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# The Romanian Double Executive and the 2012 Constitutional Crisis

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## THE ROMANIAN DOUBLE EXECUTIVE AND THE 2012 CONSTITUTIONAL CRISIS

Vlad Perju<sup>1</sup>

### § 1. *Introduction*

In the summer of 2012, Romania experienced the deepest constitutional crisis in its post-communist history. For the European Union (“EU”), which Romania joined in 2007, the crisis amplified an existential challenge posed by a turn to constitutional authoritarianism in its new member states. Coming after similar developments in Hungary, the Romanian crisis forced the “highly interdependent”<sup>2</sup> EU to grapple with the question of how to enforce basic principles of constitutionalism within the states. That challenge would have been unthinkable even a decade earlier. In “*A Grand Illusion*”, an essay on Europe written in 1996, well before the Eastern expansion of the EU, Tony Judt argued that the strongest argument for such an expansion, which he otherwise did not favor, was that membership in the Union would quiet the “own internal demons” of the Eastern European countries and “protect them against themselves.”<sup>3</sup> It turns out, however, that

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<sup>2</sup> This is how the European Commission had described the EU in the Report of the Commission to the European Parliament and the Council: “On Progress in Romania under the Co-operation and Verification Mechanism” (COM (2012) 410 final) (18 July 2012) at p. 2 (“Today’s European Union is highly interdependent. The rule of law is one of the fundamental values of the EU and there is a strong common interest in it which mirrors the interest of the Romanian public in these issues.”)

<sup>3</sup> Tony Judt, *A Grand Illusion: An Essay on Europe* (1996) 133-134.

the demons of authoritarianism have more faces and are more resilient than even that wise historian realized.

The story of Romania’s constitutional crisis is multilayered.<sup>4</sup> It is, first, a story about semi-presidentialism, a regime whose origins go back to Weimar Germany and the French Fifth Republic and which has become a popular choice for constitutional design in Europe and around the world. By contrast to Hungary’s parliamentarism, as well as to any presidential regime, semi-presidentialism splits into two the atom of executive power for the benefit of both the president and the prime minister. This feature gives the regime its appeal, but also its Achilles heel. In exploring how a constitutional culture that is still at the early stages of maturity can handle the pressures of political cohabitation in situations of ideological split within the executive, we learn about the overall appeal of the model for states undergoing this type of political transition.<sup>5</sup> Beyond constitutional structure and culture, the Romanian case study is about the old-fashioned virtues of constitutionalism (checks and balances, respect for legislative deliberation, the importance of judicial independence) and about how they hold, or give way, when political actors are willing to press the constitutional order to and beyond its breaking point. Particularly important is the self-understanding of institutions—including, prominently, the Constitutional Court—and the ineffable relation between constitutional

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<sup>4</sup> I do not “constitutional crisis” in the narrow way in which this concept was theorized in context of the American constitutional experience by Sanford Levinson and Jack Balkin, *Constitutional Crises*, 157 *U. Penn. L. Rev.* 707 (2009). Within that scholarship, my usage comes closer, though it is still different from the phenomenon of “constitutional hardball”, as theorized by Mark Tushnet, *Constitutional Hardball*, 37 *J. Marshall L. Rev.* 523 (2004). The concept of constitutional crisis in the Romanian case shares a family resemblance with that of a “constitutional coup d’état”, as applied by René Coty, a member of the Constitutional Council in the French Fifth Republic, to describe the 1962 referendum in France regarding the direct election of the President. See Chevalier and Conac (1991), at 677.

<sup>5</sup> Maurice Duverger was in semi-presidentialism “the most effective” system for Eastern European and former Soviet Union countries transitioning from authoritarianism to democracy, in Maurice Duverger, *The Political System of the European Union*, in *European Journal of Political Research* vol. 31 (1997): 137-146, 137

prudence and jurisprudence amid untenably high political stakes that threaten a country's constitutional democratic project. The dialogue – sometimes silent, oftentimes not – between the national and the European institutions is a critical axis of constitutional developments within the EU member states, circa 2012.

The existence of such a dialogue is unsurprising given the irreducibly supranational - European – dimension of domestic constitutionalism. The Court of Justice of the European Union had long held that the European and the domestic legal orders are “integrated.”<sup>6</sup> But only recently, with the Treaty of Lisbon (2009), has the EU drawn the constitutional implications of that idea by protecting at the European level some of the core constitutional values of its member states.<sup>7</sup> Despite the challenges of enforcement, these developments are recasting the boundaries between the national and supranational. The study of Romania's constitutional crisis shows the interweaving processes of constitutionalization, both still essentially incomplete, of national and European legal orders.

## § 2. The choice for semi-presidentialism

The Romanian Constitution was enacted in 1991, two years after the fall of the communist dictatorship that lasted over half a century and was, with some fluctuation but

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<sup>6</sup> See Case 6/64 – *Costa v. ENEL* (“By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an *integral* part of the legal systems of the member states and which their courts are bound to apply.”) (my italics).

<sup>7</sup> Article 2 TEU provides that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” This provision should be read together with the first sentence of Art. 4 (2) TEU: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” For a study of the Armin von Bogdandy and Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, (2011) 48 *Common Market Law Review*, Issue 5, pp. 1417–1453

essentially during that entire period, of a more ruthless type than elsewhere in Eastern Europe with the exception of the Soviet Union.<sup>8</sup> The post-communist, democratic constitutional regime shares many features of that period's wave of constitutionalization, including an enforceable Bill of Rights; European-style, centralized judicial review; and a constitutional court with jurisdiction for both abstract and concrete review. The constitutional regime is semi-presidential, inevitably *à la française*.<sup>9</sup>

The choice for a semi-presidential regime, whose main contours date back to the Electoral Law of 14 March 1990 and which was entrenched in greater detail in the 1991 Constitution, might not have been entirely obvious given Romania's recent past. The regime of Nicolae Ceaușescu (1965-1989) started on a reformist note but became over time, and especially in the last two decades, an exceedingly harsh personal dictatorship with a nationalist bent that scholars have described as a Sultanate.<sup>10</sup> Averting the evil of centralized power was a starting point for Romania's constitutional drafters, so the separation of powers played a central part. Less obvious, however, was the option in favor of a semi-presidential combination. The political experience of the French Fifth Republic had shown dual executive regimes to aggrandize the powers of the head of

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<sup>8</sup> See generally Vladimir Tismaneanu, *Stalinism for All Seasons: A Political History of Romanian Communism* (2003);

<sup>9</sup> The usefulness of classifying political systems into traditional categories—presidential, parliamentary, semi-presidential—has recently come under scrutiny as scholars have pointed to great heterogeneity within each of the different type of regime. In a recent study, Tom Ginsburg and co-authors have argue that more accurate predictions about the powers of the executive and legislator result from knowing where and when a constitution was written rather than the type of political regime it sets in place. While this conclusion is said to hold across all different types of regimes, the authors do point out that, “ironically,” semi-presidential regimes are more internally coherent than both parliamentary and presidential systems. See Tom Ginsburg, Jose Antonio Cheibub and Zachary Elkins, *Beyond Presidentialism and Parliamentarism* Coase-Sandor Working Paper Series in Law and Economics (December 2013), at 4.

<sup>10</sup> For a recent study, see C. Dallara, *Democracy and Judicial Reform in South-East Europe: Between the EU and Legacies of the Past* (2014), at 60.

state.<sup>11</sup> Moreover, by the early 1990's, the experience of the Mitterrand-Chirac executive duo (1986-1988) had demonstrated that political cohabitations, which are inevitable in the life of a semi-presidential regime, put significant pressure on the state's institutional structure. While the French Republic did not come undone during that period and its prime minister was not a *second personage*—and certainly not that of the “chief of staff to the president of the Republic,” as Rene Capitant once famously asserted<sup>12</sup>—that cohabitation reiterated the president's status as *primus inter (executive) pares*.<sup>13</sup> That itself was sufficiently worrisome for the young Romanian democracy.<sup>14</sup> Whence, then, the appeal of semi-presidentialism?

The search for an answer has to start from the deep cultural and jurisprudential affinity between Romania and France. That affinity has traditionally been strongest in the field of private law, where even the long decades of communist rule did not completely erase the influence of *Code Napoleon*. But its radiating effect reached the organization of the state, where the success of the 1958 Constitution had made French semi-presidentialism an appealing model not only for Romania but also for other young democracies in Central and Eastern Europe.<sup>15</sup> The Romanian constitutional drafters

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<sup>11</sup> See generally Jean V. Poulard, *The French Double Executive and the Experience of Cohabitation*, *Political Science Quarterly* vol. 105 (2): 243-267 (1990). I have taken inspiration from Prof. Poulard's essay in choosing the title of my article.

<sup>12</sup> Cited in Maurice Duverger, *A New Political System: Semi-Presidential Government*, *European Journal of Political Research* vol. 8 (1980): 165-187, at 172.

<sup>13</sup> Insufficient tools to constrain a president unable to force his policies on an unwilling government made critics of presidentialism extend their skepticism to semi-presidential regimes. For analysis to this effect, see Jean Poulard, *supra* note \_\_\_, at 266 (arguing that the first cohabitation had not changed the system “in a fundamental way. The prime minister was no longer the *second personage* of the executive, but he did not become the first. The president of the Republic was not reduced to a mere figurehead.”)

<sup>14</sup> While the historical evidence does not unequivocally show that a semi-presidential system with a strong president is “deadly to democracy,” as Elgie puts it, heavily presidentialized constitutional systems do pose challenges to a country's democratic record. See Robert Elgie, *A Fresh Look at Semi-presidentialism: Variations on a Theme*, *Journal of Democracy* vol. 16 (3): 98-112, at 103.

<sup>15</sup> Other countries that have chosen semi-presidential regimes include Bulgaria, Poland, Ukraine, Slovenia, Lithuania and others. For a comparative study, see Robert Elgie, *Semi-presidentialism in Europe* (1999).

thought it possible to adapt the French model to impose greater limits on the presidential powers.<sup>16</sup> Their project aligned with that of the new political elites, many of them coming from the second echelon of the Romanian Communist Party, who found semi-presidentialism appealing for realpolitik reasons. First, adopting the French constitutional model gave the new elites much needed political credibility. Second, and more importantly, the model fit the political needs of the all-powerful President Iliescu. Having filled the vacuum of power in the days after the December 1989 revolution, Iliescu understood that constitutional limits on the president's power were irrelevant so long as he had full political control over the prime minister and the parliamentary majority. He calculated—correctly, as it turned out—that the semi-presidential model would allow him to exert however much political control he wanted while retaining a constitutionalist façade of checks and balances.

Under the regime of the 1991 Constitution, executive power in Romania is shared between the president, who is directly elected for a fixed-term and has “quite considerable powers,”<sup>17</sup> preponderantly in the defense and foreign affairs areas, and the government, formed by the prime minister and his or her cabinet. The powers of the president and prime minister are balanced; the constitutional text does not irreversibly

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On a global scale, as many as a fourth of all democratic constitutions have semi-presidential regimes. See Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* (2006). However, despite the influence of this model, semi-presidentialism remains somewhat understudied. In a recent comprehensive companions to comparative constitutional law, where presidential and parliamentary regimes are studied in detail, semi-presidentialism is mentioned only briefly as a variant of presidentialism. See Rosenfeld and Sajo, *Oxford Handbook of Comparative Constitutional Law* (2012), at 645-646.

<sup>16</sup> See also Tony Verheijen, Romania in Robert Elgie (ed.), *Semi-presidentialism in Europe at 197* (noting the “much more limited” powers of the president in the Romania system, by comparison to the French president, and mentioning the limitation on the powers to dissolve Parliament, the imposition of political neutrality and the requirement that Parliament approve the president's use of decree powers).

<sup>17</sup> See Duverger, *supra* note \_\_\_\_\_. In his comprehensive study on semi-presidentialism, Robert Elgie sought to eliminate what he deemed to be Duverger's unreliably subjective feature of semi-presidential regimes. See Robert Elgie, *A Fresh Look at Semi-presidentialism: Variations on a Theme*, *Journal of Democracy* vol. 16 (3): 98-112, at 100.

weaken either office and leaves their interplay at the hands of democratic politics.<sup>18</sup>

Nevertheless, and by contrast to the French model, the Romanian regime is a “reinforced” premier-president semi-presidential system. Article 103 stipulates that the government is politically responsible for its entire activity only before Parliament—i.e., not the president—and it is Parliament that may withdraw its confidence and bring down the government. Since the threshold for introducing motions of censure is relatively low (a fourth of the total number of MPs), and there is no “constructive” requirement of a replacement premier waiting in the wings, countless such motions have been introduced in the Romanian legislature over the past two decades. Predictably, most of them have been unsuccessful—with two exceptions, including a motion in April 2012 that brought down the short-lived Ungureanu government and ushered in the “thermonuclear”<sup>19</sup> political cohabitation between President Băsescu and Prime Minister Ponta.

The constitution gives the president the power to designate the prime minister, although the nomination procedure is somewhat ambiguous. The Constitution requires the president to hold “consultations” with the party or, more commonly given Romania’s electoral system, with the coalition that wins the elections, but leaves it open whether the president may designate a candidate different from the ones put forth by the parties. This mechanism is continuous with the Constitution’s expressly stated vision of the president

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<sup>18</sup> See Sujit Choudhry, *Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring* (2014). The subtypes represent different arrangements within the dual executive. Semi-presidential regimes, broadly understood according to the above definition, include highly presidentialized regimes, regimes where the president has a ceremonial role, and the large in-between group of regimes that balance presidential and prime-ministerial powers. Some authors would only include the latter among semi-presidential regimes.

<sup>19</sup> The term comes from Elaine Scarry’s *Thermonuclear Monarchy: Choosing Between Democracy and Doom* (2013), though the context in which I use it is obviously different.



as a mediator and a politically neutral actor.<sup>20</sup> Yet, French experience shows the irresistible temptation, as French presidents have adamantly protected their power to choose a prime minister, thereby shaping the political landscape.<sup>21</sup> It is too soon to tell which way the Romanian practice will go. The three presidents elected under the 1991 Constitution—President Iliescu (1992-1996, 2000-2004), President Constantinescu (1996-2000) and President Băsescu (2004-2014)<sup>22</sup>—have at times claimed the right to choose the prime minister. In practice, however, they have always selected the candidate for prime minister recommended by the parties.

Conversely, the Romanian president cannot dismiss a sitting government. The gradual alienation and protracted conflict between President Băsescu and Prime Minister Tariceanu, who came into power as part of a center-right coalition in the 2004 elections, is a case in point. President Băsescu was left watching his prime minister reconfigure parliamentary support once the latter could no longer rely on the president's political forces, and form a minority government by calling upon occasional support from the center-left opposition.<sup>23</sup> The president “may” dissolve parliament only if no vote of confidence has been obtained to form a government within 60 days after the first request was made, and only after rejection of at least two requests for investiture. This

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<sup>20</sup> Article 80 (2) The President of Romania shall guard the observance of the Constitution and the proper functioning of the public authorities. To this effect, he shall act as a mediator between the Powers in the State, as well as between the State and society; Article 84 (1): (1) During his term of office, the President of Romania may not be a member of any political party, nor may he perform any other public or private office. For a discussion of the dangers of the purported neutrality of the head of state, especially in a situation of minority government when political parties shy away from the responsibility of governing, see the analysis of Weimar in Cindy Skach, *Borrowing Constitutional Designs* (2005).

<sup>21</sup> Granted, the French constitutional provision is somewhat less ambiguous. Article 8 provides that “The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.”

<sup>22</sup> The fourth President, Klaus Iohannis, was elected in November 2014 and will assume office a month later. It remains an open question how he will approach the office of the President.

<sup>23</sup> On the dangers of minority government in a semi-presidential regime, see Cindy Skach's analysis of the Weimar Republic, in Cindy Skach, *Borrowing Constitutional Designs* (2005).

mechanism, which has never been used, is the only dissolution tool in the hands of the president.<sup>24</sup> Unlike French presidents, whose power to dissolve the National Assembly does not depend on any constitutionally mandated substantive triggers, the Romanian head of state lacks discretion in this matter.<sup>25</sup> This issue did not surface in public debate prior to the first attempt to suspend President Băsescu from office, despite the fact that the country's first two presidents did not always face legislative majorities to their liking. Faced, as we shall see, with inimical prime ministers and hostile parliamentary majorities, President Băsescu repeatedly—and unsuccessfully—called for a constitutional amendment to give the head of state the discretionary power to dissolve the legislature as a mechanism of breaking institutional deadlock caused by political cohabitation.

It helps to remember that the balance of powers within the dual executive is not (only) a matter of formal constitutional framework, but a *mélange* between formal framework and its usage over time, in constitutional practice. Maurice Duverger pointed out long ago, in his classic study on semi-presidentialism, that “the interpretation of a constitution cannot be separated from the interrelationship of political forces to which it is applied. If the interrelationship varies, the structure and the functioning of the government established by the constitution vary at the same time.”<sup>26</sup> Constitutional experience from Weimar Germany to the French Fifth Republic and from Ukraine to Tunisia and Romania, has confirmed George Vedel's perceptive remark that semi-presidentialism is not a synthesis of presidentialism and parliamentarism, but an

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<sup>24</sup> This provision should be read together with the right to choose the prime minister.

<sup>25</sup> See, for instance, Art 12 of the French Constitution (1958). For a comparative analysis of the Romanian and French constitutional powers of the head of state, see Elena Simina Tanasescu, *The President of Romania, Or: The Slippery Slope of a Political System*, *European Constitutional Law Review* vol. 4 (1): 64-97 (2008).

<sup>26</sup> Duverger, see *supra* note \_\_\_\_, at 167. See also Carl Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 *Harv. L. Rev.* 801, 802 (1959) (noting the dangers of trying to interpret a constitutional text immediately after its adoption.)

*alternation* between them.<sup>27</sup> The reason is obvious: the limits of a president's influence over the sitting government become relevant only when the president cannot negotiate that influence politically, during periods of political cohabitation or, less intensely, when the president's diminished control over his parliamentary majority renders him unable to solve to his advantage the conflict with the prime minister. Otherwise, even in a "reinforced" premier-president model, such as Romania's, a president who controls the parliamentary majority can push to and beyond the limits of his formal constitutional power without fear of constitutional pushback.<sup>28</sup> The political influence of President Iliescu during the politically non-affiliated but reliably docile Văcăroiu cabinet (1992-1996) and that of President Băsescu during Boc I and II cabinets (2008-2009, 2009-2012), albeit with the caveat of a situation of minority government, was somewhat similar to that of a head of state in a presidential regime. I say "somewhat" because, perhaps surprisingly, semi-presidentialism gives the head of state options that she or he might not plausibly have in a presidential regime. Specifically, it gives the president the option not to become involved in governing, when friendly parliamentary majorities and governments would allow him or her to have as much political influence as they wish. For instance, President Constantinescu's view of the proper role of the head of state as a detached, above-the-politics statesman led him to focus on foreign affairs and rarely interfere in his government's domestic policies. By contrast to his hands-on approach during his first mandates (1990-1992, 1992-1996), President Iliescu acted likewise in a detached manner during his second term in office (2000-2004) and rarely interfered with his prime minister, Mr. Năstase. To be sure, both presidents paid a high price for their

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<sup>27</sup> Duverger, *supra* note \_\_\_\_, at 186. But see Cindy Skach, *supra* note \_\_\_\_.

<sup>28</sup> *Id.* at 172.

deferential stance. Constantinescu's detachment was particularly ill-timed in a country still recovering from the protracted encounter with communism; Iliescu's second term in office coincided with a spread of terminal corruption to all of the state's capillaries. It was against these immediately preceding two presidencies that Traian Băsescu assumed office in 2004 and, in an ever polarized political environment, partly of his own making, set out to become an "engaged president".

### **§ 3. Thermonuclear political cohabitation**

The reason why semi-presidential regimes come to a decisive test during periods of political cohabitation is not principally that political tensions within the dual executive reach their apex during such periods. Romania's post-1989 political experience has known many moments of great tension outside periods of cohabitation, such as, for instance, the conflict between President Iliescu and Prime Minister Roman over economic reform in 1991, which ended with the President bringing the miners to the capital Bucharest to bring down the government.<sup>29</sup> Rather, political cohabitations are crucial because, while each such period is different depending on a particular political configuration and on the personalities involved, the resolution of institutional conflicts that arise during those periods become entrenched and more likely to settle future controversies about institutional boundaries. This is especially relevant when the powers of the president and the prime minister are balanced, so that both have constitutional ammunition in the battle to expand their powers to the greatest extent possible.

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<sup>29</sup> For a taste, see <http://www.youtube.com/watch?v=cniYVLPYpil> (last accessed: September 2014).

It is therefore preferable for periods of cohabitation to arise after a semi-presidential system has had time to mature. The French Fifth Republic had over 25 years to find its rhythm before its first encounter with political cohabitation, and even then many students of French politics were doubtful whether the republic would survive the split within the executive.<sup>30</sup> The question of survival gains even greater urgency for a country that emerges from half a century of authoritarian rule. Reviewing Romanian constitutionalism in 1999, Tony Verheijen understandably hoped that Romania would not experience a period of cohabitation “until democracy is more deeply rooted.”<sup>31</sup>

But the timing of political cohabitations is largely—though not exclusively<sup>32</sup>—a matter of constitutional fortune. In 2004, Traian Băsescu, a former ship captain and mayor of Bucharest, narrowly won elections over the praetorian and corrupt former Prime Minister Năstase. Reelected, again by the narrowest of margins, for a second term five years later—the first president after the fall of communism to return to office for consecutive terms—Băsescu has been an active and savvy political operator. He presided over Romania’s accession to the European Union in 2007, which, even though it came later than the European integration of most of other countries in the region, save Bulgaria, was a momentous event in the country’s history. Băsescu scored important points with the country’s intellectual elite by condemning the communist regime as criminal and illegitimate and facilitated the opening of the archives of the former state police. His

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<sup>30</sup> See supra note \_\_\_\_.

<sup>31</sup> Tony Verheijen, supra note \_\_\_\_, at 213. Verheijen was right to warn, in his discussion of Romanian semi-presidentialism in 1999, that “one should... keep in mind that not all variants for relations between president and prime minister have so far been tested in Romania.”, in Robert Elgie (ed.), *Semi-presidentialism in Europe*, at 194.

<sup>32</sup> The length of the term of office is of course relevant in this context. In 2003, the Constitution was amended to extend the president’s term by one year, to five years (compared to Parliament’s term of four years). See also the reforms in French constitutionalism after the third – “long” – cohabitation, between President Chirac and Prime Minister Jospin (1997-2002).

support for judicial independence and the fight against endemic corruption, both structural and small-scale, which has been an all-pervasive challenge in Romania's transition from communism, have won him accolades in Western capitals. His many political enemies see in President Bănescu a polarizing figure with unquestionable political instincts whose survival, as tested four times (two elections and two Article 95 removal referenda, in 2007 and 2012) says more about Romanian politics than it does about his political stature and accomplishments. The political style and persona that he brought to the stage have not been conducive to institution-building of the type that Romania needed during the consolidation phase of its new democracy.

Be that as it may, the growing independence of the justice system, and the related danger that immunizing courts from political influence poses dangers to the country's oligarchs, have unquestionably occurred during Bănescu's presidency and are an essential part of the context in which Romanian semi-presidentialism held its first encounters with political cohabitation.<sup>33</sup> Unlike in Hungary's slide into authoritarianism under the Viktor Orbán government, where the constitutional reforms have been driven during the early stages by a combination of hubris and political ideology, the origins of Romania's 2012 constitutional crisis have more to do with personal interest and fear of accountability for acts of corruption. Political ideology was less relevant in the Romanian case, where two major political parties joined forces across the ideological spectrum to remove the president from office. President Bănescu had amply used the President's powers with

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<sup>33</sup> Technically, the first encounter with political cohabitation took place during President Bănescu's first term in office, after he became alienated from the prime minister of his choice, Calin-Popescu Tariceanu, who had to reconfigure his parliamentary support without the president's party, by relying on the political opposition to back his minority government. This was the context in which the first attempt to suspend the president occurred, in 2007.

respect to the appointment of judges and prosecutors and more generally in the functioning of the justice system.<sup>34</sup>

Under pressure from the European Union, the process of strengthening judicial independence began in earnest in 2005 and 2006. In 2005, new leaders were put in charge of the National Anticorruption Agency, which had been largely dormant since its establishment three years earlier. By 2008, the Agency was bringing scores of high-level politicians into courts on corruption charges.<sup>35</sup> Convictions took longer, but eventually started coming down. By early 2010, it had become apparent that the fight against corruption was making significant strides. An emblematic case was that of former Prime Minister Adrian Năstase (2000–2004), who was convicted of violation of campaign finance rules and was sentenced in January 2012 to a two-year term. His conviction sent shock waves throughout the entire political sphere, which caught up with politically influential oligarchs.

This mélange of economic and political interests, under the threat of the justice system, might explain the otherwise baffling timing of the escalation of the crisis in the summer of 2012, only two months after the arrival of Victor Ponta's government and a few months before an election for Parliament in which, according to all polls, the anti-presidential forces were sure to secure a big victory. Ponta, a former protégée of Mr. Năstase and the leader of the socialist party and the anti-Bănescu political coalition, is a young and charismatic leader who was invited by the president to form a government in

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<sup>34</sup> The relevant constitutional provisions are Art. 80 (2), Art. 133 (6), Art. 134 (1). For a study of President Bănescu's extensive use of the president's powers to appoint and remove prosecutors and judges, see <http://www.infopolitic.ro/wp-content/uploads/2011/01/Presedintele-jucator-28.01.2011.pdf>. (in Romanian) (last accessed: September 2014).

<sup>35</sup> See generally Dan Tapalaga and Daniel Morar, *Pretul adevarului. Un procuror in lupta cu sistemul* (2011) (in Romanian).

April 2012. A canny and aggressive risk-taker, Mr. Ponta leads a large socialist party built on the economic interest of a large network of local and powerful officials that had been starved by many years in opposition as a result of President Bănescu 's reelection in 2009. Ponta's deep personal animosity with the president reached an apex not long after coming into office, in the political storm surrounding the extensive plagiarism of his doctoral dissertation.<sup>36</sup> It was against this background of economic interest and personal animosity that the constitutional events unfolded.<sup>37</sup>

#### **§ 4. Dilemmas of (European) Representation**

The representation of a Member State of the European Union in the European Council, which brings together the Union's "Heads of States or Governments" (Article 7, TEU), is not self-evident in semi-presidential regimes. Not only is foreign policy a domain of shared competencies between president and the prime minister, but the special nature of the European Union defies a clear foreign/domestic policy divide. The changing role of the European Council, which is now arguably<sup>38</sup>—and perhaps regrettably<sup>39</sup>—the site for the most consequential decision-making, heightens the stakes of political disputes. The role of the European Council with the Union's institutions suggests that, at

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<sup>36</sup> The allegations were presented by the scientific journal "Nature", the same journal that also unveiled recently cases of plagiarism by public officials in Germany and Hungary. I was one of the independent experts that "Nature" asked to review the original materials in the Ponta case.

<sup>37</sup> Bruce Ackerman listed the personalization of presidentialism among arguments against it. In Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633. The same is true about semi-presidentialism.

<sup>38</sup> For a comprehensive study, see Frederic Eggermont, *The Changing Role of the European Council in the Institutional Framework of the European Union: Consequences for the European Integration Process* (2012). In the context of the recent crisis, see Uwe Puetter, *Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance*, *Journal of European Public Policy* 19:2, pp. 161-178, 2012. Also relevant is dispute regarding the Spitzenkandidat for the position of President of the European Commission.

<sup>39</sup> See Jürgen Habermas, *The Crisis of the European Union* 12-53 (2012) (criticizing "post-democratic executive federalism").



least formally, the president has the power and responsibility of representation as the head of state.<sup>40</sup> Yet, even though the European Council does not legislate, it is the site for political decisions with deep implications for domestic policy.<sup>41</sup> From a functional standpoint, such a structure of authority suggests that representatives of Member States must have a full mandate to deliberate and engage the responsibility of their governments.<sup>42</sup> This presents no difficulty in parliamentary regimes, where the office of the prime minister essentially merges form and function of representation. Things are more complicated in dual executive regimes, especially during periods of political cohabitation.<sup>43</sup>

It was, therefore, perhaps inevitable that the conflict regarding representation to the European Council would erupt as soon as the Romanian dual executive became politically split.<sup>44</sup> Two months after coming into office, Prime Minister Ponta, with the support of Parliament, claimed the mandate to represent the country at the June 28/29, 2012 meeting of the European Council. The president refused on the basis that the head of state had always led the Romanian delegation after the country joined the EU in 2007. A conflict between public authorities having arisen, the Constitutional Court delivered a

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<sup>40</sup> Article 91: “The President of Romania represents the Romanian State” (Art 91)

<sup>41</sup> As the Polish Constitutional Tribunal pointed out in a decision on the same question of the representation in the European Council, “Poland’s relations with the European Union defy the constitutional boundaries of ‘foreign policy’ or ‘internal affairs’.” 78/5/A/2009, decision of 20 May 2009, Ref. No. Kpt 2/08, available online at [http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt\\_02\\_08\\_EN.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf).

<sup>42</sup> The Constitution gives the government and its prime minister the responsibility to “implement the ... foreign policy of the country” (Art. 102).

<sup>43</sup> Such tensions are likely to flare up during periods of cohabitation, especially in jurisdictions such as Poland or Romania whose constitutions do not contain sufficiently detailed rules regarding the respective countries’ participation in the European Union. Contrast this approach to the recent constitutional amendments in Finland, which came into effect in 2012. The new Art 66(2) stipulates that “The Prime Minister represents Finland on the European Council.” For a helpful study, see Tapio Raunio, *Semi-Presidentialism and European Integration: Lessons from Finland for Constitutional Design*, *Journal of European Public Policy*, 19(4): 567–84.

<sup>44</sup> There had been tensions before, between president Bănescu and Prime Minister Tariceanu, but they did not receive an answer from the Constitutional Court.

judgment on June 27, one day before the meeting of the European Council in Brussels. In it, a divided Constitutional Court adopted the formal approach to the dilemmas of representation.<sup>45</sup> The Court contrasted the grand, strategic policy decisions made in the European Council and their subsequent implementation in legislative acts. Since Article 91 of the Constitution gives the president primary responsibility to represent the country in foreign affairs, the Court held the prime minister could head the Romanian delegation to the European Council only on the basis of an express mandate from the head of state. By implication, if the president refuses to mandate the prime minister, the latter is personally left without any means of access to the European institutions, since it would be ministers of his or her cabinet, rather than the prime minister in person, who would exercise legislative prerogatives in the Council of Ministers. Unlike the Polish Constitutional Tribunal, which offered a far more nuanced decision when faced with a similar question and eventually ruled in the favor of the prime minister,<sup>46</sup> the Romanian constitutional judges papered over these implications of their analysis.

The judgment of the Romanian Constitutional Court gained in clarity what it lacked in depth. The holding was indisputable: the president represents the country in the European Council. Prime Minister Ponta's reaction to this constitutional loss offered a first inkling that the political struggles to come might go beyond political conflict during cohabitation, and challenge the very constitutional framework of the state. After accusing the constitutional judges of bias in favor of the president, the prime minister complied with one aspect of the Court's judgment, namely the requirement to demand an express

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<sup>45</sup> Decision no. 683/27 June 2012. Available online, in Romanian, at [http://www.ccr.ro/files/products/D0683\\_12.pdf](http://www.ccr.ro/files/products/D0683_12.pdf).

<sup>46</sup> See *supra* note x. Finland recently adopted a similar solution, by way of constitutional amendment. There are of course differences between all these semi-presidential systems but the comparative analysis remains very useful problem, after one factors in those differences.

mandate from the president. Having been denied such a mandate, Prime Minister Ponta chose nevertheless to travel to Brussels as head of the Romanian delegation. Despite media frenzy surrounding the political drama, official notification of the constitutional decision was not published in the Official Gazette (*“Monitorul Oficial”*) before the meeting of the European Council. This delay fueled speculation given that, on the same day as the decision of the Constitutional Court, an apparently innocuous order—emergency ordinance, no less—transferred the Official Gazette from the authority of Parliament into that of the Executive.

§ 5. *Constitutional Blitzkrieg: Unraveling the Constitutional State in Four Days*

Future developments unfolded with dizzying speed. On July 3, in an extraordinary session for which MPs were summoned back from their summer recess, the new parliamentary majority as it resulted from mid-term political realignment took action to replace the presidents of the two chambers of Parliament as well as the Ombudsman. The replacement in the chambers gave control to the parliamentary agenda and committee assignments that comes with that territory. The new president of the Senate would be first in line for interim president. Changes in the Ombudsman’s office were at first harder to understand since that office had never before been the object of political contention and, perhaps relatedly, its previous occupants had not distinguished themselves in the position. True, Parliament has the right to replace the Ombudsman for violation of the Constitution or other laws. But the charges against the current occupant fell far short of “illegal

action,”<sup>47</sup> not to mention their lacking of urgency that would warrant parliamentary action during a summer session.<sup>48</sup>

The significance of these changes lay elsewhere. Under Romanian law, the Ombudsman alone has standing to challenge *ex ante* the constitutionality of emergency ordinances adopted by the executive (“*ordonanțe de urgență*”).<sup>49</sup> Such challenges are the only timely means of preventing these ordinances from producing legal effects.<sup>50</sup> Indeed, in the coming days and weeks, the interim Ombudsman declined to challenge any of the myriad emergency ordinances, despite repeated calls from civil society.<sup>51</sup> Given the Constitutional Court’s longstanding practice of not reviewing the urgency of the ordinances, which it deems to be a political question,<sup>52</sup> changes in the Ombudsman’s office effectively immunized emergency ordinances from judicial review and gave the government a free hand to bypass the other political institutions and introduce far-reaching changes in the legal system.<sup>53</sup>

And the government obliged. On July 4, the government further immunized from judicial review the measures of the state institutions under its political control. An

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<sup>47</sup> Law no. 35/1997.

<sup>48</sup> The immediate reason for replacing the Ombudsman was his constitutional challenge to an Emergency Ordinance that transferred the authority over the Romanian Cultural Institute from the authority of the President to that of Parliament. The Institute had been run by prominent philosopher and public intellectual Horia-Roman Patapievi, perceived as close to President Băsescu. However sound or unsound, the decision to challenge the validity of the Ordinance surely fell within the Ombudsman’s discretion and did not amount to “illegal action” within the meaning of the relevant statute.

<sup>49</sup> Art. 13 (1,f) Law no. 35/1997.

<sup>50</sup> While Parliament eventually must approve these ordinances, and citizens can challenge them in court, both of these mechanisms are time consuming that by the time they can be deployed the emergency ordinance will typically have long come into effect and started altering the legal order. It goes beyond the purpose of this paper but the significance of executive ordinances in the context of the separation of powers should also be considered in a broader European and historical perspective. See, for instance, Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010) 61-90.

<sup>51</sup> Cite.

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<sup>53</sup> There are limits to area in which executive can enact these measures, but the Court hasn’t been policing them effectively. See Decision no. 15/ 25 January 2000 (Constitutional Court); Decision no. 255/ 11 May 2005; Decision No. 544/ 28 June 2006 (Constitutional Court).

emergency ordinance stripped the Constitutional Court of jurisdiction to hear challenges against resolutions of Parliament (as opposed to statutes), such as the controversial resolution replacing the Ombudsman.<sup>54</sup> This became a template for the cabinet's *modus operandi*. The July 4th ordinance was substantially identical to a statute enacted in Parliament in late June 2012, whose constitutionality had been challenged *ex ante* before the Constitutional Court on June 27, 2012. The cabinet offset the risk that the Court might invalidate the statute by sheltering the amendments in the form of (re-)enactment as emergency ordinance whose constitutional validity only the Ombudsman could formally challenge *ex ante* coming into effect.

Once executive ordinances and parliamentary resolutions became immune from judicial review, the parliamentary majority moved on July 5 to the core of its actions: the procedures for suspending President Bănescu from office. The Romanian Constitution provides two mechanisms for removal of a sitting president. One mechanism is impeachment for high treason. According to Article 96, after a two-thirds majority vote in Parliament, which has the effect of a *de jure* suspension of the president, the jurisdiction for the trial on high treason charges belongs to the High Court of Cassation and Justice. A second mechanism is suspension from office (Article 95).<sup>55</sup> The president is suspended from office, on charges of having committed “grave acts infringing upon constitutional provisions,” after an absolute majority vote of the MPs. In 2007, on the occasion of the first attempt by Parliament to suspend President Bănescu<sup>56</sup>, the

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<sup>54</sup> Executive Ordinance nr.38/2012 amending Law 47/1992.

<sup>55</sup> I follow Choudhry's suggestion and refer to impeachment only in situations when a trial is involved. The official translation of the Romanian Constitution into English mentions suspension from office (Article 95) and impeachment (Article 96).

<sup>56</sup> In April 2007, Parliament took for the first time under the 1991 Constitution the extraordinary step of impeaching the president under Art 95.

Constitutional Court interpreted Article 95 as a legal sanction, rather than an instrument of ordinary, electoral politics. It held that suspension procedures should be initiated only when the president commits “grave acts” against the constitution, rather than whenever a political party or coalition has sufficient votes to get such a measure through Parliament.<sup>57</sup> Grave acts include, among others, interference with the activities of the public authorities, acts that disturb the constitutional order or seek constitutional upheaval.<sup>58</sup> The constitution requires the Constitutional Court to review the charges against the president, and presumably certify that, if proven, they amount to grave acts within the meaning of Article 95, but—importantly—the opinion of the Court is advisory only. This essentially means that, in a situation of political cohabitation, the parliamentary majority has the capacity to initiate Article 95 proceedings against the sitting president without any decisive check from other institutions. Except, that is, a referendum of removal that must be held within 30 days after the vote in Parliament. Little surprise that, on July 5, the same day when charges were read against President Băsescu in Parliament, the executive issued an emergency ordinance that made a simple majority sufficient to validate any referendum, including the referendum for removal under Article 95.<sup>59</sup>

## § 6. Constitutional Culture and the Political Reading of Article 95

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<sup>57</sup> Opinion no. 1/ 5 April 2007.

<sup>58</sup> Id.

<sup>59</sup> Emergency Ordinance amending Law 3/2000 on the Organization of Referenda. Finally, and, as we will see, relatedly, that same day the prime minister replaced the leadership of the National Institute of Statistics. Such an apparently innocuous move reflected, once again, a high degree of planning because the Institute has the official census data needed to update or otherwise establish discrepancies in the permanent electoral laws on the basis of which quorum is determined. At that time, in the summer of 2012, the country had been through a yearlong census that was completed but whose final results had not yet been released.

It has become impossible to study semi-presidentialism of the Romanian variety without a close look at where Article 95 fits within the constitutional architecture.<sup>60</sup> The contrast between the legal and the political interpretations of the mechanism of suspension of the president tracks the institutional conflict within the dual executive, and mirrors different visions of the overall constitutional regime. With support from the Constitutional Court, the president has advocated a narrow legal interpretation that makes the mechanism available only in limited circumstances. The prime minister and the legislature have supported a political interpretation that essentially provides a tool for removing the president in the hands of a parliamentary majority anytime during periods of political cohabitation or minority government. Since the president lacks an equivalent tool, the political interpretation tips the scale of Romanian semi-presidentialism in the prime minister's direction, further reinforcing the prime minister's role and de-presidentializing the regime. Perceived out of context, this direction of development is understandable. Nevertheless, as we shall see, adopting the broad, political reading—at least as deployed by parliamentary majorities in 2009 and 2012—comes at a price that might be just too high for Romanian constitutionalism.

The contrast between the legal and the political readings of Article 95 came in stark display during the 2012 constitutional crisis.<sup>61</sup> The first set of charges against the

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<sup>60</sup> Article 95: Suspension from Office. (1) In case of having committed grave acts infringing upon constitutional provisions, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in joint sitting, by a majority vote of Deputies and Senators, and after consultation with the Constitutional Court. The President may explain before Parliament with regard to imputations brought against him. (2) The proposal of suspension from office may be initiated by at least one third of the number of Deputies and Senators, and the President shall be immediately notified thereof. (3) If the proposal of suspension from office has been approved, a referendum shall be held within 30 days, in order to remove the President from office

<sup>61</sup> See Vlad Perju, *Lectia de drept: Analiza constitutională a solicitării de suspendare a Președintelui* (available at <http://www.contributors.ro/editorial/lectia-de-drept-analiza-constitucionala-a-solicitarii-de-suspendare-a-presedintelui/>) (accessed September 10, 2012).

president referred to the “usurpation” of the powers of the prime minister. The parliamentary majority accused the president of overreaching into spheres of competency that are constitutionally allocated to the cabinet. This phenomenon—of executive reach or overreach, depending on one’s views—is very familiar and every semi-presidential regime since De Gaulle’s times can tell the story using its own historical particulars. The mechanism is always the same: the president extends his or her influence by relying on the constitutional acquiescence of a prime minister over whose supporting parliamentary majority the president has control.<sup>62</sup> In post-communist Romania, presidentialization peaked during the first President Iliescu mandates (1990-1992 and 1992-1996) and during President Băsescu’s Boc cabinets: Boc I (2008-2009) and, especially, during Boc II (2009-2012). Yet the political influence of the president has at least as much to do with the prime minister’s political standing, and general strength, than with that of the president himself. However strong a president’s desire to influence the course of policy might be, the prime minister has an important say over whether the cabinet will become a medium for the implementation of those policies. That decision is complex but, fundamentally, it involves a political calculation of the strength of the relation between the president and the political majority on which the executive relies for parliamentary support. The charge of “undue” influence on the executive cannot be a proper legal basis for suspension under Article 95 because the exact boundary of how much influence is “due” shifts constantly depending on the political landscape.

The second charge against the president was more openly political, and targeted his support of the government’s austerity measures. This charge, which the parliamentary

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<sup>62</sup> It was not difficult to anticipate this evolution of the French Fifth Republic given de Gaulle’s imprimatur. See generally Carl Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 *Harv. L. Rev.* 801, 814 – 818 (1959)



indictment catalogued rhetorically as a “violation of the fundamental rights of citizens,” refers to President Băsescu’s support of the harsh austerity measures taken around the time of the 2008 economic crisis. Justified to the public at the time as necessary to withstanding the impact of the global crisis on the Romanian economy, these reforms had a debilitating effect on the population.<sup>63</sup> Against the background of widespread corruption and chronic misuse of public funds, the austerity measures contributed, albeit not immediately, to the growing unpopularity of President Băsescu’s center-right coalition. In the context of the parliamentary action against the president, they seemed designed to draw legitimacy for that action from the wave of protests that brought down political leaders across Europe. The austerity measures were largely consistent with the political ideology of the governing coalition, and presumably the very ground on which the center-right coalition was elected into office. However, the austerity measures came with the imprimatur of the European Union and, as such, were supported by political parties on both parts of the political spectrum.

But did policies amount to “grave acts against the constitution” within the meaning of Article 95? That was constitutionally relevant to the question on which the Constitutional Court had the duty to weigh in. The Court’s task should not have been too burdensome. In 2007, the Court construed Article 95 as a legal sanction, rather than an instrument of ordinary electoral politics, and accordingly dismissed as constitutionally insufficient the charges brought by the parliamentary majority against President Băsescu . However, in the summer of 2012, constitutional judges faces a serious dilemma that went beyond the mere reaffirmation of the Court’s 2009 precedent. Consistent with the fast

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<sup>63</sup> A 25 percent cut across the board, albeit temporary, of all salaries of public employees and retirements, although the Constitutional Court had deemed the latter measure unconstitutional. Decision No. 872/ 25 June 2010.

pace of the constitutional blitzkrieg, Parliament gave the Constitutional Court an unpalatably short deadline—24 hours—in which to produce its advisory opinion. By comparison, the Court had weeks to provide a similar opinion in 2007.<sup>64</sup> The dilemma was whether the Court should deliver the opinion within the set deadline, or, rather, decline doing so and ask Parliament for an extension? The Court's handling of this matter, and its attempt to calm the political waters and lower the constitutional stakes without putting itself in political peril, offers a lens through which to approach the institutional self-understanding of this critically important actor in the unfolding of the crisis.

Suppose the Court had requested Parliament to extend the 24-hour deadline. Suppose further that the request would have been denied and Parliament proceeded with the suspension procedures according to its initial timeline. Presumably, under the recently enacted amendments to Law 47/1992, the resolution of Parliament to proceed, as well as others adopted within the Article 95 proceedings, would have been immune from constitutional challenge. No other court in the land would have had jurisdiction to hear a constitutional challenge to that decision of Parliament. That could only have changed if the executive ordinance stripping the Court of jurisdiction had been deemed unconstitutional. But since only the Ombudsman could challenge its constitutionality *ex ante*, and the newly appointed Ombudsman showed no such inclination, the ordinance had to wait for an *ex post* challenge before ordinary courts. That process was too time-consuming to be adequate in these circumstances. By the time the Constitutional Court would have had the opportunity to strike it down and reclaim jurisdiction over the resolutions of Parliament, the country would have long gone down the path of no return.

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<sup>64</sup> See Opinion no. 1/ 5 April 2007.

By then the president would have been suspended, a dismissal referendum scheduled and an interim president in place with full control—or at least authority—over the country’s armed forces. From this perspective, the Court’s refusal to meet the 24-hour deadline imposed by Parliament would have achieved the opposite of the judges’ goals, namely it would have heightened the constitutional stakes considerably by making the Court as the only obstacle in a seemingly inevitable course of events. Thus, the Court’s decision to conform with the Parliament’s request and deliver the opinion—on July 6—within 24 hours, was a strategy to lower the stakes and diffuse political pressure. That decision to deliver the opinion was not tantamount to a sign of buckling under political pressure, though under the circumstances it was that too, but the outcome of strategic and quite lucid calculation on the part of constitutional judges about a highly volatile political situation.

The Court’s advisory Opinion, delivered on July 6<sup>th</sup> and under pressure that led the judges to call upon the Council of Europe for help to safeguard its independence,<sup>65</sup> is a balancing act.<sup>66</sup> In substance, and as expected for the reasons laid out above, the Court dismissed the charges against the president as falling short of “grave acts against the constitution” within the meaning of Article 95. Nevertheless, the judges chastised President Băsescu for his failure to be neutral and act, as the Constitution requires, as “a mediator between the Powers in the State, as well as between the State and society.” (Art 80 (2)).

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<sup>65</sup> See Venice Commission Study no. 685/2012, para. 61-66 (available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)026-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx)) The response of the President of the Venice Commission is available here: <http://www.venice.coe.int/webforms/events/?id=1557>. On the day of the deliberations, one of the Court’s judges reportedly received death treats.

<sup>66</sup> Advisory Opinion No 1/ 6 July 2012.

The opinion did not include a final paragraph summing up the Court's analysis, as the Court's opinions typically do, which added to the sense that the opinion was strangely inconclusive. The reasons why this paragraph is lacking are unclear. Perhaps the constitutional judges rushed to meet the deadline, or they were divided about the matter, or they thought that such a concluding paragraph would look too much like a judicial holding, which would have been inappropriate in an advisory opinion, or, they thought such a conclusion obvious from the foregoing analysis.

Despite the exceptional circumstances, the Court's decision to issue the advisory opinion gave an imprimatur of constitutional normality to the fast-paced political developments. In both substance and form, its ambiguities come across as understandable, perhaps a reflection of disagreement among the judges, but also as politically prudent given the circumstances. The unfolding of events showed that a more assertive intervention on the part of the Court might have backfired. Not only did the Court's advisory opinion not alter the legislative proceedings, which resulted in a vote to suspend the president on July 6, the very same day the Court issued its advisory opinion, but in blatant disregard of the Constitutional Court, the parliamentary debate and vote were already underway by the time then the Court notified the legislature of its opinion.

Article 95 has become an especially appealing mechanism for releasing political pressure when tensions within the dual executive reach a boiling point. Having withheld from the president the power to dissolve Parliament, the constitution is interpreted as having given to the legislature a tool to break political deadlock in its favor. If the constitutional structure does—or should—continue to encapsulate a fear of an all-powerful head of state, the political interpretation of Article 95 is to be welcomed as a

tool for preventing the presidentialization of the semi-presidential regime and for reinforcing the premier's role within the executive. Still, there are costs. First, the constitutional practice developed against the constitutional interpretation of the Constitutional Court. Second, the suspension mechanism is not risk-free. In both situations when it has been deployed, it triggered full-fledged constitutional crises, in which the parliamentary majority escalated institutional conflict and added to the volatility of the political situation.

And why, exactly, do semi-presidential regimes need mechanisms to break the institutional deadlock? Deadlock, to be sure, is not the preferred constitutional state of political institutions. But in semi-presidential regimes—just as in presidential regimes, for that matter—deadlock results from one of the possible electoral permutations, where political forces fail to operationalize the outcome of elections that do not give to any one political party or coalition a mandate to turn their political program into policy. In a semi-presidential regime, institutional deadlock is where political cohabitation ends up in the worst-case scenario. From that perspective, the need for an easily available way out of institutional deadlocks must be balanced against the reality of political cohabitation. It is understandable why political actors might want such a way out, but it is less clear why they should have what they want. The virtue of a semi-presidential constitutional regime, at least in theory, is to make political actors responsible, to socialize them into cooperating with one another for the public good when the sovereign people has not bought into the entirety of any one political program. My point here is not that institutional deadlocks have some unacknowledged virtues. Rather, it is that there should be no *easy* way out because, whenever such an exit strategy is available, that mechanism

will be abused in an unwanted political cohabitation. And aren't all political cohabitations unwanted?

A solution consistent with the spirit of accommodation and flexibility that characterizes semi-presidential regimes, at their best, is to provide a way out—though not an *easy* way out—of political cohabitations turned deadlocks. While periods of cohabitations are inevitable in the life of a semi-presidential regime, they should not become institutional deadlocks. The solution of constitutional design might be to tweak Article 95 along the lines of a mechanism that exists in the Austrian constitution.<sup>67</sup> In this situation, should the president survive the referendum of removal, Parliament would automatically be dissolved and new elections called within a specified period. Such a mechanism, which allows Parliament to break the deadlock but only at a potentially very high price, rebalances the powers within the dual executive. Rather than politically immunize the abuse of one institution—Parliament—as the political interpretation of Article 95 does, this proposed solution would rebalance the institutional equilibrium between the president and the parliamentary majority that supports the premier by sanctioning abusive exercise of constitutional powers on both sides. A possible variation on this solution of institutional design is to give the president who has been successfully returned in the dismissal referendum a window—say, between one and two weeks—in which to decide if he or she wants to dissolve Parliament and call early elections.

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<sup>67</sup> Art 60 (6), Constitution of Austria (“Before expiry of his term of office the Federal President can be impeached by referendum. The referendum shall be held if the Federal Assembly so demands. The Federal Assembly shall be convoked by the Federal Chancellor for this purpose if the National Council has passed such a motion. The National Council vote requires the presence of at least half the members and a majority of two thirds of the votes cast. By such a National Council vote the Federal President is prevented from the further exercise of his office. Rejection of the impeachment by the referendum holds good as a new election and entails the dissolution of the National Council (Art. 29 para 1).”

Another solution of institutional design, proposed by the Venice Commission, is to make the opinion of the Constitutional Court under Article 95 mandatory, rather than advisory.<sup>68</sup> Without better institutional tuning, this proposal creates more problems than it solves. It overtaxes the Court by giving it great responsibility at a time of intense political polarization. At best, it makes the Court the object of political attack, diminishes its legitimacy capabilities, and weakens its capacity to perform its functions with credible claim to independence and neutrality. At worst, this proposal creates the danger that, *in extremis*, political actors will bypass the constitutional avenue altogether and act extra-constitutionally. Still, if the Court were empowered to issue mandatory review under Article 95, in my view it would be highly recommended to include a notwithstanding clause. The clause would give the Court jurisdiction to assess whether the conditions set by Article 95 have been met, that is, if the president's actions amount to "grave facts," but Parliament could overrule the Court by a 2/3 vote, followed as in the current system by a referendum. The super-majority requirement would be sufficient to take the suspension mechanism outside of the regular electoral cycle.

### **§ 7. Prudence and Jurisprudence in the Constitutional Court**

The Constitutional Court's decision to meet an unreasonably short deadline in delivering the advisory opinion under Article 95 has already underscored the complexity of the environment in which the Court had to interpret the Constitution and uphold its supremacy. In the days after the vote in Parliament to suspend the president and before

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<sup>68</sup> See Venice Commission Study no. 685/2012, para. 78 (available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)026-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx)) (the report of the Venice commission calls for the charges to be settled by "a court," rather than specifically the Constitutional Court. However, given the nature of the sanction and existing practice, the Constitutional Court is the most likely forum in which such charged could be settled).

the constitutionally mandated referendum of removal, scheduled for July 29, the Court moved to the center of the political stage. Its web of constitutional decisions, with their rather idiosyncratic combination of prudence and jurisprudence, recast the framework in which the struggle for semi-presidentialism, and constitutionalism more generally, would have to unfold.

The Court's first acted to protect the integrity of its jurisdiction, a matter it deemed especially important during the "current political context."<sup>69</sup> The judges struck down as unconstitutional the amendments that put resolutions of Parliament outside its jurisdiction.<sup>70</sup> As we have seen, the executive had sought to immunize the statute from an *ex ante* constitutional challenge by reenacting it in the form of an emergency decree. The logic behind stripping the Court of jurisdiction was that the constitution delegates to Parliament the enactment of "organic statutes" on jurisdictional matters. Since it was Parliament that expanded the Court's jurisdiction over parliamentary resolutions,<sup>71</sup> so, it was argued, Parliament could limit that jurisdiction. The Court was not convinced. It held that limitations on the Court's jurisdiction follow a different constitutional logic than granting jurisdiction over acts that previously had not made the object of judicial review. The Court's reasoning, with its emphasis on how the expansion of judicial review is tantamount to a strengthening of the supremacy of the constitution, might suggest an old-fashioned constitutional turf war. But the decision is more complex. The Court recalled its own practice of submitting only some resolutions of Parliament to judicial review. Since legislators often use resolutions for routine business, the Court had introduced a doctrinally significant distinction between resolutions that impact "values, rules or

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<sup>70</sup> Decision no. 727/ 9 July 2012.

<sup>71</sup> Art.I (1), Law no. 77/2010.



constitutional principles” or the “organization or functioning of the state authorities and institutions.”<sup>72</sup> The distinction had a dual role: it protected the Court’s own docket from becoming overburdened as well as the legislature’s freedom to organize its internal affairs as it deemed fit, by exercising judicial review only over resolutions that fell within the first category.

Yet, the distinction between resolutions that impact “values, rules or constitutional principles” and those that do not is not as obvious or natural as the Court’s formal language would suggest. It is, rather, a matter of interpretation as the constitutional judges demonstrated in answering the constitutional challenge to the resolutions that replaced the Ombudsman and the presidents of its two chambers of Parliament. Its decisions in those cases are a textbook example of judicial prudence, by relenting on the particulars of the cases at hand after having reclaiming its jurisdiction from Parliament.<sup>73</sup> The judges found the resolutions subject to judicial review to be “individual,” rather than “normative,” acts and, as such, to fall outside their powers of review.<sup>74</sup> The resolutions were “personnel decisions” that did not involve “values, rules or constitutional principles.”<sup>75</sup> Dissenting judges vehemently contested these conclusions as departure from precedent.<sup>76</sup> As they pointed out, quite convincingly, the Court had previously assumed jurisdiction not only over resolutions relevant to any “values, rules or constitutional principles” but also over resolutions with an impact on the “organization or

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<sup>72</sup> The Court’s own interpretation of its jurisdiction is important. In the aftermath of this judgment, Parliament passed another amendment to the Statute of the Constitutional Court that essentially codified the court’s own interpretation of its jurisdiction. The Court struck down that amendment as unconstitutional on the basis that Parliament may not impose limitations on the Court even when those limitations are similar to the limitations that the Court had imposed on itself.

<sup>73</sup> Decisions no. 728 and 729/ 9 July 2012.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Three dissenting judges authored the separate opinion, available here (in Romanian): [http://www.lege-online.ro/lr-DECIZIE-728-2012-\(139590\).html](http://www.lege-online.ro/lr-DECIZIE-728-2012-(139590).html).

functioning of the state authorities and institutions.”<sup>77</sup> In the view of the dissenters, the challenged resolutions fell squarely within the former category and, therefore, within the Court’s jurisdiction.

While the dissenting judges had a point, the Court’s *modus operandi* was, once again, more prudential than jurisprudential. The majority sought to lower the political and constitutional stakes. Consider, for instance, the effect of a judgment striking down the resolution that replaced the president of the Senate. Since the Constitution makes the president of the Senate interim president after Parliament’s vote under Article 95, the Court’s judgment would have reinstated the former president of the Senate, revoked the mandate of the current interim president—who, incidentally, had taken office on the very same day that the Constitutional Court delivered its judgment—and appointed a newly vacated interim presidency of the state to the just re-instated president of the Senate. From a prudential, strategic standpoint it is easy to imagine judges’ fears that the political developments could not be rolled back, that the Court’s judgments risked being defied.

To be sure, the prudential key does not explain the Court’s interventions during the crisis. In fact, prudential decisions were deployed strategically, in order to allow the Court to choose its battles. And choose it did. By far the most consequential decisions in which the Court acted decisively, involved, first, the executive’s practice of issuing emergency ordinances “in the mirror” and, second, the referendum judgment. With regard to the former, the judges criticized—in the context of the executive decree that placed resolutions of Parliament outside its jurisdiction—the “government’s abusive attitude vis-à-vis the Constitutional Court”<sup>78</sup> and called the practice of enacting

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<sup>78</sup> Decision no. 727/ 9 July 2012.

ordinances “in the mirror” a tool for the erosion of the supremacy of the constitution. The Court reaffirmed its jurisprudence that new normative acts, whatever their legal form, cannot produce legal effect if they re-enact in substance provisions that the Court had already struck down as unconstitutional. The jurisprudential impulse behind the holding is understandable from a Kelsenian jurisprudential standpoint according to which the legal space is normative homogenous. A legal norm cannot exist in that space—that is, it cannot produce effects—if it violates the hierarchically superior statement of the norms of validity. However, among the difficulties of this conception of the constitutional realm is that of operationalizing in everyday legal practice. At the level of practice, procedural rules such as those regarding standing or jurisdiction can stand in the way of decision-makers ruling substantively on the validity of specific legal norms. The case before the Constitutional Court is a case in point. In that case, the executive ordinance was enacted while an *ex ante* constitutional challenge was pending before the Constitutional Court. Thus, contrary to the Court’s claim, the statute could not have been deemed unconstitutional at the time when the emergency ordinance was adopted. It is true that allowing the executive’s practice to stand creates a vicious constitutional circle. The enactment of executive ordinance “in the mirror” together with immunizing executive ordinances from constitutional challenges creates a constitutional black hole in which unconstitutional provisions produce legal effects—something that is legally abhorrent from the perspective of the conception presented above and to which Romanian judges, good old Kelsenians, certainly adhere. But it is more constitutional wishful thinking than a doctrinal solution to claim that statements of constitutional validity instantly pervade the entirety of the constitutional space, depriving all similar norms of legal effect. This

under-theorized constitutional space was an Achilles' heel and, as we shall see, much energy was spent debating whether it would be exploited for political benefit.

### § 7. *The Referendum Judgment: The Double-Majority Requirement*

Since popular support for President Băsescu had eroded significantly during his eight years in office, his only real chance of remaining in office depended on the rules regarding the quorum necessary to validate the referendum under Article 95. Subsequent to the first attempt at ousting him, in 2007, these rules had been the object of a protracted political battle. Presumably fearful of the actions that the new parliamentary majority might undertake, the short-lived Ungureanu government (February 2012-May 2012) raised the participation threshold to 50-percent plus one of the citizens enrolled on the permanent electoral lists (thus, a double majority).<sup>79</sup> On 26 June 2012, as the new parliamentary majority was gearing up for the constitutional changes, the legislature amended back that same provision of the referendum law requiring only a majority of the votes cast (a single majority).<sup>80</sup> That amendment was challenged in the Constitutional Court.

In Judgment no. 731/10 July 2012, the Court held that the double majority was a constitutional requirement. Anything less, the Court argued, would violate an “essential” condition of representativeness for giving constitutional effect to the will of the people as the ultimate sovereign. The idea that a popular decision is not representative unless it can be reasonably construed as the will of the majority is easy to grasp. The 1991 Constitution itself was subject to the same double majority requirement, and it was

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<sup>79</sup> Law no. 62/2012 privind aprobarea Ordonanței de urgență a Guvernului nr.103/2009 pentru modificarea și completarea Legii nr.3/2000

<sup>80</sup> For convoluted legislative history, see report of Venice Commission, supra note \_\_\_\_.

similarly amended in 2003. And yet, however well grounded in constitutional theory, the double majority requirement was not entirely consistent with the Court's previous decisions. In 2007, the Constitutional Court ruled on a similar amendment to the referendum law, since the referendum of removal held that year was organized under a last-minute amendment that allowed the removal of the president by a simple majority of votes cast (the single majority rule). In a decision that is not a model of clarity, the Constitutional Court left open the possibility that Parliament may decide in the future that a referendum could be valid with less than a 50-percent turnout.<sup>81</sup> Importantly, the Court did not interpret the constitution to impose substantive limits on Parliament's freedom to enact legislation regarding the validity quorum in popular referenda. The Court confirmed this interpretation when certifying the result of the 2007 referendum even though the turnout was only 44-percent of registered voters.<sup>82</sup> While the issue of certification was purely formal in that particular context, since 74-percent of the participants in the referendum had voted to return the president into office, the Court certified the results of the referendum, rather than nullifying it on grounds of failure to meet the participation quorum.

Hence, the Court's holding in Judgment no 731/10 July 2012, was an unexpected departure from precedent for which the judges offered no explanation.<sup>83</sup> Importantly, this holding effectively sealed the fate of the attempt to oust the president. With only three weeks of preparing the organization of the referendum, in the hot summer month of July and with a great number of Romanians working or living abroad—approximately 3

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<sup>82</sup> Decision no. 5/2007.

<sup>83</sup> See Kim Lane Scheppele and Vlad Perju, Separating Law and Politics in Romania, <http://krugman.blogs.nytimes.com/2012/07/12/guest-post-separating-law-and-politics-in-romania/> (accessed July 10, 2014).

million—the Court’s decision on a double majority requirement essentially handed the president a winning strategy: to boycott the referendum.<sup>84</sup> When the referendum returns showed 87.5-percent in favor of dismissing the president, all the attention turned to the question of the quorum. After some equivocation, the Constitutional Court concluded that it had not been reached. 46.24-percent of citizens enrolled on the permanent electoral lists voted in the referendum, the quorum had not been met, and therefore the results of the referendum could not be validated. The president could return to office.

Nevertheless, this outcome—the president’s return—is not as straightforward as it appears, and the significance of the 2012 constitutional crisis for Romanian semi-presidentialism and constitutionalism requires putting that outcome in the context of constitutional alternatives open to the political actors. Intensely aware of its implications, the political forces opposed to President Bănescu welcomed the Court’s decision on the double majority with dismay. Their initial impulse was constitutional disobedience. Two ministers in the Ponta government, with direct responsibility in the organization of the referendum, announced in public that the double-majority threshold did not apply to the July 29 referendum. The basis of that pronouncement was an Emergency Ordinance, enacted by the cabinet on July 5, which amended the referendum law by—again—dropping the turnout requirement, and making a simple majority of votes cast all that was needed for a referendum to be valid. The strategy at work is the familiar one: enactment of an emergency ordinance replicating the substantive provisions of a legislative statute whose validity was challenged in an action pending before the Constitutional Court at the

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<sup>84</sup> Against this background, the anti-Bănescu coalition mobilized and deployed all their resources. The pressure on their coalition’s regional leaders to report very high returns was tremendous. In a remarkable showing of independence, one year after the referendum, prosecutors indicted high public officials in the Ponta government for illegalities in the organization of the referendum.

time when the emergency ordinance was enacted. Purely formally, such an emergency ordinance would be valid unless challenged before the Court. Since only the Ombudsman had standing to challenge the ordinance *ex ante*, and since the Ombudsman's office declined to bring any such challenges, the emergency ordinances remained in effect. While the Court's decision of July 10 is broad in its language, the legal norm before the Court on that occasion was the amendment to the statute, not the emergency ordinance. Hence, the cabinet members pointed out that the emergency ordinance had not been the object of constitutional review, and therefore remained valid law. Despite the Court's harsh words about the practice,<sup>85</sup> it was conceivable, at that point in the unfolding of the crisis, for the cabinet and the parliamentary majority to hide behind constitutional ambiguity and push through with their plan to oust the president. Overriding the Court's interpretation would have no doubt been controversial, but the political climate was as prepared as it ever could be to withstand such an override. There was enough ambiguity in the constitutional doctrine, and the executive ordinance provided sufficient cover that, given the fast pace of the events and considering the Court's previously prudential attempts to lower the political stakes, that Court's pronouncement on the double-majority could conceivably have been sidelined. Why, then, were the bypass constitutional mechanisms not deployed? Was constitutional design or constitutional culture decisive in averting this "nuclear" option, or should the causes for resolution of the conflict, and ultimately of the president's return into office, be sought elsewhere?

#### § 8. *The Foundations of Constitutionalism: Domestic and European*

It is necessary, but insufficient, to point to the Constitutional Court's decision on the

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<sup>85</sup> See *supra* at \_\_\_\_.

double majority requirement, together with the failure to meet the quorum requirements in the referendum for dismissal, as the reason for the president's return to office. As we have seen, the initiators of the constitutional blitzkrieg had previously shown readiness to bend or break the constitutional rules on a number of occasions: the unrelenting political and institutional pressure on the Constitutional Court and its members, combined with the dismissal of the Court's advisory opinion under Article 95 and the violation of its Court's decision regarding participation in the European Council; by making a mockery of the dignity of legislation when short-circuiting processes of deliberation in Parliament; when immunizing Executive Ordinances via the takeover of the Ombudsman's office; by establishing ready-to-use extra-constitutionalism mechanisms, such as Executive Ordinances that mirrored the substance of statutes pending before the Constitutional Court, in order to bypass the decisions of the Court. Against this background, the relevant question becomes why the Court's double majority judgment was obeyed, given the severe consequences for the parliamentary majority.

Enter the European Union. EU institutions and political forces from across the ideological spectrum saw the constitutional events in Romania as going beyond a typical confrontation between the president and the prime minister in a semi-presidential regime. The choice for semi-presidentialism itself is presumably protected under Article 4(2) TEU as part of Romania's constitutional identity.<sup>86</sup> But the extent to which that guarantee applies to the interpretation and application of the rules of semi-presidentialism remained an open question. Acting in the aftermath of Hungary's turn to authoritarianism, the EU institutions and forces intervened swiftly and effectively in the

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<sup>86</sup> See Art 4(2) TEU ("The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.").



Romanian constitutional battle. The day after the decision of the Constitutional Court was delivered, the President of the European Commission publicly summoned Prime Minister Ponta to Brussels and demanded that he obey the decision of the Court.<sup>87</sup> Martin Schultz, the president of the European Parliament and leader of the European socialists, which is Ponta's European political family, applied political pressure on Ponta in public.<sup>88</sup>

The Commission found itself in a better position to respond to events in Romania than it had been with political developments in neighboring Hungary.<sup>89</sup> To start, Romania has a special relation of constant monitoring by the European Union<sup>90</sup> Its accession to the Union in 2007 was conditioned on a system of close monitoring of its institutions, and especially its justice system.<sup>91</sup> Under this Mechanism of Co-operation and Verification ("MCV"), the EU produces reports every six months based on close monitoring of developments in Romania and direct specific action on the part of the Romanian authorities. The credibility of these in-depth reports, and their effectiveness, depends on their independent, almost technical, nature. The existence of a decision of the Constitutional Court regarding the double majority requirement for the validation of referenda facilitated in a crucial way the intervention of the European authorities. It

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<sup>87</sup> This was one of a number of non-negotiable demands. These points are included in the Report of the Commission to the European Parliament and the Council, published on July 18, 2012, as part of the Cooperation and Verification Mechanism. See page 20. Available at: [http://ec.europa.eu/cvm/docs/com\\_2012\\_410\\_en.pdf](http://ec.europa.eu/cvm/docs/com_2012_410_en.pdf)

<sup>88</sup> Similar pressure was exerted by individual countries with the EU – most prominently, Germany and the UK- as well as from outside the EU, especially by the US.

<sup>89</sup> See Kim Lane Scheppele's interventions monitoring constitutional developments in Hungary. Available at <https://lapa.princeton.edu/newsdetail.php?ID=63#english>.

<sup>90</sup> A similar mechanism was imposed on Bulgaria. The EU reports on both countries are available here: [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

<sup>91</sup> Commission Decision of 13/12/2006 [C(2006) 6569] (available at: [http://ec.europa.eu/enlargement/pdf/romania/ro\\_accompanying\\_measures\\_1206\\_en.pdf](http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf)). The legal basis of this measure is Art. 37/38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0203:0220:EN:PDF>).

allowed the Commission to frame its demands in terms of “neutral principles,”<sup>92</sup> such as “compliance with judicial decisions,” “upholding the rule of law,” “respect of the independent judiciary.” The European Commission had been pressing the Romanian authorities on these matters both before and after the accession.<sup>93</sup> While the European authorities at the time took note of the exceptional nature of the events in the summer of 2012, the formal letters and communiqués—what Anthony Giddens nicely calls “paper Europe”<sup>94</sup>—retain their appearance of continuity because they can be framed as part of the Union’s long-standing interest, and lingering worries, about Romania’s commitment to the rule of law and judicial independence.

Still, exactly what types of pressure did the EU institutions apply? To start, the threat of hard sanctions against Romania, and specifically the Ponta government, was limited. The MCV gives the Commission some tools to sanction the disobedient state, such as “the suspension of Member States’ obligation to recognize and execute, under the conditions laid down in Community law, Romanian judgments and judicial decisions, such as European arrest warrants.”<sup>95</sup> But it was unclear how these far-reaching sanctions could be activated effectively, or even how they fit with the more general, though equally

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<sup>92</sup> I mean this in the sense that Herbert Weschler introduced in American constitutionalism. See Herbert Weschler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

<sup>93</sup> Commission Decision of 13/12/2006 [C(2006) 6569] (available at: [http://ec.europa.eu/enlargement/pdf/romania/ro\\_accompanying\\_measures\\_1206\\_en.pdf](http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf)), imposed a number of benchmarks on which Romania would regularly report to the European Commission: “(1) Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.  
(2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.  
(3) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.  
(4) Take further measures to prevent and fight against corruption, in particular within the local government

<sup>94</sup> Anthony Giddens, *Turbulent and Mighty Continent: What Future for Europe* (2013), at 31.

<sup>95</sup> *Supra* note \_\_\_\_.

difficult to implement, sanctions included in the Lisbon Treaty.<sup>96</sup> Real sanctions—“hard law”—in this context refers to the legal sanctions such as the suspension of votes in the Council that the Union can impose on recalcitrant Member States that violate the EU’s fundamental values.<sup>97</sup> These measures had never been applied in practice and are difficult to implement because political coalitions can maneuver to prevent the formation of sufficient voting majorities.<sup>98</sup> In the Commission’s rhetoric, the MCV set Romania’s case apart in a way that states like Hungary or Poland or the Czech Republic, which could have blocked the sanctions’ measures, should not find threatening to their own interests whatever sanctions the EU would impose against Romania. The availability of the MCV structure allowed the Commission to at least argue that real sanctions were politically more feasible in Romania’s case than they would have been in Hungary.<sup>99</sup> But that

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<sup>96</sup> For a discussion of the possible dovetailing of the two mechanisms, see Armin von Bogdandy and Michael Ioannidis: Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done?, in *Common Market Law Review* vol. 51, 59-96 (2014).

<sup>97</sup> Art 7 TEU details the preventive and sanctioning mechanisms for violation of values enumerated in Article 2 TEU (see supra note 5): (1) On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. (2) The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. (3) Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State. (4) The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

<sup>98</sup> Only later, in March 2014, the Commission presented a proposal for the “EU framework for safeguarding the rule of law in Europe” regarding the implementation of Article 7 TEU. The proposal is available here: [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)

<sup>99</sup> The Hungarian constitutional situation and the EU’s slow and ineffective reaction provide an important context for understanding the EU involvement in Romania in the summer of 2012. At the time when the Romanian crisis started, the Commission had not yet won an infringement conviction against Hungary. One

argument is not particularly convincing. Even if the MCV did make Romania's situation different from that of any other countries, except Bulgaria, it is very likely that other Member States conceived their self-interest in sufficiently general terms to believe that imposing sanctions on any state, even on a state whose legal situation was formally quite special, was sufficiently threatening as to warrant opposition.

The focus thus has to turn from hard, legal pressure to political pressure. The European Commission had other political bargaining chips, such as the threat of derailing the country's accession to the border-free Schengen Area.<sup>100</sup> But, as later developments showed, the onset of the constitutional blitzkrieg was sufficient to derail the Schengen accession, and the initiators of the constitutional actions probably understood, and felt ready to pay that price.

A more plausible answer has to do with how key leaders of the anti-presidential coalition, and especially Prime Minister Ponta, engaged in a political cost-benefit analysis that showed they had more to lose from pushing the constitutional order beyond the breaking point than by desisting. In this balancing act, the prime minister realized that his European credentials would be irreparably damaged if he disobeyed the Constitutional Court. This political calculus was different at the onset of Article 95

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case was pending, an age discrimination challenge to a mandatory retirement statute that allowed the Hungarian government to replace a great number of judges, including on the Constitutional Court. The European Court would eventually rule against Hungary (see Case C- 286/12, available here: <http://curia.europa.eu/juris/documents.jsf?num=C-286/12>). The text of the new Hungarian constitution is available here, in English. <http://lapa.princeton.edu/hosteddocs/hungary/Hungarian%20Constitution%20English%20final%20version.pdf>. The text of the proposed fourth amendment is available here: <http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf>. For a general description of the constitutional evolution in Hungary since 2010, see Kriszta Kovács and Gábor Attila Tóth, Hungary's Constitutional Transformation, *European Constitutional Law Review* 7 (2): 183-203 (2011); Andras Jakab and Pal Sonnevend, Continuity with Deficiencies: The New Basic Law of Hungary, *European Constitutional Law Review* 9 (1): 102-138 (2013)

<sup>100</sup> For a description of the Schengen Area, see [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm) (last accessed September 2012)

proceedings, because at the time it was not known that final political victory would require open disobedience to the Constitutional Court,<sup>101</sup> an action with grave consequences on the prime minister's reputation and standing in the European Union. And the reputational cost was only the beginning. Influential networks of local oligarchs constitute the base of the governing coalition and are direct beneficiaries of EU structural funds.<sup>102</sup> Support for leadership in the governing coalition depends on satisfying the local barons' thirst for resources, which would have dried up even faster than they had already in the case of an all-out war with the Commission. In short, it is to a large extent because the prime minister calculated that he stood to lose too much from pursuing the constitutional blitzkrieg that the events unfolded as they did. This is also part of the reason why Romania has not witnessed the official endorsement of nationalistic, anti-European discourse.

It is possible to interpret the centrality of this political calculus as evidence that neither the constitutional structure of Romanian semi-presidentialism, nor the tools of European constitutionalism, ultimately solved the constitutional crisis. If anything, the features of the semi-presidential regime were a foil against which events unfolded, and were used gradually to escalate the crisis. As far as the EU is concerned, if compliance with the values that the Treaty of Lisbon at least purports to defend is a matter of cost-benefit analysis on the part of national political elites, then such analysis will be highly contextual in the sense that differently positioned political actors will have different

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<sup>101</sup> In a January 2013 report to the European Parliament on Progress in Romania under the Co-operation and Verification Mechanism, the European Commission duly notes that "The fact that the final Constitutional Court ruling on the validity of the 29 July referendum was respected was a key signal that Constitutional norms were no longer being put into question." (p. 3)

<sup>102</sup> Transparency in the allocation of European funds, and the reform of public procurement rules, have since the beginning been among EU demands. See Report from the Commission to the European Parliament and the Council on "Progress in Romania under the Cooperation and Verification Mechanism" at pp. 18-19 (discussing the need to strengthen public procurement legislation).

benefits and costs to weigh.<sup>103</sup> Members of the governing coalition other than Prime Minister Ponta would have stopped at nothing in pursuing the ousting of the president. They adopted a nationalist discourse and openly advocated disobedience to the Constitutional Court. It so happened that, in this particular context, the prime minister's interests rested elsewhere, and that he was in a position to decide the course of events.

### § 9. *Whither Constitutionalism*

An alternative interpretation is more uplifting. After all, the EU offered support to domestic institutions such as the judiciary, whose growing independence and effectiveness in the fight against corruption triggered the constitutional crisis in the first place. The constitutional blitzkrieg also mobilized large sections of the Romanian civil society, despite growing social and political polarization. These seem to be the marks of a resilient constitutional structure. Is this, then, a story of the fragility of constitutionalism, or one about its resilience?

To answer this question, consider the aftermath of the crisis. At a political level, the conflict that flared up in the summer of 2012 had quieted somewhat in the following months. The president and the prime minister signed a memorandum of cohabitation that has kept the country afloat. At some level, the very existence of the memorandum signals the semi-presidential regime functioned as it was supposed to, that is, by socializing competing political actors into working with one another. The fact that these two political

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<sup>103</sup> Hanging the fate of constitutionalism on this contingent allocation of roles shows structural, underlying weakness. For such proposals, see Kim Lane Scheppele, *The Case for Systemic Infringement* (available at: [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf)); Jan-Werner Muller, *Could There be a Dictatorship inside the EU?* (<http://www.bc.edu/content/bc/centers/cloughcenter/events/f2013-s2014/1018-constitutionalism.html>). However, the Commission's 2014 framework takes a different route for enforcing Art 2 values. See *supra* note \_\_\_\_.

actors showed sufficient pragmatism to overcome resentment and animosity is noteworthy.

At the same time, however, socialization of this type takes more time and disposition than both actors exhibited in this instance. From this perspective, the memorandum between the president and the premier had the effect of giving both parties the respite they needed to regroup. On his part, the crisis left the president weakened. Despite the effective referendum boycott and the hype of mobilizing civil society and external partners, the political message was not lost on the president: he had alienated a very large part of the electorate. It also showed that, in a political cohabitation, the powers of the head of state are considerably diminished. As to the parliamentary majority interpreted, correctly as it turned out, that the president's return was nothing more than a temporary setback. In elections for Parliament in December 2012, the coalition won over 70-percent of the seats in Parliament and returned into office with great confidence and eagerness to apply their newly learned lesson: that European constitutionalism would not act as a side-constraint so long as that agenda could be cast in the EU-proof discourse of neutral principles of the rule of law. Domestic politics is immunized so long as they could turn constitutional Eurospeak, especially of the aspirational type, against itself. Democracy, representation, the will of the people: what better anchors for grounding political action in a Union still struggling with structural deficits of democratic legitimacy?

Unsurprisingly, then, the majority's most immediate project upon returning to power was a process of constitutional amendment aimed at "clarifying" the details of Romanian semi-presidentialism. Specifically, the amendments seek to diminish the

power of the president and enhance those of the prime minister and Parliament. The project tries to pull Romania's constitutional regime as closely as possible towards a parliamentary regime while nevertheless retaining the façade of semi-presidentialism. At least at the current moment, and perhaps for a long time to come, that façade is unshakable given that a large majority of Romanians (about 80-percent) seem adamant about directly electing their president. And, *pace* Finnish semi-presidentialism, that office can completely be stripped of competencies if the president is directly elected.<sup>104</sup>

As reactive to the events in the summer of 2012, the amendments ignore one obvious fact and pose two serious risks. The obvious fact is that the circumstances leading to which the amendments are reacting are unlikely to reoccur, at least in the foreseeable future. In that sense, constitutional revenge misses its target. There are also significant dangers to devising constitutional amendments that react to particular political circumstances. If successful, they risk turning the constitution into a political tool like any others, to be deployed –and modified- according to partisan political interest whenever electoral circumstances allow it. Once the constitution becomes a tool for the back-and-forth of daily politics, there is a risk that the constitutional text will be amended time and again to reflect whatever political interest the majority has at a given point in time.<sup>105</sup> Semi-presidentialism is particularly prone to such attempts to “clarify” the dual nature of the executive via constitutional amendment. The outcome is a high level of

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<sup>104</sup> The trajectory of semi-presidentialism in Finland was deeply influenced, unsurprisingly, by the long presidency of Urho Kekkonen (1956-1982). See generally M. Sasklin, *Constitutionalism in Finland* (1995).

<sup>105</sup> But see Stephen Homes and Cass Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in Sanford Levinson (ed.), *Responding to Imperfections: The Theory and Practice of Constitutional Amendments*, 275, 290 (1995) (“Let constitutional politics collapse into ordinary politics – for this “collapse” is not only inevitable, but under current circumstances in Eastern Europe, desirable.”). Whatever the soundness of this position for the context to which its authors applied it, namely the protracted processes of constitution-making in post-communist states other than Romania, it is less than obvious that their argument has equal force two decades later, after the (re-)foundation of these constitutional orders. I am grateful to Fady Houry for bringing this argument to my attention.



constitutional fluidity, which post-communist Romania has resisted thus far, that is prone to be strategically exploited. A related risk, as the Hungarian developments show, is that of a perfect constitutional storm that takes the country in the direction of authoritarianism. In this scenario, a political force that understands the fluidity of the political/constitutional game will shelter its own constitutional actions from future revision by entrenching itself into power for a period that defies regular electoral cycles. The risk here is one of constitutional ossification that entrenches into power a particular political agenda or set of interests.

For all the risks involved, the process of constitutional amendments are powerful instruments in the hands of national elites in their relation to European officials. The will of the people, as expressed in national referenda on domestic constitutional matters, albeit with implications at the European level, carries special weight in the democratically deficient European Union. But there is a legal wrinkle. When does the expression of popular will produce legal effect? In contrast to Hungary, the mechanism of constitutional amendment in Romania is more cumbersome. The centerpiece is a popular referendum.<sup>106</sup> Hence, the old conundrum and intense debate about the quorum for participation.

Anticipating that a double majority requirement might end the prospect of constitutional amendment, just as it ended efforts to oust the president, the parliamentary majority enacted legislation in the summer of 2013 that lowered the participation quorum in all referenda to 30-percent of the citizens enrolled on the permanent electoral lists (on condition that at least 25-percent of votes be valid). Effectively, this means that if a

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<sup>106</sup> Art 151 (3) (“The revision shall be final after the approval by a referendum held within 30 days of the date of passing the draft or proposal of revision.”).

simple majority of 30-percent of the polls, with the additional 25-percent requirement, is sufficient to validate a referendum, the substantive outcome can be decided if 12.5-percent of the population votes in favor of that solution. The majority justified the low threshold by invoking the recommendations of the Venice Commission against a referendum quorum. Indeed, the Venice Commission had recommended that quorum requirements be removed for fear that they would undermine the direct engagement of citizens in the exercise of democratic self-government.<sup>107</sup> But the Venice Commission failed to slice the issue as narrowly as the underlying consideration required. In principle, concerns about democratic participation are understandable in the case of legislative referenda where interested citizens are called upon to decide substantive questions of public policy. But referendums that have implications for constitutional structure are different. Consider the context of Romania's constitutional amendment, where a constitution adopted and amended once (in 2003) with a quorum requirement of 50-percent could later be amended again with only a 30-percent quorum. To its credit, the Venice Commission understood the thinness of its guidelines and recommended—too late, as it turns out—caution on the part of the Romanian authorities.<sup>108</sup>

As expected, the new legislation was challenged in the Constitutional Court. In yet another reversal of its recent jurisprudence, but in a return to its 2007 case-law, the Constitutional Court upheld the lowering of the referendum quorum, though it imposed a one-year moratorium before the law could come into effect. The Court offered no strong argument for lowering the referendum quorum, other than to note the silence of the

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<sup>107</sup> Venice Commission Code of Good Practices on Referendums (Study no. 371/2006), Para. 50-52 (available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)008-e)).

<sup>108</sup> Venice Commission Study no. 685/2012, para. 46,47 (available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)026-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx))

constitution on the matter, thus leaving it open to the legislature to enact whatever regulations it deemed appropriate. From a purely strategic/institutional standpoint, by allowing the referendum law to stand but delaying it for one year, the Court deferred to Parliament, while at the same time seeking to lower the stakes and diffuse the political tensions.

Recent developments show that constitutional democracy in Romania as well as in other countries in Central and Eastern Europe that joined the EU in the first decade of the twenty-first century is not an “irreversible”<sup>109</sup> state of affairs.<sup>110</sup> At the same time as it has had to deal with the euro-crisis and the rise of anti-Europeanism in Western Europe, the EU has been trying to gauge the scale of the authoritarian challenge and to find ways to influence the constitutional developments. The story of the 2012 constitutional crisis in Romania, and its aftermath, shows just how difficult that process is—and how important it is for the future of European integration.

### ***§ 10. Post-Scriptum***

On November 16, 2014, Romanians faced a choice in the presidential run-off between the center-left candidate and then Prime-Minister Victor Ponta and a center-right candidate, Klaus Iohannis. Mr. Iohannis, an ethnic German and a Lutheran, had been for many years the mayor of a small town in Transylvania with little exposure to national politics. By a significant margin and with notably high turnout, Mr. Iohannis was elected to replace President Basescu into office. This result, which the foreign press called

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<sup>109</sup> Report of the Commission to the European Parliament and the Council: “On Progress in Romania under the Co-operation and Verification Mechanism” (COM (2012) 410 final) (18 July 2012) at p. 4 (arguing that the 2012 events in Romania had “called into question the irreversibility of the reform process.”)

<sup>110</sup> For a view of developments in the entire region, see Jan-Werner Muler, Eastern Europe Goes South: Disappearing Democracy in the EU’s Newest States, *Foreign Affairs* (March/April 2014): 14-19.

“Romania’s Obama moment”<sup>111</sup> and “the most positive political development in Europe in 2014”<sup>112</sup>, took many in Romania and abroad by surprise. Prime-Minister Ponta conceded graciously but resisted, at least in the immediate aftermath of the elections, calls to step down as Prime Minister. He justified his continuing political legitimacy by reference to the semi-presidential system and vouched to have a less confrontational relationship with newly elected president.

It remains an open question if Mr. Ponta’s role in the 2012 crisis contributed to his defeat in the presidential elections. Initial evidence does not point in that direction, at least to the extent that the events of 2012 were not the subject of debate during the presidential campaign, largely because Mr. Johannis himself saw no benefit in associating his candidacy with the outgoing President Basescu. But it is too soon to draw definitive conclusions. It is noteworthy that the President elect was quick to express his unqualified support for the fight against corruption and also to signal his hope in the formation of a new, center-right parliamentary majority and a new government in the near future. The experience of many semi-presidential regimes after a period of strong presidential leaders is a drift toward parliamentarism. Whether Romania will follow this course in the post-Basescu political period will depend on the length of the new political cohabitation and how deftly the particular political actors will protect the authority of their institutional roles.

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<sup>111</sup> <http://euobserver.com/political/126609> (last accessed December 1, 2014)

<sup>112</sup> <http://www.ft.com/intl/cms/s/0/4d7e35a8-6f47-11e4-b50f-00144feabdc0.html> (last accessed December 1, 2014). One consequence of the Romanian elections is to leave Hungary’s Orban even more isolated on the map of EU politics. Much will depend on how the new European Commission, under the presidency of Jean-Claude Juncker, will respond to the Hungarian developments.