

SOME CONSIDERATIONS REGARDING THE POWERS OF THE PRESIDENT OF ROMANIA CONSIDERED IN TERMS OF THE JURISDICTION OF THE CONSTITUTIONAL COURT

Daniela Cristina VALEA*

ABSTRACT: *According to a recent decision (issued on 30 May 2018¹), the Romanian Constitutional Court intervened by resolving a prospected constitutional conflict, occasion which determined mutations in one of the powers of the Head of the State provided by the Romanian Constitution (appointment/revocation of Prosecutors - Article 94 letter c) and Article 133 para. 1 of the Constitution of Romania republished). It is not the only intervention of the Constitutional Court in Romania that configures/reconfigures the institution of the Head of State. In this paper, we intend to address only those decisions issued by the Constitutional Court in the exercise of its powers to resolve the constitutional conflicts between authorities (Article 142 letter e) decisions of the Romanian Constitution, which, in our opinion, have the greatest impact in terms of reconfiguring the position of the President of Romania, and tangentially the reconfiguration even of the type of government and the political regime.*

KEY WORDS: *Head of State; Constitutional Court of Romania; constitutional conflict; attributions*

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1. INTRODUCTION

The state can not be conceived without a Head, however symbolic it may be (Iorgovan, A., 2005, p. 283). The Head of State's institution is related to the very nascency of the state because it originates in those leaders of larger or smaller human communities, elected or imposed leaders, depending on circumstances and conjunctures.

Today, the institution of the Head of State is closely linked to the type of government. The defining features of the Head of State institution and its relations with the legislative power form into criteria for the classification of the types of government (Apostol Tofan, D., 2006, pp. 51-53) and even of the political regimes.

* Assoc. prof. PhD., University of Medicine, Pharmacy, Sciences and Technology, Department of Law and Public Administration; lawyer, Mureș Barr Association, ROMANIA.

¹ Decision of the Constitutional Court no. 358 of 30 May 2018 on the request for settlement of the legal conflict, constitutional in nature, between the Minister of Justice, on the one hand, and the President of Romania, on the other hand, published in Official Gazette of Romania no. 473 of 7 June 2018.

According to Article 1 para. (2) of the Constitution of Romania republished, the type of government of the Romanian state is *the republic*. Chapter II, Title III of the Romanian Constitution, republished, regulates the institution of the Presidency in Romania as the Head of the Romanian state. Regarding the type of political regime in Romania, this time the Constitution no longer expressly states which would be the political regime, thus allowing doctrine and the constitutional case-law to clarify this aspect, but there is no doubt as to the intention of the constitutional legislator from 1991 to shape an institution of the Head of State that is specific to a semi-presidential regime (elected by universal vote but accountable to Parliament, yet with a rather consistent sphere of attributions).

The President of Romania is a unipersonal (or individual) body, and as an institution it comprises public services meant to carry out the attributions of the presidential institution, to prepare its acts and to ensure their execution. What *characterizes* this unipersonal body, *the only one chosen at the level of the central bodies of the executive power*, is that it can issue unilaterally, within the limits of its powers, binding acts even for subjects of law that are not part of its own structure, therefore it can resort to acts of power. The President of Romania does not have his own coercive force, but is part of an organ system of the executive power, which may, if necessary, ensure the enforcement of his acts by coercion.

2. THE CONSTITUTIONAL FRAMEWORK

The Romanian Constitution confers the President of Romania a special position in the political-juridical organizational structure of the state, characterized by the role, functions and attributions conferred upon him.

Thus, the President of Romania holds *a triple role* (Iorgovan, A., 2005, pp. 291-292; Deleanu, I., 1992, p. 206):

1. *Head of State*. The ensemble of attributions conferred on the President by the Constitution places him in the position of the Head of State, position in which the President represents the Romanian state internally and internationally. As such, the President is entrusted with a number of attributions such as: concludes international treaties; approves the establishment, dissolution or change of the rank of diplomatic missions; accredits and recalls the diplomatic representatives of Romania in other states; accredits the representatives of other states in Romania.

2. *Chief of the Executive* - in which the President presides over the meetings of the Government in which he is participating (Article 87 of the Revised Constitution), fulfills the specific tasks related to defending the Constitution (Article 80 paragraph (2) of the Constitution republished), establishes the state of siege or the state of emergency (Articles 92 and 93 of the Constitution republished), designates a candidate for the role of Prime Minister, appoints the Government on the basis of a vote of confidence granted by the Parliament, revokes ministers. However, it is debatable how, in our constitutional system, we could have two heads of the executive - the President of Romania and the Prime Minister, all the more so as this Constitution distributes the most important attributions of the executive between the President and the Government (Prime Minister). With all these observations, for reasons related to the necessity of personifying the state in external and internal relations, at least formally, the President can be considered the chief of the executive power (Drăganu, T., 2000, vol. II, p. 238). According to another opinion, the President may be considered the chief of the executive (Guțan, M., 2013, p. 99), but with

extremely limited powers, the most important political position being the Prime Minister's position (Iorgovan, A., 2005, vol. II, p. 165). It is also relevant that Article 107 para. (2) of the republished Constitution, expressly stipulates that the President of Romania *can not revoke the prime minister*.

3. *Mediator* - between the powers of the state, between state and society (public authorities, trade unions, etc.) is stipulated in Article 80 para. (2) of the Constitution. In this capacity, the President of Romania can solve political conflicts between public authorities². In the legal literature, it was argued that the capacity of mediator can only rule out the chief executive position of the President, because, in principle, nobody can be a judge in his own case (*nemo auctor in rem suam*) (Chiriac, L., 2007, p. 86).

In order to enable the activities of the Head of State institution to be carried out, certain (specific) *roles* are conferred upon it, synthesized by doctrine in:

1. the role of *representing the state* - a role which traditionally belongs to any head of state. The role of representation of the Romanian state derives from the representative character of the institution, the President of Romania being elected by universal, equal, direct, secret and freely expressed vote. This confers upon the Head of State equal representation with that of the legislative power. The President of Romania represents the Romanian state and society both internally and (especially) externally.

2. the position of *guarantor* - the President of Romania is the guarantor of national independence, unity and territorial integrity (a role expressly provided in Article 80 para. (1) last thesis of the Romanian Constitution, republished).

3. the position of *mediator* - the president is a mediator between the authorities of the state and between state and society, a role based on several aspects: representativeness and non-affiliation to any political party (Deleanu, I., 1992, pp. 623-624), does not have legislative initiative and does not have powers in the performance of the domestic and foreign policy of the country and of the general leadership of public administration; can not influence the will of the Parliament, has no attributions specific to the Government (Ionescu, C., 2013, pp. 346-366). Through this function, the President of Romania observes the compliance with the Constitution and the good performance of the public authorities (according to Article 80 para. (2) of the Constitution of Romania, republished).

In order to fulfill his role and to perform his function, the President of Romania has a series of *attributions* stipulated expressly and restrictively by the Fundamental Law of the state.

Several classifications of the attributions of the President of Romania have been elaborated in the doctrine by taking into account different criteria. Relevant from the perspective of the theme of this paper is the criterion of the *need for the involvement of other bodies* to perform the attributions of the head of state (considered "decisive for defining his position and role" (Drăganu, T., 2000, vol. II, p. 239)). In view of this criterion, attributions are divided into (Drăganu, T., 2000, vol. II, pp. 239-276):

I. Powers exercised by the President of Romania without the participation of any other state body:

1. convening the newly elected Parliament.

² See the Decision of the Constitutional Court no. 98 of 7 February 2008, published in the Official Gazette no. 140 of 22 February 2008.

2. calls on the Presidents of the Chambers of Parliament to meet in extraordinary sessions.
3. addresses messages and requests to the Parliament.
4. promulgation of the law.
5. the President may ask only once the Parliament to review the law or the Constitutional Court to verify its constitutionality.
6. the President appoints a candidate for the role of Prime Minister and appoints the Government by decree, after the vote of confidence given by the Parliament.
7. appointment of the interim Prime Minister.
8. participation in Government meetings.
9. consultation of the Government.
10. as commander of the armed forces and chairman of the Supreme Council of National Defense, convenes and chairs the meetings of this body where he holds a deliberative vote.
 11. appoints in public positions, under the conditions stipulated by law.
 12. the President appoints three judges to the Constitutional Court.
 13. mediates between the powers of the state as well as between the state and society.
 14. approves the regulation of the organization and functioning of the Romanian Presidency.
 15. the President has the right to request the prosecution of the members of the Government.

II. Powers exercised by the President of Romania at the proposal of other bodies:

1. the appointment of irremovable judges in accordance with the law at the proposal of the Superior Council of Magistracy.
2. the appointment of other civil servants at the proposal of certain state bodies (appointment of prosecutors, except for the trainees, at the proposal of the Superior Council of Magistracy).
3. the initiative to revise the Constitution at the proposal of the Government.
4. accreditation and recall of diplomatic representatives, approval of the establishment, dissolution or change of the regime of diplomatic missions, at the proposal of the Government.

III. Powers exercised by the President of Romania in consultation with the political factors stipulated by the law (Drăganu, T., 2000, vol. II, p. 263).

1. the appointment of a candidate for the role of prime minister (after consulting the party having the absolute majority in the Parliament) or, if that majority does not exist, of the parties represented in the Parliament.
2. the power to ask citizens with voting rights, after consultation with the Parliament, to express, by referendum, their will on matters of national interest.

IV. Powers of the President exercised by decrees that are not countersigned by the Prime Minister but are adopted with the prior approval of the Parliament. Such an attribution is the appointment of the Government, by a decree which does not require to be countersigned by the Prime Minister.

V. The powers of the President exercised either with the prior approval or with the subsequent notification or approval by Parliament, by decrees subject to the countersign of the Prime Minister:

1. pronouncing the general or partial mobilization.

2. conclusion of international treaties on behalf of Romania.
3. taking steps to force back an aggression against the country.
4. establishing the state of siege or emergency.

VI. *Powers of the President of Romania exercised with the counterpart of the Prime Minister*, without the need for the prior or subsequent approval of the Parliament, without any proposal from another state body:

1. awarding decorations and titles of honor.
2. awarding the rank of marshal, general, admiral.
3. granting individual amnesty.

3. THE JURISDICTIONAL FRAMEWORK

Considering the above-mentioned constitutional provisions, one can state that the institution of the Head of State in Romania does not correspond totally to one of the classical models. As the constituent legislator from 1991 outlined an atypical model of a semi-presidential republic, so the Romanian presidential institution has certain peculiarities.

Moreover, over the past 30 years since the entry into force of the Fundamental law, the presidential institution has evolved, suffered a series of "adjustments" and with the participation of the Constitutional Court of Romania. This was also possible due to an attribution conferred upon the Constitutional Court of Romania in 2003, as part of the constitutional review process. At that time, on the one hand, the Head of State was given a new power³, on the other hand the Constitutional Court was also given the power to resolve "legal conflicts, constitutional in nature, between public authorities, at the request of the President of Romania, of one of the Presidents of the two Chambers, of the Prime Minister or of the President of the Superior Council of Magistracy" (Article 142 letter e) - the Romanian Constitution, republished.

Since 2003, the Constitutional Court has been notified to exercise this attribution 38 times, and on some of these occasions, one of the "protagonists" of such a conflict was the President of Romania⁴. Through the decisions issued by the Constitutional Court in these situations, the institution of the head of state was somehow reconfigured, in particular by reconfiguring the constitutional relations between the Head of the State and the other fundamental institutions of the Romanian state.

Even the first decision issued by the Supreme Court in the exercise of this attribution focused on a constitutional conflict between the Presidents of Romania and the Senate of Romania⁵, referral dismissed, the constitutional court considering that certain statements

³ Which he has exerted nine times - https://ccr.ro/uploads/Statistica/2018/ActivitateRo_aug.pdf (23.09.2018).

⁴ https://ccr.ro/uploads/Statistica/2018/ActivitateRo_aug.pdf (23.09.2018).

⁵ Decision of the Constitutional Court no. 53 of 28 January 2005 on the requests for settlement of the legal conflict, constitutional in nature, between the President of Romania and the Parliament, formulated by the President of the Chamber of Deputies and by the President of the Senate, published in the Official Gazette of Romania no. 144 of 17 February 2005. In the same train of ideas, also: the Decision of the Constitutional Court no. 435 of 26 May 2006 on the request made by the President of the Superior Council of Magistracy for the settlement of the legal conflict, constitutional in nature, between the judicial authority, on the one hand, and the President of Romania and the Prime Minister, on the other hand, published in the Official Gazette of Romania no. 576 of 4 July 2006; Decision of the Constitutional Court no. 158 of 19 March 2014 on the request for settlement of the legal conflict, constitutional in nature, between the President of Romania and the Government

of the President of Romania at that time published in the press did not give birth to such a conflict, those statements being considered “political opinions, expressed on the basis of Article 84 para. 2 in conjunction with Article 72 para. 1 of the Constitution”. However, taking advantage of the first referral, the Constitutional Court established by that decision the meaning of the expression “constitutional legal conflict between public authorities” provided by the constitutional text, including by establishing the sphere of the category of public institutions that might be involved in a conflict, constitutional by nature, as well as one of the coordinates of the immunities of the Head of State regarding the legal irresponsibility for votes or political opinions expressed in the exercise of the mandate. At the same time, the content of “political opinions expressed in the exercise of the mandate” has been stated, that they can also take the form of opinions, value judgments, statements, opinions or suggestions regarding other public authorities. And these can not by themselves constitute legal conflicts between public authorities, even if they are critical, as long as they do not trigger institutional blockages and are not such opinions as to prevent the fulfillment of the constitutional attributions of those public authorities.

Decision no. 356 of 5 April 2007⁶ followed, which established more clearly the coordinates of the head of state's attribution provided by Article 85 para. 2 of the Constitution of Romania republished, namely, to appoint and revoke, on the proposal of the Prime Minister, some members of the Government in case of government reshuffle or job vacancy. The Constitutional Court has determined that in the exercise of the attributions provided by Article 2 of the Constitution, the President of Romania does not have a right of veto (which does not exclude the possibility of a motivated refusal), but may ask the Prime Minister to renounce his suggestion when he finds that the nominated person does not fulfill the legal conditions to exercise the position of Member of the Government. Subsequently, the Constitutional Court added two more issues concerning the exercise of this attribution, by Decision no. 98 of 7 February 2008⁷, establishing that, in such a situation:

- “The Prime Minister is obliged to nominate another person”, referring to the fact that in this case the President does not execute a decision of the Parliament but is in the position to decide the appointment of some ministers on the proposal of the Prime Minister, having the option to receive the Prime Minister's suggestion or to ask him to make another suggestion.

of Romania, formulated by the Prime Minister Victor-Viorel Ponta, published in the Official Gazette of Romania no. 292 of 22 April 2014; Decision of the Constitutional Court no. 284 of 21 May 2014 on the request for settlement of the legal conflict, constitutional in nature, between the President of Romania and the Government of Romania, drafted by the Prime Minister Victor-Viorel Ponta, published in the Official Gazette of Romania no. 495 of 3 July 2014.

⁶ Decision of the Constitutional Court no. 356 of 5 April 2007 on the request for settlement of the legal conflict, constitutional in nature, between the President of Romania and the Government of Romania, drafted by the Prime Minister Călin Popescu Tăriceanu, published in the Official Gazette of Romania no. 322 of 14 May 2007.

⁷ Decision of the Constitutional Court no. 98 of 7 February 2008 on the request for settlement of the legal conflict, constitutional in nature, between the President of Romania and the Government of Romania, drafted by the Prime Minister Călin Popescu Tăriceanu, published in the Official Gazette of Romania no. 140 of 22 February 2008.

- The President of Romania may refuse a single nomination of the Prime Minister in this respect, singularity argued, by analogy it is true⁸, by appealing to Article 77 para. 2 of the Fundamental Law on the President's right to ask the Parliament to review a law before promulgation, only once.

On another occasion, the Constitutional Court ruled that the attribution of the President of Romania to appoint the interim Prime Minister or interim ministers, based on the provisions of Article 107 of the Constitution, is not conditioned upon obtaining the prior approval of the Parliament, under the provisions of Article 85 para. 3 of the Fundamental Law⁹. In connection with the same attribution, the Constitutional Court also stated that the Head of State would be able to intervene and appoint an interim Prime Minister in "any of the cases of termination of the Member of the Government capacity as provided by Article 106 of the Constitution"¹⁰.

Also, regarding the attribution of the President of Romania to request the prosecution of the Members of the Government for the acts committed in the exercise of their capacity (current and former ministers, as long as at the request date they have the capacity of parliamentarians), the Constitutional Court in Romania intervened stating that: the request to be prosecuted may also target former members of the Government; this power represents an "absolute right ... to request prosecution", and its exercise by any of the competent institutions (the Head of State, the Senate and the Chamber of Deputies) "can not be achieved to the detriment of the others, the right of one institution not being conditioned by the right of the others", but also by practically limiting the powers of the President of Romania to request the prosecution only for the members of the Government and former members of the Government who, at the time of the referral, do not have the capacity of deputy or senator."¹¹

The Constitutional Court by Decision no. 384 of 4 May 2006¹², stated that the attribution of the President of Romania provided by Article 94 letter b) of the Constitution regarding the awarding of ranks of marshal, general and admiral; "is a right of the President, not an obligation, so that the Head of the State has the opportunity to judge whether or not he will grant these ranks, without being conditioned by law, as is the case with the powers of appointing persons in public positions."

In exercising its constitutional powers, the President of Romania participates in the meetings of the European Council as Head of State. This attribution may be delegated by

⁸ Aspect criticized by some members of the Constitutional Court, among others - see the separate opinion of Tudorel Toader and Pușkás Valentin Zoltán in the Constitutional Court Decision no. 98 of 7 February 2008.

⁹ Decision of the Constitutional Court no. 1.559 of 18 November 2009 on the request for settlement of the legal conflict, constitutional in nature, between the Romanian Parliament and the President of Romania, drafted by the President of the Senate, published in the Official Gazette of Romania no. 823 of 30 November 2009.

¹⁰ Decision of the Constitutional Court no. 1.560 of 18 November 2009 on the request for settlement of the legal conflict, constitutional in nature, between the Romanian Parliament and the President of Romania, drafted by the President of the Senate, published in the Official Gazette of Romania no. 824 of 30 November 2009.

¹¹ Decision of the Constitutional Court no. 270 of 10 March 2008 on the requests drafted by the President of the Chamber of Deputies and the President of the Senate regarding the existence of a legal conflict, constitutional in nature, between the President of Romania, the Ministry of Justice and the Prosecutor's Office attached to the High Court of Cassation and Justice on the one hand and the Parliament of Romania, on the other hand, as well as on the request of the President of the Superior Council of Magistracy regarding the legal conflict, constitutional in nature, between the Public Ministry and the Parliament of Romania - the Chamber of Deputies, published in the Official Gazette of Romania no. 290 of 15 April 2008.

¹² Published in the Official Gazette of Romania no.451 of 24 May 2006.

the President of Romania, expressly to the Prime Minister. Thus, the action of the Government and of the Prime Minister to exclude the President of Romania from the delegation participating in the European Council¹³ generated a constitutional conflict, the two executive authorities having no such competence under the provisions of the Fundamental Law. The participation of the President of Romania at the meetings of the European Council is an expression of the President's role as Head of State and as representative of the Romanian State.

Through the intervention of the Constitutional Court, both by Decision no. 45 of 30 January 2018, as well as by Decision no. 358 of 30 May 2018¹⁴, the content of the attribution of the President of Romania for the appointment, respectively the revocation of the prosecutors, was more clearly defined. On the one hand, it was established that for the appointment of prosecutors in the positions of leadership it is necessary that the two competent public authorities, the Government and the President of Romania, should work together, but that the prevailing role lies with the Minister of Justice considering the statement "the constitutional role of the Minister of Justice in relation to prosecutors, the President having the power to appoint in consideration of the solemnity of the act and of the need for permanent cooperation and consultation within the bicephalous executive,"¹⁵ while maintaining a limited presidential veto when refusing a single nomination proposal for the leading positions provided in Article 54 para. 1 of the Law no. 303/2004, and therefore maintaining the appearance of a minimum discretionary power of the President of Romania within this procedure. On the other hand, as regards the procedure of revoking a prosecutor from a leading position, the Constitutional Court has even given up this appearance of a minimal discretionary power, stating that "the President of Romania has only one power related to this procedure, limited to verifying the conditions for the legality of the procedure"¹⁶. Therefore he can refuse to issue a decree of revocation from that position strictly on the grounds of legality of the proposal of revocation. In the aforementioned decision, the Court also noted that in the event of the dismissal of a prosecutor from the leading structures, the provisions of Article 77 of the Constitution of Romania regarding the possibility of refusing only once the appointment (a principle imposed extensively by the Court) are not applicable, as it is not the case of a similar situation. We find such a solution intriguing in the case of the express refusal of the President of Romania to order the revocation of a prosecutor, given that the Constitutional Court, previously, stated the right of the Head of State to refuse only once a proposal from

¹³ Decision of the Constitutional Court no. 683 of 27 June 2012 on the legal conflict, constitutional in nature, between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania no. 479 of 12 July 2012. See also the Decision of the Constitutional Court no. 441 of 9 July 2014 on the request for the settlement of the legal conflict, constitutional in nature, between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania no. 657 of 5 September 2014.

¹⁴ Decision of the Constitutional Court no. 358 of 30 May 2018 on the request for the settlement of the legal conflict, constitutional in nature, between the Minister of Justice, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania no. 473 of 07 June 2018.

¹⁵ Decision of the Constitutional Court no. 45 of 30 January 2018, published in the Official Gazette of Romania no. 199 of 5 March 2018.

¹⁶ Decision of the Constitutional Court no. 358 of 30 May 2018, published in the Official Gazette of Romania no. 473 of 7 June 2018.

an authority with which he is also bound to cooperate. Another criticism that can be brought to this decision¹⁷ is that, in the Constitutional Court's view, the appointment of prosecutors by the President of Romania has as its constitutional basis the Article 94 letter c) corroborated with Article 134 para. 1 of the Constitution of Romania republished, invoking those (sub-constitutional) legal provisions detailing the procedure. But no reference is made to the text of Article 134 para. 1 of the Constitution of Romania, a fundamental text which places the President of the Republic in the equation of the appointment procedure, and obviously that of the prosecutors' revocation procedure. Practically, by reference, the two constitutional texts (Article 132 paragraph 1 and Article 134 paragraph 1 of the Constitution), by Decision no. 358/2018 of the Constitutional Court have established a hierarchy of application, giving priority to the application of the provisions of Article 132 para. 1 of the Romanian Constitution, and by eliminating the very final decision from the procedure of revocation.

In another train of thoughts, we find excessive, even unconstitutional, the mention in the decision regarding the obligation of the President of Romania to issue the decree of revocation, thus exceeding the limits of the constitutional jurisdiction of the Court and, above all, the role of the guardian of the supremacy of the Constitution. By this Decision, it seems that the Supreme Court has secured the supremacy of a law - no. 303/2004 - rather than the supremacy of the Constitution.

4. CONCLUSIONS

In conclusion, the presidential institution in Romania is constantly evolving, at least in terms of the sphere and content of the powers. And this is due less to the will of a constitutional lawmaker (possibly within a review procedure), but rather to the intervention of the Constitutional Court. Although the presidential institution is also marked by other decisions of the Supreme Court, the greatest impact have, as shown above, occurred in the procedure for resolving constitutional conflicts between authorities, given that the need to refer the matter to the Court appears only in the actual exercise of the various attributions of the Head of the State.

Perhaps the Court's intervention was sometimes considered inadmissible (as the existence of a constitutional conflict in fact is not present) or the solutions and the arguments used are subject to criticism by the generally binding effect of the decisions stated in Article 147 para. 4 of the Constitution of Romania republished, the impact on the attributions and their exercise by the President of Romania is unquestionable.

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¹⁷ Along with those expressed both in the competitor's opinion but especially in the three separate opinions on the Constitutional Court's Decision.

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