier, in 2007[11], the opinion of the Constitutional Court was negative).

- The recent amendment allows the Constitutional Court to also check the compliance with the constitutional procedures, after the issue of a decision to suspend the President from office. More specifically, in terms of the suspension procedure, the check in terms of constitutionality shall consider both the substance of the issue (i.e. the reasons) before the vote of the reunited Chambers, for consultation purposes – since, as we all know, the Constitution of Romania was only amended in 2003 –, and the procedural aspects *per se* (e.g. the number of deputies who initiated the procedure, the majority qualifying for the cast of votes, etc., according to article 95 and article 67 of the Constitution), however, in the latter situation, only after the vote of the reunited Chambers.

- This second check, which regards only the procedure itself, can be performed by the Constitutional Court upon the request of one of the parties concerned (that we will list below), following the vote for the suspension from office.

The holders of the right to request the check of the decisions of the Parliament in terms of constitutionality are the following:

1) presidents of the two Chambers,
2) a parliamentary group, or
3) a number of at least 50 deputies or at least 25 senators, thus keeping the three categories of holders as set forth in the Constitution, making no addition to or elimination from them.

Considering the above, we believe that this amendment of Law no. 47/1992 is unconstitutional because this piece of legislation actually dissimulates an attempt to revise the Constitution of Romania.

It is true that there are theoreticians of the constitutional law asserting that a constitution can be revised according to the revision procedures or implicitly[12]. According to this theory[13], the case we are now analyzing would be the second case, i.e. the implicit revision of the Constitution.

Thus, the revision[14] of the Constitution consists of its amendment by rewording or abrogating certain articles, or by adding new text.

The implicit revision of the Constitution may result from the adoption of a judicial norm whose content derogates from the constitutional provisions. In such case, such norm must not have been adopted by a law amending the Constitution, but by a simple ordinary law or even by an organic law.

In conclusion, the implicit amendment[15] of the Constitution consists of the change of some of its provisions, without resorting to the revision procedure set forth in the fundamental Law itself, but to some other procedure. Virtually, the implicit revision, whatever the reasons and the procedure used, results in the infringement upon the Constitution.

It is well known that any law system establishes the principle of legality, therefore the Romanian legislation is also generous from this point of view, thus establishing, at constitutional level, a general obligation for all the holders of a right, public authorities or not, to observe the law while conducting their activity.

Also, it is important to underline that, in the western[16] political mentality, the compulsoriness of the law refers both to the individual and to the public authorities, including the State. In other words, all the State authorities must observe the law, just like any citizen.

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[11] In 2007, Romania witnessed the first attempt to engage the political liability of the President of Romania, which failed as a result of the vote of the population, cast by referendum, although the Parliament had decided to suspend the President from office.

[12] Cristian Ionescu, *Treatise of Comparative Constitutional Law*, 2nd Edition, (Bucharest, C.H. Beck Publishing House, 2008), p. 915.

[13] This is a personal theoretical opinion

[14] Cristian Ionescu, *op.cit.* p.203

[15] Cristian Ionescu, *op.cit.* p.204

[16] Cristian Ionescu, *Comparative Constitutional Law*, (Bucharest, C.H. Beck Publishing House, 2008), p.36

Conclusions

In close connection with the principle of legality, the principle of the stability of legal relationships is consecrated at the European level. Thus, the principle of legal certainty refers not only to the lawmaking operation that must observe certain strict rules[17], but also to the "possibility offered to any citizen of evolving in a certain legal environment, protected from the vagueness and sudden changes that effect the legal standards"[18].

Returning to the provisions of Law no. 177/2010 amending the organic law of the Constitutional Court, we believe that the principle of legal certainty is violated, thus creating a general uncertainty at the level of the public perception of the trust put in the political life of a country.

Moreover, the procedure of suspension of the President from office, as recently amended, has virtually become almost impossible during the same commission, thus giving the possibility both to the governing parties and to the opposition to "bother each other" by this constitutionality questioning game.

In conclusion, we believe that the recent amendment of Law no. 177/2010, considered in terms of the procedures of suspending the President of Romania from office, is an "unconstitutional solution due to its wording and an anti-constitutional solution due to its effects" and we subscribe to the opinion of the reputed author Verginia Vedinaş[19] recently expressed in a specialized study.

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[17] Law no. 24/2000 establishing the legislative technique rules for drafting pieces of legislation, published in the Official Gazette no. 139/2000, as subsequently amended by Law no. 60/2010, republished in the Official Gazette no. 260 / 21 April 2010.

[18] M. Heers, *La securité juridique en droit administratif français: vers une consécration du principe de confiance légitime?* (RFDA 1995), p.963, quoted by Ion Brad in *Revocarea actelor administrative (Revocation of Administrative Acts),* (Bucharest, Universul Juridic Publishing House, 2009), p. 123 et seq.

[19] Verginia Vedinaş, *op.cit.,* p.104

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