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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE DUTIES OF THE PRESIDENT OF ROMANIA IN THE PROCEDURE OF NAMING THE GOVERNMENT – PART II

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Abstract: *During the second part of this study, we aim to analyse other aspects regarding the duties of the Romanian President in the procedure of appointing a Government, particularly in regard to naming the candidate for the office of prime minister, thus referencing the potential situations which can occur in the exercise of these duties according to the constitutional regulations in force. We will also express a point of view in regard to the particular situation which is currently developing on our political stage. We will also consider constitutional regulations specific to other European states so as to point out possible solutions of constitutional revise in order to prevent or even avoid such political crisis in the future.*

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

1. Introduction

In ensuring the enforcement of the principle of separation and equilibrium of powers within a state, an important role is played by the Romanian President by exercising his duty to mediate between the powers of the state and between state and society.

This is one of the reasons the constitutional regulation of article 84 first alignment of the republished Romanian Constitution regulates the neutrality of the Romanian President, by stating that he can't be a member of a political party and can't perform any public or private function.

Or, this very neutrality, as well as his abilities to mediate between the powers of the state, must be present and visible when the President of Romania is exercising his constitutional and legal duties in appointing the Romanian Government, as shown in the first part of our analysis dedicated to the theme mentioned in the title.

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2. Other Issues regarding the Duties of the Romanian President in the Process of Appointing the Government. Naming the Candidate for the Office of Prime Minister

By exercising his duty to mediate and by expressing his neutrality and equidistance in regard to all political actors which are involved, but without showing passivity in exercising his specific constitutional duties in the procedure of naming the Government, the Romanian President will "initiate the procedure of investing a Government and will exercise his competence in appointing a candidate for the office of prime minister so as this entire procedure results in obtaining the vote of confidence" (Romanian Constitutional Court, Decision no 85/2020, point 106). As the Constitutional Court stated, we believe that when the Romanian President asks the political parties to consult, as it happens in the political-constitutional reality for some period of time, including when the candidate for the office of prime minister is appointed, he acts "in such a way as to achieve the purpose of the [constitutional regulations which apply in the procedure of appointing a Government, AN], not in a manner which would prevent the achievement of this purpose" (Romanian Constitutional Court, Decision no 85/2020, point 106).

On the other hand, doctrine also pointed out that these consultations have their own role and purpose, which "derives from the necessity to ensure parliamentary support for granting the vote of confidence to the new Government" (Muraru & Tănăsescu, 2019, p. 865).

In regard to the means for accomplishing these consultations, neither the Constitution nor any other primary law, regulate specific details. Therefore, the decision belongs to the Romanian President (see Muraru & Tănăsescu, 2019, p. 865). However, in our opinion, we should consider the state practice configured up until that moment; also, these consultations should be so frequent and thorough as to secure a parliamentary majority needed for granting the vote of confidence.

Another reason in favour of the fact that the choice of the Romanian President of the office of the prime minister must be that person who benefits "from the wide support of the parliamentary parties which provide the vote of confidence of the Government" (Muraru & Tănăsescu, 2019, p. 747) is his ability to appoint any person. Thus, he is not limited to "appointing a candidate with political background or a member of the Parliament" (Muraru & Tănăsescu, 2019, p. 747). This freedom to appoint a candidate by considering the provisions of article 17 of the Administrative Code, with subsequent changes and completions, is justified by the necessity that the President of Romania, by the consultations he holds, must mediate potential disagreements between the parties which can occur in the process of gathering parliamentary majority needed to appoint the candidate with real and certain chances to secure the needed majority to grant his official naming as prime minister. (See Muraru & Tănăsescu, 2019, p. 748).

Furthermore, the Romanian Constitutional Court pointed out that this consultation stated in article 103 first alignment of the republished Constitution "is not a mere act of courtesy and not an exchange of opinions, but a real and responsible dialogue, which causes important effects in regard to the entire procedure stated in article 103 first alignment of the Constitution, thus objectively basing the evaluation and decision of the

President to appoint a prime-minister". (Romanian Constitutional Court, Decision no 85/2020, point 113).

Thus, the Romanian President will have to base his decision regarding the appointing of the candidate to the office of prime minister, a decision which becomes effective by the decree which is published in the Official Bulletin of Romania, part I, on the result of these consultations, a result which should undoubtedly show which party holds constitutional majority that will provide the vote of confidence to the Government, as well as the governing program.

As a consequence, the Romanian President does not have the possibility to randomly exercise his competence in the context of the provisions of article 103 first alignment of the Constitution (See Romanian Constitutional Court, Decision no 85/2020, point 108) as he "can't ignore the electoral results of competitors and the purpose of the procedure, namely appointing a candidate who can secure parliamentary majority in order to obtain the vote of confidence" (Romanian Constitutional Court, Decision no 80/2014, paragraph 318).

Not being acquainted with this discretionary power of the Romanian President in appointing the candidate for the office of prime minister entails the fact that "he does not hold a decisive role in this procedure " (Romanian Constitutional Court, Decision no 85/2020, point 108), as he only has the competence to appoint, as a candidate, the representative chosen by the political alliance or the political party which holds absolute majority of parliamentary seats or, in case such a majority does not exist, the representative named by the political party or political alliance who can secure parliamentary support needed to secure the Parliament's vote of confidence (Romanian Constitutional Court, Decision no 80/2014, point 319). In this context, the Romanian Constitutional Court states that "the Romanian President plays a mediation role between the political forces" (Romanian Constitutional Court, Decision no 80/2014, point 319). He must fully and actively exercise this role, especially during times of political crises generated by the vote of no confidence, as well as the disintegration of the political coalition which supported the dissolved Government, but also by the difficulty to form a new parliamentary majority needed to appoint a new government.

In such a political context, a strong-willed president of a republic, who acts to the extreme limit of his constitutional duties and who chooses to act discretionary, thus affecting the neutrality and impartiality of his office, will attempt to force his own will, by exercising a partly exclusive competence.

Thus, in our opinion, the Romanian President can exercise his duty to appoint a candidate for the office of prime minster in a discretionary manner in special situations such as:

- although a Parliamentary majority seems to be forming, the parties can't decide on which candidate to support→ in this case, the Romanian President will appoint a candidate in order to profit (or even to try to do so) from the weakness of the parties and will attempt to force his favourite candidate. Thus, he will be able to hope that, once the vote of confidence is granted, he will be able to control the actions of the Government, thus affecting the principle of separation and equilibrium of powers within state, as well as that of the loyal cooperation between public authorities

- he does not consider the majority which can form to support a candidate for the office of prime minister and appoints the candidate who is supported by another political party in order to test the possible enforcement of the provisions of article 89 of the republished Constitution or even pushes to initiate the procedure of anticipated parliamentary elections→ thus, the party which is unconstitutionally supported by the Romanian President will have the opportunity to acquire the needed majority so that a political coalition for supporting the government in agreement with the Romanian President's political will is no longer required - he observes that the majority needed to support a certain candidate in order to secure the vote of confidence needed for the governing team and the governing programme is not forming → in which case he directly or indirectly invites the representatives of the party he visibly supports to negotiate with the other parties in order to from the majority needed to appoint a Government (this is the current situation in our country AN).

We believe such an approach by the Romanian President is not correct in regard to his constitutional role, which requires him to perform his duty of mediation between the power of the state and between state and society, as we have previously mentioned, or, by acting in this manner, the Romanian President is not involved in the negotiation between the political parties in order to ease these negotiations and to find optimal solutions to end the political crisis. Thus, as a result of performing an active role in mediating the dialogue between the political parties by attempting to end the conflicts between these parties, the President could facilitate the solving of the crisis by forming a parliamentary majority and appointing a candidate for the office of prime minister who is supported by him. This would seem to be the optimal and constitutional manner to solve the current political crisis and any similar crises, especially since it overlays with other significant crises, among which the most significant one is the public health crisis.

It is accurate to state that, even as a result of active involvement in such negotiations, the result can be an unwanted one, namely the needed majority to support a future Government is not identified. In this situation, but also in case other conditions are met, the Romanian President might exercise his constitutional role of dissolving the Romanian Parliament, as stated in article 89 of the republished Constitution, thus initiating the procedure for anticipated parliamentary elections. In our opinion, this is not beneficial for any state society, especially a society as ours, in which it is more than necessary for each public authority to fully exercise its constitutional and legal duties, to fail to invest a Government which enjoys the possibility to fully exercise its duties for more than a few months.

Lack of involvement of the Romanian President in these consultations, in situations such as the above–mentioned ones, is not, in our opinion, proof of his political neutrality, of his lack of political involvements in such crises. On the contrary, as shown by the current reality which is developing in our country, it can result in the escalation of the crises, including by blocking the opportunities to solve them.

In case the Romanian President believes that such consultations are "mere formal acts of courtesy" as named by the Romanian Constitutional Court (Romanian Constitutional Court, Decision no 85/2020, point 113) and he discretionary decides to hold them from time to time to acknowledge the success of negotiations - by appointing the candidate

for the office of prime minister and forming the Parliamentary majority needed to support him, even his failure to do so - can be translated by dissolving the Romanian Parliament, in which case the political liability of the Romanian President can be engaged, according to the provisions of article 95 of the Constitution.

3. Statements regarding the Change of Romanian Political Regime. Constitutional Regulations of other European States in regard to the Involvement of the Head of State in Appointing the Government

Considering the current political crises, the voices of politicians and not only those, passed along wishes for constitutional revise, which entail the change of the political regime to a parliamentary one or a purely semi-presidential one. In our opinion, the constitutional configuration of neither of the two is optimal, and the reasons are as follows:

– a parliamentary regime would entail the deprivation of the citizens who have the right to vote to directly elect the head of the state. He would be chosen by the Romanian Parliament who would thus acquire the right to revoke him from office by a simple procedure. Thus, the possibility of amicably solving a political crisis as the one we are currently facing, would be removed, as there would not be any "real and responsible dialogue" (Romanian Constitutional Court, Decision no 85/2020, point 113) through a neutral and impartial public authority as should be the President of Romania
– an authentic semi-presidential regime would entail an increase in the prerogatives of the President, as it is obvious in the French system in which, according to the provisions of article 8 corroborated with those of article 9 of the French constitution, the President of the Republic appoints the prime minister, presides the Council of Ministers even if the Government is accountable to the Parliament, according to the provisions of article 21 of the same Constitution and can even be sanctioned by a vote of no confidence, according to article 49 of the Constitution which leads to his firing from office. We would not encourage the constitutional regulation of such a regime as in the exercise of some of their constitutional regulations, some Romanian heads of state acted in a truly discretionary manner (see the above-mentioned statements AN), thus generating or aggravating constitutional conflicts. Or, an increase in the duties of the head of state or the content of his duties seems like a potentially dangerous endeavour which endangers the democratic character of our country and is unfortunately premature 30 years after the passing and coming into force of the current Constitution.

In this context, we believe in the Finnish lawmaker's solution which regulates a reduced involvement of the President in appointing the candidate for the office of prime minister, leaving this task to the Parliament. Thus, according to article 61 alignments 2 and 3 of the Finnish Constitution, the Parliament elects the prime minister who holds "more than half of the freely expressed votes within Parliament" (Finnish Constitution, article 61 third alignment). Previously, "parliamentary groups negotiate the political program and the members of the Government. The President of the Republic, based on the result of these negotiations and after hearing the opinion of the President of the

Parliament and the parliamentary groups, passes along to the Parliament, the name of the candidate for the office of prime minister" (Finnish Constitution, article 61 third alignment). The procedure is formally finalized by the President of the Republic who, according to article 61 first alignment of the Finnish Constitution, appoints the prime minister chosen by the Parliament, as well as the other members of the Government, in accordance with the suggestions of the prime minister.

A solution which is beneficial for our constitutional system is the one regulated in article 64 second alignment of the Finnish Constitution when "in any case, the President will fire the Government or a minister in case he no longer benefits from the confidence of Parliament even when such a specific request is not made".

An interesting and viable solution, from our point of view, is that of the Croatian lawmaker, as stated in the provisions of articles 110-112 "The person to whom the President of the Republic entrusts the task of forming a Government nominates the members of the Government. Immediately, after the Government is formed, but no longer than 30 days from the time the mandate is accepted, the especially empowered person presents the government and its working program before the Croatian Parliament and requests a vote of confidence. The Government assumes responsibility if the vote of confidence is given by the majority of the voters of the Croatian Parliament. (…). Based on the decision of the Croatian Parliament to express the confidence in the newly formed Government, the decision for the naming of the prime minister is made by the President of the Republic and signed also by the President of the Croatian Parliament" (Croatian Constitution, article 110).

However, in agreement with article 111 of the Croatian Constitution "in case the entrusted person fails to form a Government within 30 days from the time he had accepted this task, the President of the Republic can decide to extend this term, but with no more than an additional 30 days. If the entrusted person fails to form a Government in these additional 30 days or if the government fails to obtain the vote of confidence from the Croatian Parliament, the President of the Republic entrusts the task of forming a Government to another person". The Croatian lawmaker also stated a solution for the case in which the Government can't be formed although all the previously mentioned steps had been taken; thus, according to article 112, in such a situation "the President of the Republic appoints a nonpartisan (apolitical) interim government and simultaneously calls for snap elections for the Croatian Parliament". Thus, the Croatian Constitution states specific terms for identifying the candidate for the office of prime minister, as well as constitutional sanctions for the case in which the procedure or some stages of it fail.

The Slovenian lawmaker was also rigid in configuring the procedure for appointing the candidate for the office of prime minister, by imposing terms and clear and concise constitutional solutions, as well as specific sanctions in case this procedure or some steps of this procedure are not finalized.

Thus, according to article 111 of the Slovenian Constitution, "after consulting with the leaders of parliamentary groups, the President of the Republic suggests to the National Assembly a certain candidate for the office of President of Government.

The President of Government is chosen by the National Assembly with the vote of the majority of deputies, except for the case in which the present Constitution states differently. Voting is carried out by secret vote.

If that specific candidate does not obtain the needed majority than, after one more round of consultations, the President of the Republic can suggest, within 14 days, a new candidate or the same candidate; other candidates can also be nominated by other parliamentary groups or by a group of at least 10 deputies.

If more candidates are nominated during this time, each of them is subject to separate voting, starting with the candidate suggested by the President of the Republic and, if this candidate is not chosen, all other candidates are subject to a vote, in the order in which they were nominated. If no candidate is chosen, the President of the Republic dissolves the National Assembly and calls for new election, except for the case in which the National Assembly decides, within 48 hours and with the vote of the majority of deputies present, to organize elections for the office of President of the Government, in which case the vote of the majority of deputies who are present must be sufficient to elect a candidate.

During this new election, the candidates are individually voted, in the order of the number of votes received on the occasion of the previous vote and are then subsequently voted again; the candidate nominated by the President of the Republic will undergo the voting procedure first. If no candidate obtains the necessary number of votes during this election, the President of the Republic dissolves the National Assembly and calls for new elections".

4. Conclusions

Although we have appreciated the constitutional freedom created by the lawmaker for the Romanian President to exercise his right to assess in the course of fulfilling his duties of appointing the candidate for the office of prime minister, by the responsible exercise of his duty to mediate and by considering the existing constitutional, political, economic, social and international situation, we believe a revise of the constitutional provisions which apply in other European states , as previously mentioned, is needed. This statement is all the more justified as, in our view, we are currently experiencing a political crisis.

"The respect of the state of law can't be limited to the enforcement of the explicit and formal provisions of the law and the constitution. It also entails a constitutional behaviour and constitutional procedures, which facilitate conformity with the formal rules by all constitutional organisms and mutual respect" (The Venice Commission, December 2012 notice, paragraph 72).

By the same notice, the Venice Commission showed "that the purpose of these provisions (the constitutional provisions) is to enable the good functioning of the institutions based on loyal cooperation between them" (The Venice Commission, December 2012 notice, paragraph 87).

In this context, the Constitutional Court pointed out an opinion which we embrace, namely that "an institutional conduct is subject to loyal cooperation and has (…) an *extra*

legem component, founded on constitutional practices, which result in the good functioning of state authorities, the good administration of public interest and the respect of citizen's fundamental rights and obligations.

The secondary purpose is avoiding inter institutional conflicts and removing blockage in the exercise of legal prerogatives" (Romanian Constitutional Court, Decision no 85/2020 point 123).

To the extent to which it is possible, avoiding a political crisis or solving it, necessarily entails, in our opinion, the "loyal cooperation between authorities so as each of them undergoes all rational steps within the legal institutional dialogue" (Romanian Constitutional Court, Decision no 85/2020 point 123).

As a consequence, if the President of Romania unjustly hinders or even blocks the procedure of appointing a candidate for the office of prime minister, one can consider accounting for the political responsibility of the Romanian President or even dissolving the Parliament, depending on the "guilt" of one or the other of the two authorities.

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