

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE DUTIES OF THE PRESIDENT OF ROMANIA IN THE PROCEDURE OF NAMING THE GOVERNMENT - PART I

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Abstract: *According to the current constitutional provisions in force, the President of Romania has duties in regard to the naming of the Government, as he is the one who begins this procedure by appointing a candidate for the position of prime minister; the President is also the one who concludes this procedure, based on the vote of confidence granted by the Parliament. Considering these constitutional provisions, state practice, doctrine, jurisprudence of the Constitutional Court of Romania, but also the constitutional provisions of other states, we aim to analyze certain delicate aspects which occur in the exercise of these duties. We will appreciate on the existence or inexistence of a discretionary power of the head of state in the exercise of these duties. In this scientific endeavor, we will use specific methods of research, as is the comparative one, the logic one, the systemic and/or the teleological one.*

Key words: *head of state, candidate, prime-minister, vote of confidence, Government*

1. Introduction

The Romanian lawmaker has stated, both by the 1991 Constitution as well as by its revision, that the president of a country whose constitutional role is stated in article 80 of the Constitution must perform “*a function of mediation between the powers of the state, between the state and society*”. However, upon taking a closer look at the provisions of the second alignment of article 80 of the republished Constitution, we can conclude that this function is in close connection to the one whose performance it contributes to, namely the “*respect of the Constitution and good functioning of the public authorities*”. By its jurisprudence, the Constitutional Court of Romania stated that “*the function of guaranteeing and supervising stated in article 80 of the Constitution entails, by definition, the observation of the existence and functioning of the state, the*

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vigilant supervision of the way in which the actors of public life behave - public authorities, constitutional organizations, civil society - and the respect of the principles and regulations established by the Constitution, the protection of the fundamental values as regulated in the Fundamental law" (the Constitutional Court of Romania, advisory notice no 1/2007, point 3.9, paragraph 6). This opinion was maintained by the Constitutional Court when it phrased its advisory notice of 2012 (the Constitutional Court of Romania, advisory notice no 1/2012, point 3.1, paragraph 17). The Constitutional Court also showed that "neither supervision nor the function of guarantee are passively achieved, by contemplation, but by vivid and specific activity" and "in any case, the exercise of an active role in the political and social life of the country by the President can't be characterized as a behavior which is contrary to the Constitution" (The Constitutional Court of Romania, advisory notice no 1/2007, point 3.9., paragraph 6 and 8).

On the other hand, in regard to the mediation between the powers of the state, between state and society, doctrine points out that "this function must be seen as a permanent activity of the President" (Deaconu, 2012, p. 310), as „he must always maintain a balance between the powers of the state and a permanent dialogue with society" (Deaconu, 2012, p. 310). Thus, in the exercise of his duties, the President of Romania must actively get involved and, we add, he must perform these duties in good faith so as to prevent the occurrence or escalation of conflicts and to identify, along with other public authorities, the optimum solution for solving a situation of crisis or at least he must be able to create the basis for such a solution. However, in our opinion, in regard to the above-mentioned statement, the head of the state, must act as stated above even when he is [performing his specific constitutional duties within the procedure of naming the Government.

2. The Duties of the Romanian President in the Process of Appointing a Government. The Naming of the Candidate for the Office of Prime Minister

Given the constitutional provisions in force, namely article 85 first alignment, corroborated with those of article 103 of the republished Constitution, the Romanian President is the one who begins the procedure of appointing a new Government, by naming, with respect of certain conditions, the candidate for the office of prime minister. The President of Romania is also the one who concludes this procedure by appointing the Government based on the vote of confidence granted by the Parliament, in the meeting held by the two chambers of Parliament.

Our constitutional provisions state an identical procedure in order to appoint a Government in office regardless of how this procedure occurs in a normal situation - namely after Parliament elections, in an exceptional situation - when the Government in office resigns or the prime minister finds himself in one of the situations stated in article 110 second alignment corroborated with those of article 106 of the Constitution or the Government was dismissed by using the constitutional tool found at the disposal of the Parliament - a vote of no confidence. Similarly, the procedure is not different even after the vote of no confidence which represents the discontent of the majority, namely the two chambers of Parliament, as a result of exercising Parliament control on the initiative

of members of Parliament or in case the vote of no confidence is provoked by the Government, according to the provisions of article 114 of the Constitution.

Within the procedure of appointing a Government, first of all, the Romanian President must appoint a candidate for the office of prime minister. Specifically, the previously mentioned constitutional provisions clearly state the fact that he should follow the next steps: 1) consult with the party which holds Parliament majority - a party which will thus provide its vote of confidence, given the fact that vote of the majority of senators and deputies is needed; he must also consult with the parties which are represented in Parliament, as long as the previously mentioned situation does not occur; 2) subsequently, based on these consultations, he will have to appoint a candidate for the office of prime minister. This is achieved by presidential decree, published in the Official Bulletin of Romania, part I, according to the provisions of article 100 of the Constitution. This decree is signed only by the President, as it is not subject to the rules of countersigning because it is a mandatory step in the procedure of appointing a Government who must be able to fully exercise its duties.

As granting the vote of confidence is essential in appointing the Government by the President of Romania, this vote is exclusively determined by the vote of the party which holds majority in Parliament, the constitutional provision regarding the obligation of the President of Romania to previously consult with the party who holds majority in Parliament and, in case such a majority does not exist, with all parties which are represented in Parliament, we appreciate is a provision which is aligned with the logics of constitutional texts of law. In our opinion, it is more than obvious that “the role of consultations derives from the necessity to secure the Parliament’s support in granting the vote of confidence for the new Government” (Muraru & Tănăsescu, 2008, p. 960).

The Constitutional Court of Romania expressed a similar opinion, by examining the constitutional provisions regarding the necessary steps for appointing the Government and stated that “appointing a Government entails the performance of shared duties between the President of Romania and the Parliament. Thus, this procedure is initiated (appointing the candidate for the office of prime minister) and finalized (appointing the Government based on the vote of confidence granted by the Parliament) by acts issued by the President of Romania” (the Constitutional Court of Romania, Decision no 85/2020, point 105). As mentioned by the Constitutional Court of Romania “appointing the Government is conditioned on the vote of confidence granted by the Parliament as, only in case this vote is granted, will the President proceed to appoint a Government, as stated in article 85 first alignment of the Constitution” (the Constitutional Court of Romania, Decision no 85/2020, point 105).

Through its jurisprudence, the Constitutional Court of Romania had already stated that “appointing the government by the President of Romania is not achieved on request from the prime minister, but upon request from the presidents of the two chambers of Parliament and based on the decisions of Parliament to approve the Governing Program and the complete list of members of the Government. The constitutional obligation of the President of Romania is based on the decision of the Parliament and, in exercising his prerogatives, the President issues decrees for the appointment of members of the Government, followed by the oath of confidence as requested by law” (the

Constitutional Court of Romania, Decision no 356/2007, point 4, paragraph 2).

State practice from the last years has shown that, usually, we are in the situation in which, before appointing the candidate for the office of prime minister, the President of Romania must first consult with the parties, as he is not in the situation in which, after Parliament elections, only one party holds the absolute majority. Thus, he must first call all parties which are represented in Parliament, as in the contrary case, “he will be guilty of violating the Constitution with all the consequences which derive from this, as even the procedure for his suspension from office can be started” (Muraru & Tănăsescu, 2008, p. 960). In this context, the President of Romania can't enjoy the exercise of discretionary power in appreciating the relevance of inviting a party to consultation, in regard to the number of votes it holds in Parliament.

It is also necessary to restate the fact that, by the provisions of article 84 first alignment of the republished Constitution, the lawmaker configured a neutral president of republic, impartial in regard to political affiliation, thus creating the premise for the objective and impartial exercise of the constitutional duties, including those mentioned in the present study. As a consequence, regardless of the personal opinions of the person who holds the office in regard to political view and the governing potential of a certain party, thus showing full impartiality, the President of Romania must consult with all parties represented in Parliament, in order to appoint, as a result of these consultations, the candidate for the office of prime minister. The respect of the above mentioned provision is mandatory, “as this appointment is not an exclusive choice of the President, but the result of consultation and/or negotiation between the President and the party who holds absolute majority in Parliament or, in case such a majority does not exist, between the President and the parties which are represented in Parliament” (the Constitutional Court of Romania, Decision no 875/2018, point 65).

On the other hand, in case there is a party which holds majority in Parliament, appointing the candidate for the office of prime minister is an easy task; in case consultation with several parties are needed, debatable aspects may occur in regard to this appointment. Some of these can be generated by the political parties, as is the possibility “of appointing a candidate (for the office of prime minister) from a party which does not hold majority in Parliament” (Muraru & Tănăsescu, 2008, p. 959; Poenaru, I. 2002, p. 13, op. cit. in Muraru & Tănăsescu, 2008, p. 959), or the possibility of excluding the party which holds the majority, especially in case there is a coalition between the parties which obtained few votes but, by joining forces, can reach the majority needed to support a certain candidate for the office of prime minister. (See Muraru & Tănăsescu, 2008, p. 959; Poenaru, I. 2002, page 13, op. cit. in Muraru & Tănăsescu, 2008, p. 959). However, some of these situations can be generated by the President of Romania, as are: appointing a candidate for the office of prime minister who does not have support from a party which holds Parliament majority, but, for certain reasons, is seen as an appropriate candidate - a situation in which this candidate must gather support from Parliament majority, needed to obtain the vote of confidence for the list of members of the Government and the Governing Program, which are subject to Parliamentary vote; or appointing a candidate for the office of prime minister who does not have the support of Parliament majority, but comes from a party which

has the confidence of the President of Romania, although a minority party and can meet some difficulty in gathering Parliament majority needed to obtain the vote of confidence; or the appointment of a candidate in order to respect constitutional provisions, but with the publicly declared or private intent to generate a political-constitutional situation which is likely to create the premise for enforcing the provisions of article 89 of the republished Constitution, in regard to the Romanian President's right to dissolve Parliament and to organize anticipated Parliamentary elections; or appointing a candidate for which majority support can be identified in Parliament, but such support comes from different parties from those who initially supported this candidate after the election or even from a coalition reconfigured at some point - in this case we must consider the situation in which the procedure of appointing a Government is needed while the old Parliament is still in office, as a result of the dissolve or resignation of the Government.

Given the above mentioned situations, we can state certain specific issues; however, within this first part dedicated to this task, we aim to identify possible answers to the following question: is there a constitutional possibility for the President of Romania to play an active role in exercising his duties, by exercising discretionary power in appointing the candidate for the office of prime minister, thus ignoring the result of the consultation he holds to this end with the party which holds Parliament majority or with the parties which are represented in Parliament if we are again confronted with such a situation?

3. Conclusions

We believe the answer to the above phrased question should respect both the letter and the spirit of the Constitution, as all constitutional regulations emphasize "impartiality and equidistance are both qualities which the President of Romania should prove to have in performing his duty to mediate between the powers of the state" (Muraru & Tănăsescu, 2008, p. 757), especially in the situations in which configuring a majority in Parliament is all the more difficult as a result of the fact that more and more political parties have access to Parliament, based on very tight results in the election. Also, we must consider that all constitutional provisions must be interpreted in the way they were meant to be enforced, in this case appointing a candidate for the office of prime minister who has real chances in obtaining the majority he needs to form a Government.

Similar is the optics of the Constitutional Court of Romania, which stated that, in order to reach the desired purpose, namely that of appointing a Government according to the constitutional provisions, a purpose which must also be considered by the President of Romania, "the appointment of the candidate for the office of prime minister must be based on the President's belief that the candidate he appoints will be able to form a majority in Parliament in order to be able to form a Government" (the Constitutional Court of Romania Decision no 85/2020, point 116). One more additional argument is represented, in our opinion, by the constitutional regulations of other states, such as those of article 98 point 3 of the Croatian Constitution, according to which the Croatian

President “will appoint as prime minister a person who ... enjoys the confidence of the majority of its members (the Croatian Parliament)”.

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