

ABOUT THE LEGAL NATURE AND THE LEGAL EFFECT OF THE CENSURE MOTION WITHIN THE CONSTITUTIONAL LAW SYSTEM IN ROMANIA

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ABSTRACT: *The parliamentary procedure of the censure motion has as a generator the legal document itself, known as such, which produces political effects (the vote of no-confidence leads to the demission of the Government) and also legal consequences (to the extent that a normative administrative act is the subject of the motion it is repealed by default or it requires the elaboration and issuance of a repealing act).*

KEYWORDS: *censure motion, Parliament, Government, Romanian Constitution, liability, political effects*

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The separation of powers in State does not exclude but on the contrary it requires as mandatory and involves, as a corollary of the Montesquieu “doctrine”, in addition to the cooperation between them, “*ces trois pouvoirs seront forcés d’aller de concert*”, also the reciprocal control between them¹.

Therefore, the rule of law finds its source in terms of material and formal, abstract and impersonal point of view, in the collaboration and the mutual control of powers, a mechanism justifying the legitimate foundation of the constitutional democracy.

According to Article 61 paragraph 1 of the Romanian revised Constitution², the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country. The Parliament’s right to exercise control over all the activities of State and all its institutions and authorities derives right from the substance of this fundamental settlement that is precisely from the sovereignty of the people.

The professor Tudor Drăganu³ stated that the Constitution of Romania from 1991, by setting the mutual control of its fundamental institutions (idea maintained for that matter after the revision of 2003-A/N), refers to various forms of control at its disposal and the Parliament takes elements out of the control of jurisdiction, acknowledgement and

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¹ See Al. E. Silvian, Regulamentul administrativ, “Revista Geniului” Printing shop, Bucharest, Cotroceni, IV, 1934, p. 12.

² Published in the Official Journal of Romania, Part I, no. 767 of 31 October 2003.

³ See Tudor Draganu - “Drept constituțional și instituții politice - tratat elementar”; Vol.II, “Lumina Lex” Publishing House, Bucharest, 1998, pag. 160.

appraisal, sanctioning, approval⁴. The Parliament's control exercised according to "the nature of the organic control and the type of the verified activity"⁵ is carried out upon the activity of the President, Government and judicial authorities (the appointment of the members in the Superior Council of Magistracy), of certain independent administrative authorities (the Romanian Intelligence Service, the National Audiovisual Council of Romania, the Romanian Ombudsman, the Romanian Court of Accounts etc.).

Unfortunately, the involution of the Constitution of 1991, after its revision in 2003, is demonstrated by damaging the supremacy and original jurisdiction of the Parliament, the holder and guardian of people's sovereignty, in the re-examination of the Constitutional Court decisions pronounced following the objection of unconstitutionality within the foregoing examination, *ie.* prior the enactment of laws. Therefore, by its content, the Romanian Constitution revised in 2003 offered the constitutional law doctrine a *sui generis* thesis by which a court of a political-judicial nature and which is not part of the judiciary, I have mentioned here the Constitutional Court (consisting of nine judges, three appointed by the President of the Republic, three by the Chamber of Deputies and three by the Senate)⁶ becomes a superpower as both the Parliament and the Government or any other public authority, any natural or legal person is obliged to obey its decisions, which are final and therefore with binding effect, *erga omnes*⁷.

The parliamentary control is achieved through different means and ways and its completion will draw constitutional liability and sanction.

If the presidential regimes are characterized by the individual - political responsibility of ministers to the President, in the parliamentary regimes the ministers are liable both individually and jointly for the entire activity of the Government⁸. The Parliament controls the Government and its sanction is the involvement of its liability, particularly the political liability⁹. The ministerial liability may be political, criminal or civil in nature while the political liability may be jointly or individual¹⁰.

It is true that within the Romanian Constitution, the Government is not responsible for the activity of a minister, the individual responsibility bringing the minister's dismissal, but it is responsible only entirely, collectively, for all its entire activity. Professor Tudor Drăganu, showed that "the idea of joint liability of the Government to the Parliament originates in the countries where the parliamentary regime started"¹¹. The French Constitution of 1958 stipulates in Article 20 the Government's responsibility to the Parliament, with reference to Articles 49 and 50 which recalls the conditions under which it is exercised (the Prime Minister engages at the National Assembly the Government's liability on a program or a general policy statement, the National Assembly questions the

⁴ *Ibidem*, pp. 159 -160.

⁵ *Ibidem*, p. 160.

⁶ See Daniela Cristina Valea "The Control of Constitutionality of the initiatives for revision of the Romanian Constitution", in *Juridical Current* no. 4/2011, Tîrgu Mureş, pp. 91-102.

⁷ See Article 147 of the Romanian revised Constitution, Lucian Chiriac "Controlul Constituționalității Ordonanțelor Guvernului", Accent Publishing House, Cluj Napoca, 2004, p. 29, Daniela Valea "Sistemul de control al constituționalității în România", "Universul Juridic" Publishing House, 2010, p. 227.

⁸ See Tudor Drăganu, *op.cit.*, p. 169.

⁹ See Joseph Barthélemy et Paul Duez, "Traité de droit constitutionnel", Editions Panthéon-Assas, 1926, 1933, réédite en 1985, 2004, p. 694.

¹⁰ *Ibidem*, pp. 702-703, 707.

¹¹ See Tudor Drăganu, *op.cit.*, p. 169.

responsibility of the Government by voting a censure motion, the Prime Minister may ask the Senate to approve a general policy statement). The Constitution of the Italian Republic of 27 December 1947¹² stipulates in Article 94 paragraph 2 that each chamber confer or denies the confidence through a motion motivated and voted by roll-call and Article 95 paragraph 2 states that the ministers are jointly liable for the acts of the Council of Ministers and individually for the acts of their department. Poland's Constitution of 1997 stipulates in Article 158 paragraph 1 position 4 that "The Sejm votes the censure motion" in Article 157 paragraph 1 the total mistrust of the Council of Ministers and in Article 157 paragraph 2 the mistrust individually in ministers (in Article 159 paragraph 1 it is said that the Sejm can vote the censure motion also against a minister).

According to Article 109 paragraph 1 of the Romanian revised Constitution, the Parliament exercises a political control over the Government which is "politically accountable" only to the Parliament. Basically it is a reflection of the symmetry principle in law as once the Government, after receiving a vote of confidence from the Parliament, it is the only body vested with the attribute of exercising the sovereignty of the people, being the only one to dismiss with full legal competence. Romania's Constitutional Court acknowledged in one of its decision that because of the Parliament's preeminent position within Romania's system of public authorities, it exercises the prerogatives of the greatest importance for the state activity, being the expression of the national sovereignty resulting from the Parliamentary elections. Among these prerogatives, along with the ones regarding the adoption of laws is also the activity of control over the executive¹³.

Moreover the idea of joint liability imposes when the Government elaborates and issues its legal acts as a collegiate body. If the vote of confidence concerns the entire Governmental program, it is natural and consequently the confidence vote aims at the Government's activity as a whole, a vote that eventually is established by its resignation.

The Romanian revised Constitution of 1991 in the Article 108, regulated the legal acts that the Government adopts and issues as a collegiate body (ordinances and decisions). The control of legality of these acts is assigned to the constitutional contentious by the *a priori* control (the law for approval or rejection of an ordinance)¹⁴ or *a posteriori*, by the objection of unconstitutionality (by enabling ordinances and emergency ordinances) respectively by the administrative courts (the decisions)¹⁵. The Romanian Constitution, establishing the joint liability (collegiate) of the Government which may end in its dismissal, excluded the fact that the Government could be dismissed

¹² Entered into force on 1 January 1948.

¹³ See the Decision of the Constitutional Court no. 48 of 17 May 1994, published in the Official Journal of Romania, Part I, no. 125 of 21 May 1994.

¹⁴ See the Decision of the Constitutional Court no. 972 of 31 October 2007, published in the Official Journal of Romania no. 828 of 4 December 2007 (regarding the constitutionality of the law for the rejection of the Emergency Ordinance of the Government no. 25/2007, The Decision of the Constitutional Court no. 1 of 11 January 2012, published in the Official Journal of Romania no. 53 of 23 January 2012 (related to the objection of unconstitutionality of the provisions of the Law for amending and supplementing the Emergency Ordinance of the Government no. 155/2001).

¹⁵ See Dragoș Chilea, Ana Aura Chilea, "Systemes juridictionnels administratifs dans etats de L'Unione Europeenne: Un regard particulier sur la France et la Roumanie" in Juridical Current no. 4/2011, Tîrgu Mureș, pp. 103-118.

for the mistakes of a single minister (Articles 106 and 109)¹⁶. So the Government's liability is a collective liability¹⁷ for a collective activity reflected also in its provisions. The Romanian Constitution provided that the Government is obliged to resign if a censure motion is adopted by Parliament reunited in the two chambers¹⁸ altogether. "For a Parliamentary control to be authentic it must be absolute, *ie* the Parliament of the country must have the opportunity to take any measures render significance to this plenitude"¹⁹.

Government's political liability can be engaged in two ways, namely a *direct* one by an action that comes from the Parliament aiming at the Government's activity as a whole exerted by the censure motion (Article 113) and the second one, an *indirect* one, by engaging the liability of Government to the Chamber of Deputies and the Senate, in a joint session, on a program, a general policy statement or a bill coming from the Government to Parliament. Challenging the Parliament would lead to the resignation of the Government, if a censure motion of rejection passed (Article 114).

From the above we deduce that the censure motion is a procedural form of control which calls into play the joint liability of the Government and its sanction is the no-confidence vote²⁰. But what is the censure motion? In terms of terminology, the concept of motion - motion (in French) comes from Latin and means "to put in motion" (*mise en mouvement*) – a text subject to the approval of an assembly, of one of its members or a part of the members²¹. The word "censure" implies a "control function", a result (not in culture, art, journalism) either a stop (ceasing) result of political deformities or a perpetuation (continued) result of a controlled activity²².

The Romanian revised Constitution and the Regulation of the joint meetings of the Chamber of Deputies and of the Senate establish the character of the Parliament acts classifying them in *exclusively political acts* (messages, declarations, resolutions, appeals and so on) and *legal acts*.

1. *Exclusively political acts*, even if they are manifestations of will, they do not generate, modify or extinguish rights and obligations, but they are rather an expression of a position to a particular problem or national or international event. Basically, these acts are not designed to produce legal effects only the affirmation of principles or conduct according to the will of the state²³.

2. The legal documents are generally characterized in the legal literature as being manifestations of will clearly intended by the body empowered by law, aiming to produce

¹⁶ See Tudor Drăganu, *op.cit.*, p. 172 (during the period between the first Constitution of Romania – 1866 and the Carlist Constitution – 1938, there was a joint liability but also an individual liability of each minister).

¹⁷ See Tudor Drăganu, *op.cit.*, p. 172.

¹⁸ During the prewar and interwar period the customary rule manifested, according to which the vote of no-confidence of the Senate would have been sufficient to dismiss the Government – Tudor Drăganu, "Începuturile și dezvoltarea regimului parlamentar în România până în 1916", Dacia Publishing House, Cluj Napoca, 1991, p. 341.

¹⁹ See the Decision of the Constitutional Court no. 209 of 7 March 2012 published in the Official Journal of Romania no. 188 of 22 March 2012.

²⁰ See George Alexianu, "Dreptul constituțional", Socec & Co. Societate anonimă Publishing house, Bucharest, 1928, p. 369

²¹ See Dictionnaire 2009, Le petit Larousse illustré, Edition Larousse, p.665

²² See Denis Alland and Stéphane Rials - "Dictionnaire de la Culture Juridique", Editions Quadrige/Lamy-PUF-2007, p. 178 and the following.

²³ See Tudor Drăganu, Actele administrative și faptele asimilate lor supuse controlului judecătoresc potrivit Legii no. 1/1967, „Dacia” Publishing House, Cluj, 1970, p. 83.

certain legal effects, whose achievement, if necessary, may be assured through the force of coercion of the State²⁴.

According to Article 67 of the Romanian revised Constitution the legal documents that can be adopted by the Chamber of Deputies and the Senate are laws, ordinances and motions. A criterion of external constitutionality of these acts “is represented by the quorum”²⁵ and in order the criterion to produce legal effects the acts must be published in the Official Journal of Romania.

Motions express the critical position of one of the rooms, or both rooms concerning the activity of the government.

Motions can be simple motions or censure motions. *The simple motions* may be adopted by the Chamber of Deputies and the Senate (separately) which express a position on a domestic or foreign policy issue or, where appropriate, on an issue that was the subject of an interpellation (Article 112 paragraph 2). The censure motion expresses the position of the Parliament, reunited in a joint session, to withdraw the confidence granted to the Government. The censure motion aims to the activity of the Government being challenged by the Parliament or it may cover the request of engaging the liability being challenged by the Government this time.

Professor Tudor Drăganu, in an attempt to define it, said that “the motion expresses the position of the issuer chambers (separately or jointly A/N) regarding an issue of domestic or foreign policy”²⁶. The motions represent legal instruments that allow the rolling of the activity of the Parliament in the fulfillment registry of the constitutional duties²⁷. It is true that in the legal literature, it was stated and we believe rightly, that in reality, although the motions are generally classified as legal documents, except the censure motions, the others do not have the features of legal acts and can only produce moral²⁸ and political effects.

The censure motion is a legal document that can generate legal effects guaranteed by legal sanction²⁹.

According to Article 113 paragraph 1 of the Romanian revised Constitution, adopting a censure motion produces as a legal effect the loss of the Parliament’s confidence in the Government. Consequently its powers will be limited, step by step, stopping once with appointment of the new Government.

The motions claim with difficulty the status of separate legal acts, which are a variety of the Parliament’s decisions³⁰. Consequently, like any legal act, it is born and produces legal effects until its termination.

On 27 April 2012 the Chamber of Deputies and Senate, chambers of the Romanian Parliament, in a joint session, under Article 67, Article 110 paragraph 2 and Article 113

²⁴ *Ibidem* p. 72.

²⁵ See Decision no. 209 of 7 March 2012 of the Constitutional Court, published in the Official Journal of Romania no. 188 of 22 March 2012.

²⁶ See Tudor Drăganu “Drept constituțional și instituții politice-Tratat elementar”, vol. II, Lumina Lex Publishing House 1988, p. 213.

²⁷ See Decision no. 209 of 7 March 2012 of the Constitutional Court, published in the Official Journal of Romania no. 188 of 22 March 2012.

²⁸ See Tudor Drăganu, *op.cit.*, p.213.

²⁹ See Tudor Drăganu, *op.cit.*, p.213.

³⁰ See Ion Deleanu “Instituții și proceduri constituționale în dreptul comparat și în dreptul roman-tratat”, Serv-Sat Publishing House, 2003, p. 580.

paragraph 1 of the Romanian republished Constitution, adopted a censure motion republished - no. 1/2012 "Stop the Blackmail-Prone Government. Never This Way!"³¹ which brought the fall the Government. The third part of the motion was named and had as subject "the breach of the university autonomy – the case of the University of Medicine and Pharmacy - Tîrgu Mureş". In its turn it presented three subtitles: 1. A decision of a criminal nature, 2. A decision in conflict with the European regulations in the field, 3. A decision encouraging the separatism and not the multiculturalism. This last part of the censure motion had as a starting point the fact that the Romanian Government issued the Decision no. 230 published in the Official Gazette of 29 March 2012, a decision through which they considered that the constitutional and guaranteed principle of the university autonomy is violated.

In our opinion the censure motion has a repealing effect towards the Government Decision no. 230 of 27 March 2012³², and consequently, once with its adoption, the incriminated normative administrative act has ceased to exist.

It is known in the law theory that the repeal can be explicit (direct) or implicit (indirect). According to Article 64 paragraph 4 of the Law no. 24/2000 republished regarding the legislative drafting rules, for drafting the normative acts³³ "if a lower standard, with the same object was not expressly repealed by the normative act of a superior rank, this obligation would belong to the authority which first issued the act".

The question is whether the censure motion has or has not a repealing feature. In fact, Professor Ioan Muraru shows that the Romanian Constitution does not make a classification of the Parliament's acts in terms of their normative or individual feature³⁴. But, as mentioned before, the censure motions may be considered a diversity of the Parliament's decisions.

The question is whether in case of censure motion we are facing a legal act, an act acknowledged by the law to have a certain effect, in our case the repealing of a normative administrative act.

It is undeniable that by the constitutional definition (Article 67) in this case of censure motion we are in the presence of a legal act. On the other hand it is more than obvious that the censure motion produced a result. Therefore, if the Government was dismissed, it would mean that the legal effects occurred, the executive limited its activity for a period of time after which it permanently ceased exercising the constitutional responsibilities and primarily those of central and local administration leadership. In other words, the dismissed Government is no longer the holder of rights or obligations.

Accordingly, the censure motion has proven to be a legal act characterized in its substance by an expression of the will of the representative assembly that produced legal effects guaranteed by the fundamental act that extinguishes rights and obligations of the Government.

The censure motion is a volitional form that is part of a specific procedure for drafting, issuance and execution of a legal act. In this case, in the presented context, we

³¹ Published in the Official Journal of Romania no. 284 of 27 April 2012.

³² Published in the Official Journal of Romania, Part I, no. 208 of 29 March 2012.

³³ Republished in the Official Journal of Romania, Part I, no. 260 of 21 April 2010.

³⁴ See Ioan Muraru „Drept Constituțional și instituții politice”, ACTAMI Publishing House, Bucharest, 1997, p. 405.

believe it doesn't even matter whether the legal document entitled "motion of censure" has or has not a normative or individual feature, once with the premise shown above it receives a repealing feature. There's one condition, the normative administrative act should be the subject of the censure motion that led to the resignation of the Government. We can say that the censure motion does not present a proclamation feature but a determinative-imperative feature with an enforceable effect in the authority conduct. Thus, if we didn't acknowledge the production of various juridical effects in process, it would mean to accept the possibility of comparing the censure motion with a material-technical operation, respectively with an operation from the category of preparatory acts, which would restrict up to their lack of efficiency and substance the effects of such a legal act, a fact that would be unacceptable. Moreover, such an assertion is unacceptable as it means that we should admit that the censure motion is part of a special legal category which produces indirect legal effects, without being a normative act it would need to determine another expression of willingness that should generate, modify or extinguish rights or obligations. But such a claim is false as long as we cannot accredit the thesis that the first expression of will did not produce concrete and declarative legal effects, which resulted in either dismissal of the Government, or the adoption of a law³⁵.

In fact we can say that the censure motion does nothing more than determine and declare by the competent authority, the Parliament, the nullity of the Government's Decision, which in this case can no longer enjoy the presumption of legality³⁶.

The administrative provisions, according to Article 108 from the Romanian Constitution, are developed and issued for the organization of law enforcement. It is admitted in the practice of the state organs that by a higher normative legal act of a higher rank, we speak here about the law, another inferior normative legal act may be repealed (*ie* all the categories of normative administrative acts)³⁷.

Why is it that by a censure motion, a legal act with the same constitutional source as the law, a lower administrative act could not be canceled (repealed)? The more so as the absolute nullity in this case stems from the fact that the Government Decision no. 230 is the result of a flagrant violation of the imperative provisions of the Constitution from which it cannot derogate.

In our opinion, in this case, the rules of Article 67 paragraph 1 of the Law no. 24/2000 are applicable in their interpretation, meaning that the judgment impugned rules incriminated by the Government's Decision, entirely, which made the subject of the legal act – censure motion – were directly and implicitly repealed. That is to say, how else to accept that the Government is dismissed for its decision and still, the incriminated act to remain in force? It would be totally unacceptable and counterproductive for the rule of law and its sustainable development³⁸.

In conclusion, if we accept the thesis that the motions are a variety of decisions, that they are legal acts and like any legal act they produce legal effects, by default we must accept that besides the political effects produced, legal effects are generated consisting

³⁵ See Tudor Drăganu, *op.cit.*, pp. 80-87.

³⁶ See Rodica Narcisa Petrescu, *Drept administrativ*, Editura Accent Publishing House, Cluj, 2004, p. 320.

³⁷ To the contrary, the organization of the state power cannot repeal the regulations, Rodica Narcisa Petrescu, *op.cit.*, p. 323.

³⁸ See Zsuzsanna K. Szabo "Analysis of research on sustainable development. The goals of sustainable development, practical and theoretical framework in EU and Romania, *Juridical Current* no. 4/2011 pp. 253-262.

either in a direct repeal or an indirect one or in a compliance obligation (which is not always supposed to act immediately). In this case we must accept that we are facing an implicit rational and legally logic repeal. The new Government's obligation to proceed to the adoption of a decision that would repeal explicitly, directly the normative administrative act that led to the fall of the previous Government intervenes only if the repealing feature of the censure motion is not acknowledged.

