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Romanian Political Practice Concerning the Functions of the President

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Abstract

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The aim of this presentation is to make a comparative analysis between the constitutional regulation of the role of the President in Romania, defined by the functions exercised while in office, and the political practice in this matter, in the light of some decisions of the Constitutional Court.

This paper is a study structured in two parts. The first one presents a general overview of the Romanian president's functions, according to the constitutional provisions, namely representation of the state; guarantee of certain fundamental values, such as national independence, unity and territorial integrity of the country; mediation among state powers, as well as between the state and society. The second part of this study refers to some relevant aspects from Romanian political practice concerning the performance of the last two functions previously enumerated.

The actual manner in which Romanian presidents exercised their role determines us to outline certain tendencies. In this regard, by its decisions pronounced in the matter, the Constitutional Court has provided a broad, even subjective interpretation of the prerogatives of the head of state in the execution of the two functions mentioned above.

The attitude of the Constitutional Court has encouraged excesses of power – up to the limit of the constitutional provisions and even with their violation – committed by the presidents which have held the office of head of state.

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Keywords: Romanian President; functions; political state practice; Constitutional Court's decisions.



1. Introductory Considerations

The issue approached in this study raises a special interest at the international level, highlighting the increase of the President's importance in Romanian political practice, through excess of power in the exercise of prerogatives. This fact is not in accordance with the increasing trend of attenuation of the President's role in European semi-presidential regimes.

This paper is structured in two parts. The first one presents a general overview of the Romanian president's functions, according to the constitutional provisions, namely representation of the state, guarantee of certain fundamental values, mediation among state powers, as well as between the state and society. The second part of this study refers to some relevant aspects concerning the execution of the last two functions previously enumerated.

By presenting and commenting upon some decisions of the Constitutional Court, we may deduce the arbitrary vision of the Constitutional Court on the manner of transposition of the two analysed functions of the head of state, vision which facilitated repeated violations of the constitutional prerogatives of the President.

2. The Method

As main research methods, we have used qualitative and quantitative analysis, as well as comparative and the systemic methods.

The comparative approach aims at detecting the similarities and differences concerning the head of state in the Romanian political regime, examined in the light of both constitutional provisions and political practice. Therefore, the first part analyses the head of state from the perspective of legislation and doctrine and the second emphasizes different aspects of practice.

At the same time, the method used allows us to understand how the institution has evolved over different time periods and to appreciate his direction at present.

In our exposure, the systemic method is really useful due to its global approach to different problems regarding the head of state in the overall political regime existing in a specific state, namely the Romanian semi-presidential regime, in this case.

3. Overview of the functions of the President

To clarify a terminological problem, it is necessary to specify that, in our analysis, the president's attributions were derived from a series of *functions*, as they are wider in scope than *attributions* and refer to the performance of acts necessary for the proper functioning of the whole system. In this way, a function can be reflected through a series of attributions which determine its essence.

In light of Article 80 of the Constitution of Romania expressing *the role of the head of state*, legal literature identified three of its functions: *the function of representation of the state*, *the function of guarantor of certain fundamental values* (for example, independence and state unity, territorial integrity, the fundamental law), as well as *the function of mediation* (Constantinescu et. al., 2004: 141).

3.1. *The function of representation of the state*

Representing the state internally is materialized in the exercise of some attributions laid down in Article 94 of the Constitution: conferring decorations and honorary titles; conferring the ranks of marshal, general, admiral; appointment to public office, under the law (Article 94, letter c), in other cases than the ones where appointments to public offices rest with the Parliament, according to Article 65, letters h, i; Article 142, paragraph 3; Article 133; Article 140, paragraph 4 of the Constitution. These appointments will be made by the President under the strict conditions determined by law.

The function of representing the state externally is highlighted in the provisions of Article 91, in conjunction with those of Article 148, paragraph 4 of the Constitution. In this respect, a first attribution concerns the conclusion of international treaties on behalf of Romania, treaties negotiated by the Government and subject to ratification by Parliament within a reasonable time. This provision reflects the cooperation between Parliament, Government and President, and this is one of the fundamental requirements of the principle of separation and collaboration of powers consecrated in Article 1, paragraph 4 of the Constitution. Article 91 must be corroborated with the provisions of Article 11 paragraph 1 and of Article 20 of the Constitution as well as with the regulations contained in Law nr.590/2003 on treaties.

Another prerogative of the head of state, which is part of foreign policy, is the fact that the President, on the Government's proposal, accredits and recalls the diplomatic envoys of Romania, and approves the establishment, dissolution and the change in rank of diplomatic missions (Article 91 paragraph 2 of the Constitution). In these situations, it is necessary that, under Article 100 paragraph 2 of the Constitution, the President's decrees be countersigned by the Prime Minister. A prerequisite on the accreditation of diplomatic representatives of Romania is for the foreign policy committees of the legislature, according to parliamentary regulations, to give an advisory opinion. If the above mentioned attributions are performed in collaboration with the Government, the accreditation of the diplomatic representatives of other states falls exclusively under the competence of the head of state (Article 91 paragraph 3, Article 80 paragraph 1 of the Constitution).

In the area of European affairs, the constitutional legislator establishes the responsibility of the Parliament, the President of Romania, the Government and the judiciary, the obligation to guarantee the fulfilment of obligations resulting from the accession, as well as the principle of priority or primacy of EU law. This principle states that the whole Community legal order, without distinction between the norms arising from institutive treaties and the regulations of secondary law, has greater legal force than internal laws, regardless of their rank. This duty of the President refers to activities associated with further integration of Romania, which involves both taking over and applying in national law the whole Community acquis, as well as the effective participation of the Romanian state in all activities within the European Union's institutional system.

3.2. *The function of guaranteeing certain fundamental values*

With regard to *the function of guaranteeing certain fundamental values*, some authors have identified *the function of defence* the President exercises (Prélot, Boulouis, 1978: 671), while others have determined his *function of guarantor* (Deleanu, 1992: 208).

An opinion (Deleanu, 2006: 719) concerning *the function of guarantor* conferred to the head of state supports the idea that it is performed in a double direction: *guarantor of the state* and *guarantor of the Constitution*. In this latter capacity, the president or monarch "safeguards compliance with the Constitution", that is he contributes to the fulfilment of a function which is achieved through the cooperation of authorities and, at the same time, by mutual control.

The function of guaranteeing the Constitution - which the head of state exercises as representative of the state and as organ of the executive power (Vrabie, 2004: 86) - is implemented, under the provisions of the fundamental law, through a series of prerogatives: the promulgation of laws, the sending back of laws for reconsideration in Parliament, or the notification of the Constitutional Court or the Constitutional Tribunal in order for it to perform the constitutional review of the law. The duty of defending the values enshrined in the Constitution also rests with the other public authorities, which, by their action, contribute to the maintenance, within the constitutional framework, of the activity of the whole "organizational apparatus" exercising state power.

As *guarantor of the state*, the President exercises some attributions in the area of defence. Accordingly, he is the head of the armed forces or of a state institution that unitary organizes and coordinates the activities concerning national defence and security. Hence the President may order certain measures in exceptional circumstances, such as imminent danger of armed aggression or a serious internal political crisis.

3.3. *The function of mediation among state powers as well as between the state and society*

Through a teleological interpretation of Article 80 paragraph 2 of the Constitution, we conclude that, in Romania, *in order to safeguard compliance with the Constitution and the proper functioning of the public authorities, the President acts as a mediator among state powers and between the state and society*. Therefore, mediation is exercised by the head of state for the fulfilment of his complex duty of *safeguarding the fundamental act and the proper functioning of the activities of the institutions vested with public authority*.

The notion of mediation reminds the concept of *arbitration*, used in relation to both the President of the French Republic and the Head of state in Spain (Article 5 of the Constitution of France and article 58 of the Constitution of Spain).

The head of state being entrusted with *the function of mediation* is justified by the fact that he personifies the power, continuity and unity of the state and also, unlike the other authorities, he is not - or should not be - the exponent or promoter of the aspirations of a party.

It is noteworthy that the comprehensive meaning of the concept of *mediation* has given rise to controversy in political practice and doctrine, on the exercise of the function of mediator by the head of state. Moreover, it is indeed difficult to outline a coherent framework of this concept due to its complexity and the varied way in which mediation can actually be exercised.

We appreciate that *mediation does not intervene only to reconcile already existing conflict situations, but also to alleviate or avoid certain tensions that could create major conflicts between public authorities or between them and society*.

Doctrine has considered (Deleanu, 2006) that such a function conferred to the head of state finds its legitimacy in the President's election by universal and direct suffrage and in that the head of state does not belong to any political party, thus being obliged to adopt a policy of neutrality, of prevention of disagreements that can happen at time on the political stage between various state authorities. Nevertheless, practice has shown manifest involvement on the President's part in the purview of the bodies exercising state power.

The impartial position (Duculescu & Călinoiu, 2003) the head of state must adopt on existing dissensions within the scope of the exercise of state power, justified by the provisions of Article 84 paragraph 1 of the Romanian Constitution, allows the President to mediate between the political party which he was part of and the opposing one. The absence of the mentioned provisions would have resulted in the President being "judge and party in the same case" (Iorgovan, 2005: 292).

In Romania, according to doctrine, *the function of mediation* is reflected in numerous prerogatives conferred by the Constitution: convening an extraordinary session of Parliament; sending messages to Parliament on the main political issues of the nation; notifying the Constitutional Court, before the promulgation of the law, to perform constitutional review of the law; dissolution of Parliament, under the conditions set by the Constitution; designating a candidate for Prime Minister, after consultation with the party which has absolute majority in Parliament, or, if there is no such majority, with the parties represented in Parliament; in the event of government reshuffle or vacancy of office, removing or appointing, at the Prime Minister's proposal, some Government members; consulting with the Government on issues of particular importance; participating in the Government's meetings; appointing magistrates; appointing some members of the Constitutional Court; organizing a referendum on matters of national interest (Vrabie, 2010).

4. Discussions and results

4.1. Attributions exercised in performing the function of guaranteeing certain fundamental values

Explaining the contents of *the function of guaranteeing certain fundamental values*, the Constitutional Court considered that the functions of guarantee and safeguard consecrated in Article 80 paragraph 1 of the Constitution involve the careful observation of the existence and functioning of the state, the vigilant supervision of the manner the actors of public life act – the public authorities, the organizations legitimized by the Constitution, civil society – of compliance with the principles and norms established by the Constitution, defending the values enshrined by the fundamental law. *Neither safeguarding nor the function of guaranteeing are achieved by passive contemplation, but by live, concrete activity* (Advisory Opinion no. 1/2007).

As noted in the doctrine, under the Constitution, the President of Romania has *the function of president of the Supreme Council for National Defence* (Article 92 paragraph 11 of the Constitution) and is forbidden to preside over other specialized central bodies of state administration, which can only be established by law, under Article 116. The establishment of a central specialized body is done by means of organic law, according to Article 116, paragraph 3 in conjunction with Article 64 and Article 74 paragraph 1 of the Constitution. Contrary to these constitutional provisions, President Emil Constantinescu established, under his presidency, a *National Council to Fight Corruption*, whose

members were, along with cabinet members and leaders of other government structures, the chiefs of the intelligence services, the Attorney General and the President of the Court of Accounts. Moreover, the Presidency issued a circular to the presidents of county councils for the formation of similar bodies at county level. Legal literature concluded that this case was not only a violation of the constitutional provisions on the attributions of the President of the Republic as head of the Executive, but also of the principle of separation of powers (Iorgovan, 1998: 736).

In order to safeguard the fundamental values enshrined in the Constitution, *the President has the prerogative of declaring the state of siege or of emergency*. The official declaration of President Constantinescu of 21 January 1999 stated that *the state of emergency would automatically produce legal effects on 22 January, according to the actions of the miners*. However, the anticipated measure was not taken, although, in the context of the events in the mentioned period, it would have been required (Andreescu, ***; Siserman, 2002). That measure was all the more necessary, as the actions of the miners from Jiu Valley represented a situation in which the state of emergency could be imposed, as such situations were defined by *the UN Commission on Human Rights* as "international conflict, war, invasion, defence or security of the State or parts of the country; civil war, rebellion, insurrection, subversion, or harmful activities of counterrevolutionary elements; disturbance of peace, public order or safety; danger to the constitution and authorities created by it; natural or public calamity or disaster; danger to the economic life of the country or parts of it; maintenance of essential supplies and services for the community" (UN Commission on Human Rights, 1962).

Regarding *the President's attribution to initiate the revision of the Constitution*, at the Government's proposal (Article 150 paragraph 1), on 9 June 2011, President Traian Băsescu sent to the Constitutional Court the bill for constitutional revision - together with the opinion of the Legislative Council -, to check the fulfilment of the conditions for the initiation of revision. As a result, the Constitutional Court convened on 16 June 2011, for a ruling to that effect. In *Decision no. 799/2011*, the Court found that the bill for constitutional revision had been initiated in compliance with Article 150 paragraph 1 of the Constitution, contrary to the opinion expressed by the Association of Magistrates in Romania. Correspondingly, certain provisions of this bill are found unconstitutional and others - listed by the Court - are referred to the attention of the President of Romania, in the sense that he must comply with the observations in this decision.

The Association of Magistrates in Romania considered that, through the bill for revision submitted by the President to the Constitutional Court, he seriously violated Article 150 paragraph 1 of the Constitution, as it was not possible for the President of Romania to elaborate his own bill of Constitution, under the constitutional provisions in force (Dinu, 2011). They also stated that from the provisions of the fundamental law resulted that this proposal rested with the Government; therefore the bill for revision should be elaborated by the Government and not by the head of state. This conclusion can also be drawn from the fact that in Chapter II of Title III of the Constitution dedicated to the President, he is not conferred legislative initiative and also from the fact that in Chapter I (Section 3 - Legislation) the President is not part of the holders of the right of legislative initiative. We believe that some of the arguments of the Association of Magistrates in Romania are pertinent.

On March 21st, 2012, the head of state sent a letter to the President of the Chamber of Deputies, Valeriu Zgonea, by which he requested keeping on the agenda of the Chamber the bill for revision of the Constitution, initiated by the President in June 2011. He said he had sent this letter because the legal term for the bill to be debated by the Legal Committee had been exceeded. Therefore, the president notified the Chamber of Deputies on its obligation under the Constitution, to continue debating procedure on the bill for revision of the Constitution. The letter sent to the Chamber of Deputies was also based on Article 227 of the Regulation of the Chamber of Deputies, according to which "the bills and legislative proposals entered on the agenda of the Chamber of Deputies and the Senate, whose mandate has expired, shall follow their procedure in the newly-elected Chamber of Deputies". This request is justified on the basis of some provisions in the Constitution of Romania: Article 63, paragraph 5 ("the bills and legislative proposals entered on the agenda of the former Parliament, shall follow their procedure in the new Parliament"); Article 2 on the direct exercise of sovereignty by the people through referendum and Article 90 by whose interpretation "the referendum is the expression of the will of the people". The head of state also invoked the Constitutional Court's Decision no. 682/2012 whereby it was decided that "the authorities with decision-making competences in the field of the issue subjected to referendum, in this case the Parliament, must consider, analyse and identify ways of implementing the will of the people. Another view of the effects of consultative referendum would reduce it to a purely formal exercise, a simple opinion poll" (Decision no. 682 of June 27, 2012, Constitutional Court).

In response, the President of the Chamber of Deputies declared that he submitted the bill for revision of the Constitution, introduced in Parliament in 2011 – bill that transposed the result of the referendum in December 2009 –, to the Constitutional forum for consultation and to the committee especially constituted for the amendment of the fundamental law. This bill was considered "politically illegitimate", as it did not have the support of parliamentary majority, since politicians had not been consulted on the matters in this bill subject to revision (** Zgonea, 2013).

4.2. *Attributions exercised in performing the function of mediation*

As previously mentioned, legal literature has emphasized the association between the exercise of the function of mediation and the interdiction of the head of state being member of a political party.

In the political practice concerning the exercise of the presidential mandate, the head of state in office did not fulfil his *obligation of politic non-partisanship*, consecrated by the Constitution, reason for which he was repeatedly accused of violating the fundamental law and suspended from office.

It was consistently noticed that after his election in office, the President remained attached to the doctrine of the party that propelled him in elections, by permanently supporting and promoting that political party in the struggle for the exercise of state power. The Constitutional Court considered that "the President of Romania may, given his prerogatives and his legitimacy, express opinions and political options, formulate remarks and criticisms concerning the functioning of public authorities and their representatives, propose measures or reforms, which he considers desirable for the national interest. The opinions, remarks, preferences or demands of the President do not have decisional

character and do not produce legal effects, the public authorities being entirely responsible for assuming or ignoring them" (Advisory Opinion no. 1/2007).

The Constitutional Court stated in a decision that the *President's obligation of politic non-partisanship is not absolute*. The Court specified that "it cannot consider that the situation provided by Article 84 paragraph 1 of the Constitution which establishes a temporary political incompatibility for the Romanian President, could, in the absence of a constitutional provision, have the consequence of forbidding the right of being elected for President of Romania, under the conditions of him not becoming member of a political party". It was also considered that it is inconceivable to prohibit the President in office to run in elections on the lists of a political party, a political alliance or an electoral alliance even for a second successive term, since this way the text of Article 81, paragraph 4 "would become inapplicable, devoid of substance" (Decision no. 339 of 17 September 2004).

The Constitutional Court concluded by means of a decision that "*the function of mediation among state powers and between the state and society*, provided by Article 80, second thesis of the Constitution, *requires impartiality on the part of the President of Romania, but does not exclude the possibility of expressing his opinion on the best manner to resolve the occurred divergences*. The right to express one's political opinion is also guaranteed for the President of Romania by Article 84 paragraph 2 of the Constitution, which provides for the head of state the same immunity as for deputies and senators, Article 72 paragraph 1 of the Constitution being applied accordingly" (Decision no. 53/2005). Likewise, the Constitutional Court also held that "the interdictions laid down in Article 84 do not exclude, however, the possibility of expressing further the political opinions, commitments and goals presented in his electoral program or to advocate and act for their achievement, in compliance with the constitutional prerogatives" (Decision no. 53/2005).

Based on this direction of the Constitutional Court, the doctrine considered that the President of Romania can mediate a legal conflict of constitutional nature between public authorities, but he may not establish a solution for it. Moreover, the president can express his opinion on the best way of resolving such a conflict (Deaconu, 2011).

In 2005, there was a direct confrontation between the parliamentary majority and the opposition on a legislative package on the reform of justice and the restitution of property nationalized during the communist regime, which was subject to the review of the Constitutional Court. The Court delivered a judgement of partial constitutionality (Decision no. 375 of 6 July 2005), ruling that certain legal provisions are not in accordance with the Constitution.

Following this political crisis in the summer of 2005, President Băsescu reunited at Cotroceni the Presidents of both Chambers, the Prime Minister, the leaders of the parliamentary groups, the Minister for Relations with the Parliament, the members of the Constitutional Court; on this occasion, as mediator in some dissension occurred between state institutions, the head of state asked the Chambers and the Government to find suitable formulations for the four articles - which were rejected by the Constitutional Court's decision – in a package of laws on the reform in the areas of property and justice on which the Government assumed its responsibility (www.presidency.ro).

In the same context, following referral by the President to the Constitutional Court, the latter ruled a decision (Decision no. 419 of 18 July 2005), in which it held that the *Law on the reform of property*

and justice, as well as some additional measures have been brought into line with the Constitutional Court's Decision no. 375 of 6 July 2005, by the texts adopted in the joint session of the Chambers of Parliament of 13 July 2005.

5. Conclusions

Following the presentation of several relevant aspects of the Romanian political practice concerning the exercise by the President of the function of guaranteeing certain fundamental values and of that of mediation among state powers as well as between the state and society, some tendencies become quite obvious.

In this regard, through its decisions, the Constitutional Court gave a rather broad, non-objective interpretation of the prerogatives of the head of state in the fulfilment of the two functions mentioned above.

The attitude of the Constitutional Court has favoured the excesses of power - up to the limit of constitutional provisions and even with their violation - committed by the presidents who held the office of head of state.

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