

SOME CONSIDERATIONS REGARDING THE POWERS OF THE HEAD OF STATE IN THE PROCEDURE OF GOVERNMENT INVESTMENT

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Abstract

The stipulations regarding the procedure of the Government investment and especially those which establish the competences of the Romanian President, articles 85 and 103 of the Constitution, gave birth to various disputes in the last years.

In this paper we try to answer the questions which usually appear when a new Government must be invest. How large are the powers of the President in the procedure of investment, is the President obliged to nominate as prime-minister the candidate proposed by a political party which holds majority in Parliament without any personal initiative or can the President ignore a post electoral parliamentary majority and impose his choice for candidate?

Key words: President; designation; candidate; political parties; Prime-minister; investment.

In the duties incumbent on the Government appointment, the President of Romania “shall designate a candidate to the office of Prime Minister and appoint the Government on the basis of the vote of confidence of Parliament” (Article 85 paragraph 1).

These constitutional provisions are required to be corroborated with the stipulations of Article 103 of the Constitution, under which “the President of Romania shall designate a candidate to the office of Prime Minister, as a result of his consultation with the party which has obtained absolute majority in Parliament, or, if there is no such majority, with the parties represented in Parliament ...”

Therefore, from the interpretation of these constitutional provisions, it results that the President of Romania is involved both in the initial phase of the investment proceedings of the Government, by exercising his powers of appointing the Prime Minister, and in the final stage, by appointing the new Government on the vote of confidence by Parliament. These matters we shall treat below.

I. The designation of the candidate to the office of Prime Minister

The first stage of the Government investment proceedings has as main protagonist the President of Romania, who appears as the only public authority, competent to designate, when the Constitution allows it, a candidate to the function of Prime Minister.

According to the doctrine¹, the candidate’s designation to the office of Prime Minister presents the significance of a mandate given by the President of Romania to the personality charged with completing the list of the future Government, the elaboration of the government programme and the presentation of the demand for according the vote of confidence by Parliament.

¹ M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Romanian Constitution, commented and annotated*, Publishing House Regia Autonomă „Monitorul Oficial”, București, 1992, p. 228.

The exertion of these presidential powers is held in the mediation function that the President of Romania² exercises and it involves the organization of political consultations within the political party that holds the majority in Parliament or, if there does not exist such a party, these consultations shall take place with all parties represented in Parliament. This is done in order to realise the parliamentary majority support that is necessary for granting the vote of confidence and to form the Government.

So, the decision of the President of Romania is tightly related to the political configuration of the Parliament, if one party has absolute majority in Parliament or if there is no such party. Both hypotheses are poorly delineated in legal terms and they may be the source of some controversial solutions, such as it was demonstrated in practice.

a) the situation in which it exists a political party which holds the absolute majority in Parliament

In this situation, the President of Romania has the constitutional obligation to consult only this party and only after this consultation he may designate the candidate for Prime Minister. This candidate may be a politician, eventually the leader of the major party, but he can equally be a person that is politically insubordinate, a specialist, meaning a technocrat.

The President's power in exercising his attribution of nominating the candidate in this situation is significantly different, according to the situation of the party or that of the coalition of parties which sustained him in obtaining his presidential mandate. More precisely if this party or coalition of parties holds a comfortable majority in Parliament.

Thus, the President shall dispose of a large power of appreciation in appointing the candidate for Prime Minister only in the situation in which the party or coalition, that had supported him, won a comfortable majority in Parliament. In this case, although after the elections he will no longer formally appear as leader of the party with the support of which he was elected, the President of the Republic will remain the invisible adviser of this party, at least in terms of the most important political issues and he will certainly manage to impose his option in nominating the candidate for prime minister³.

Different will be the position of the President, if a party other than the one who supported him in the election of the supreme function would get the majority in Parliament. We appreciate that, in this situation, the President shall be confined to a passive role, that of proposing the candidate expected by the party that emerged victorious in the elections with an absolute majority of half plus one of all deputies and senators, without having any personal initiative in the appointment of this candidate, because the constitutional text itself does not allow him to do so⁴.

b) the situation in which no party or electoral coalition won the absolute majority in Parliament

If any political party or coalition of parties that were presented together in the elections failed to obtain an absolute majority in Parliament, the issue of designation of the candidate for prime minister is controversial.

In this case, we consider that the President of Romania has two obligations:

1. the obligation to consult all the parties that have a parliamentary presence;

² Ioan Vida, *Executive power and public administration*, Publishing House Regia Autonomă „Monitorul Oficial”, București, 1994, p. 54.

³ Tudor Drăganu, *Constitutional Law and Political Institutions, Elementary Treaty, Tome II*, Publishing House Lumina Lex, 1997, p. 233-234.

⁴ In the same direction I. Rusu, *Argumentation on constitutional rules regarding the designation of the candidate for Prim-minister by the Romanian President*, in *Dreptul* nr. 12/2008, p. 110.

2. the obligation to seek a solution which satisfies the adhesion of several parties in order to ensure a majority in Parliament not only to obtain the vote of investiture, but also to achieve the legislative programme, as a dimension of the government programme.

Consultation of all parliamentary parties is therefore mandatory, but, as for the modalities for consultation, in absence of some constitutional details, it shall remain at the appreciation of the head of state to find specific formulas to fulfil this obligation, formulas that will take under consideration the practice of the political life and the President's style as a politician. But if a parliamentary party will be omitted from the consultation, without a majority party in Parliament, then the President shall be guilty of violating the Constitution, with all legal consequences arising out of it. In this case it can be started the proceedings for suspension from office⁵.

Since 1990 and especially in the last years, the procedure for nominating the candidate for prime minister by the President of the Republic raised some question marks: can the President ignore the party that obtained the largest number of votes in the parliamentary elections and therefore the largest number of seats in Parliament, designating as candidate for the prime minister another person than the one supported by this party, or, is the President obliged to nominate as prime minister the candidate proposed by a post electoral parliamentary majority composed from parties that each of them obtained a fewer votes than a party which remained outside the coalition but a party that holds most of the seats in the Legislative forum?

The constitutional text is quite permissive giving to the President a large number of options regarding the election of the person to be designated as prime minister. Thus, after consulting all political forces represented in Parliament, the President of Romania may nominate the candidate for prime minister in the person of a political party leader, a technocrat from one party, a non-party technocrat, a specialist who is also a deputy or a senator, or a specialist who is not a member of Parliament⁶. However, we appreciate that, regardless his option, the President of Romania will have to ensure himself that the nominated person enjoys the parliamentary support. Otherwise that candidate will not receive the vote of Parliament, possibility which can be repeated, coming finally to early elections, according to Article 89 of the Constitution.

It is, therefore, a very serious political test for the President of Romania, and the internal political stability of the country depends on it. This, admitting that there may be the possibility that, even after early elections, no political party shall obtain an absolute majority in Parliament. In this case, the procedure of constituting the Government shall be repeated under the same conditions, namely in the absence of a majority parliamentary party and in a total disagreement President – Parliament, regarding the composition and the programme of the new government, situation that will lead again to early elections.

If the President of Romania, consciously, will create a political crisis, by appointing repetitively some candidates to the office of prime minister, candidates that do not enjoy the political support of Parliament, it will be questioned the very political liability of the head of state as it is a serious violation of the Constitution, particularly that provided by Article 80. This article forces the President to act as a mediator between the state

⁵ Dana Apostol-Tofan, *Remarks on article 103*, in *"Romanian Constitution. Comment upon articles"*, Coordinatores I. Murau, E. S. Tănăsescu, Publishing House CH Beck, București, 2008, p. 960.

⁶ M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *The Romanian Constitution review, remarks and explanations*, Publishing House All Beck, 2004, p. 167.

powers, as well as between the state and society and to ensure a good operation of the public authorities.

From this perspective, we appreciate that the President of Romania shall take under consideration the option of the majority coalition in Parliament when he will proceed to the designation of the candidate to the office of Prime Minister, regardless if this coalition was formed before or after the elections, provided that the person approved by the parliamentary majority to satisfy the legal but also the moral and professional requirements to exercise such a position in state. In this regard, Professor Tudor Drăganu cleared that, even in the situation when no party has an absolute majority in Parliament, the Head of State will not be fully entitled to nominate the candidate for prime minister, because he will have to designate him in such a way that this candidate to be able to obtain the Parliament's vote of investiture⁷.

There is however one exceptional situation in which the President of Romania may designate as candidate a particular person that he wants, but proposed by a certain minority party. This is the situation when the political parties represented in Parliament after the elections fail to form a majority coalition, in which case the President of Romania will have the freedom to choose between the proposals made by the parties represented in Parliament (all minorities), designating the person he wishes, but who must be included between the proposals of the parties.

II. The investment of the Government

After granting a vote of confidence by the both Houses of Parliament, in joint session, to the new Government and to its programme, the Parliament's decision shall be communicated to the President of Romania. The latter will issue the decree of appointing the Government, act published together with the governmental programme in the Official Gazette of Romania, Part I.

The appointment of the Government by the President of Romania, based on the vote of confidence of Parliament, represents an act of an imposed competence, in the sense that the President can not refuse the appointment, but he is obliged to do so, because he does not dispose of the freedom in this regard⁸. In this respect, it was shown that the presidential decree of appointing the new Government has only the role to formally finish the entire procedure of investment, being complementary alternative to the main and essential political will belonging to Parliament⁹.

Therefore, the investment of the Government is the formal act by which the President, without having any possibility of choice, nominally certifies the collective investment of the Government made by Parliament, but, it is also a solemn act, meaning the completion of the investiture.

Thus, after the investiture of the Government, the Prime Minister, the Ministers and other members of the Government shall individually take an oath as provided under Article 82, this oath being the same with the one taken by the President of Romania. Taking the oath signifies the end of the investiture proceedings, the mandate's end of the previous Government and the begging of exertion the mandate by the new Government.

Of those submitted, it results that the proceedings of investiture has the meaning of constituting the Government, as a will's expression of the both public authorities elected by

⁷ T. Drăganu, *above quoted work*, p. 263.

⁸ D. Apostol-Tofan, *above quoted work*, p.963.

⁹ I. Santai, *The Administrative Law and the Administration Science, Tome I*, Publishing House "Risoprint, Cluj Napoca, p. 178.

the vote given by the electorate, Parliament and the President of Romania. Anyway in this situation the main role is held by Parliament, by giving the vote of confidence. Nevertheless, the President, especially in the phase when designating the candidate for the office of Prime Minister, can play a crucial role.

However, the subsidiary role of the President in the proceedings of investment the Government is undeniable since, although the Government is appointed by the President of Romania, by decree, this act will not lead to relations of subordination between the two public authorities that form the executive, but, on the contrary, the Government will be responsible only before the Legislative forum, the one who has accepted its governmental programme.

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