

THE CONSTITUTION OF THE ROMANIAN GOVERNMENT IN LETTER AND SPIRIT OF THE CONSTITUTION AND THE SPIRIT OF THE PRINCIPLES OF DEMOCRACY

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Abstract in original language

We chose to do this study because the Government of Romania is the most important authority of public administration, and from its actions depends the efficiency of all public administration. In this study we analyze how it is constituted the Government of Romania and constitutional issues which have arisen and may arise when the government formed. Also in this study will give an interpretation of constitutional text, which governs the formation of Government in letter and spirit of the Constitution and the spirit of the principles of democracy.

Key words in original language

Government; public administration; constitution.

In our study we will examine the creation and investing of the Romanian Government, as it plays a leading role in the public administration. We will make this analysis as revealed by the title of the study in the letter and spirit of the Romanian Constitution and in the spirit of the principles of democracy.

We decided to realize this study given that in recent years in Romania is a true "tail spin" regarding the procedure for investing the government because the state institutions involved in the procedure of investing give different interpretations of the constitutional text.

"Through public administration is carried out the executive state function, because it is responsible for organizing the actual implementation and enforcement of laws. Public administration includes central government bodies and their decentralized services and local government bodies. All these public authorities are working under the overall leadership of Government, who is head of executive power."¹

The quote above is necessary to base our study on the importance of government on one hand and the central role that the Romanian Government occupies regarding the public administration, on the other hand.

¹ Anton, T., Administrative Law , 3rd Edition, București: C.H. Beck, 2008, p. 1.

As indicated by art. 102, letter 1 of the Basic Law of the Romanian state, “the government, according to its government program approved by Parliament, ensure the implementation of domestic and foreign policy of the country and exercise the general lead of the public administration.”

And art. 1, letter 1 of Law no. 90/2001² states that "Government is the public authority of executive power that works on the vote of confidence given by the Parliament and ensure the implementation of domestic and foreign policy of the country and exercise the general lead of the public administration.”

Of the two law texts at first it sets out clearly the relationship that the Government should have with the Parliament and the second is revealed by the fact that the Government is the head of public administration. In other words, public administration effectiveness depends on the Government decisions and actions, of how the Government establishes it's operation and organization.

In the following we will consider the investing procedure of the Government, and we will give our own interpretation on how this procedure mentioned above should run.

Procedures for setting up and investing the Romanian Government are stated in Art. 103, of. 1, 2, 3 of the Constitution of Romania: "(1) President of Romania shall designate a candidate for prime minister, after consultation with the party having absolute majority in the Parliament, or if there is no such majority, the parties represented in Parliament.”

(2) The candidate for the office of Prime Minister shall ask, within 10 days from designation, the vote of confidence of Parliament on the program and complete list of Government.

(3) The program and the list of the Government shall be debated in the Chamber of Deputies and the Senate, in a joint session. Parliament grants confidence to the government by a majority vote of deputies and senators.

Form the text of this article we will first consider the first part (Al. 1) of which we separate two features:

1. First, the President of Romania is obliged that at the designation of the candidate for the Prime minister, to consult the party which has absolute majority in Parliament.
2. Secondly, if no party has absolute majority in the Parliament, then the President is obliged to consult the political parties represented in Parliament.

² Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries published in M. Of. no. 164, to April 2, 2001.

As we can see the Romanian Constitution requires the President to consult before designating the candidate for prime minister. Strictly according to the text of Art. 103 it shows that the Romanian President to consult political parties and only political parties, other electoral competition should not be consulted.³ Please note that by competing candidates understand "the political parties, political alliances, electoral alliances and legally constituted organizations of citizens belonging to national minorities represented in the Council of National Minorities, who make proposals for nomination, and independent candidates."⁴

Continuing strictly on the point of this text we find that the President must consult the political party and only political party which has absolute majority in Parliament. In other words, if a political alliance or electoral alliance obtains an absolute majority in Parliament, the President cannot consult the electoral competition as a whole, but must consult each political party separately. On the other hand if a legally constituted organization, belonging to national minorities (which is an electoral competitor according to the law 35/2008), should never be consulted, even if it holds an absolute majority in the Romanian Parliament.

Going further on the same working hypothesis, we reach the situation that if a political or electoral alliance would get absolute majority in Parliament, the President could not consult the alliance as a whole but must determine whether any of the political parties that constitute the alliance has alone absolute majority in Parliament and if it has then it should refer only that political party. And if none of the political parties constituting the alliance does not have absolute majority in Parliament then the President shall consult all political parties represented in Parliament.

If a political or electoral alliance consists of a political party or several political parties, on the one hand and an electoral competitor, which is not a political party, on the other hand, then the President of Romania shall consult only the political parties.

For all of these working hypotheses based strictly on the wording of the Constitution is clear that all Presidents of Romania to date violated the fundamental law of the state when they designated the candidate for prime minister, whereas there was no political party which has obtained absolute

³ Romanian Constitution adopted in 1991 and revised in 2003, Art. 103 "... After consulting the party which has absolute majority in Parliament if there is no such majority, the parties represented in Parliament".

⁴ Law no. 35/2008, for the election of the Chamber of Deputies and the Senate and for amending Law no. 67/2004 for the election of local government authorities, the local government Act no. 215/2001 and Law no. 393/2004 on the status of local elected officials, art. 2, paragraph 16, published in M. Of. no. 196, to March 13, 2008.

majority in Parliament since the general elections of 1996 and to date they have consulted all electoral competitors.

We are repudiating all these assumptions and trying below to show how things should be done in letter and spirit of the Romanian Constitution and on the principles on which democracy is based.

We believe that the President of Romania would have to consult all electoral competitors, even a representative of independent MPs if they are a representative number in Parliament. In our opinion these consultations are made primarily to reveal the good faith of the President of Romania in nominating for the position of Prime Minister, and ensure harmony between Government and Parliament. Even if an electoral competition would get absolute majority in Parliament, the President shall consult the other electoral competition to meet the democratic spirit of the Constitution and to strengthen democracy in Romania. We believe that democracy does not mean a dictatorship of the majority and should therefore be heard and taken into account as many ways to adjust the balance between the wishes of the majority and minority, in fact there is no guarantee that the "truth" is the majority.

The Constitution of Romania is obviously incomplete with regard to the text of art. 103, on the consultations to be made by the President but this could be adjusted by a referral to the Constitutional Court and through an interpretation in the spirit of democratic principles, or why not a revision of the Constitution .

However, nothing prevents the President of Romania to consult all electoral competitors, since the Constitution does not prohibit this but it requires the President who to consult. Thus we believe that the spirit of democracy and to strengthen democracy in Romania the President must consult all electoral competitors who have represented the Romanian Parliament.

Article 85, letter 1 of the Romanian Constitution regulates that: "President of Romania shall designate a candidate for prime minister and appoint the Government on the vote of confidence given by Parliament."

A first step to interpret the text strictly according to its letter and conclude that the President of Romania may designate any candidate he wants, without taking into account the consultations that we talked about above. It is significant that the power of appointing the candidate for prime minister is only the President's of Romania, and he may designate the candidate for prime minister as he pleases.

We repudiate entirely this working hypothesis and give an interpretation of that article in the letter and spirit of the Constitution and democratic principles in the following.

As outlined in the last part of art. 85, letter 1 of the Constitution, the President of Romania "appoints the Government on the vote of confidence of Parliament. It is clear that the Government as a whole, including the Prime Minister, must meet a prerequisite that is to enjoy the confidence of Parliament and not of the trust of the President. Furthermore according to art. 103, letter 2 "the candidate for the office of Prime Minister shall request within 10 days of the designation, the vote of confidence of Parliament on the program and complete list of Government", and in conformity with letter 3 of the same article the Chambers of Parliament met in joint session, discuss the schedule and list of Government and give confidence to the Government by a majority vote from the deputies and senators.

Behold, the Romanian Parliament has a major role in the inauguration of the Government, since it must also accept and approve the government program and the nominal list of all persons who constitute the Government. If Parliament does not agree with some proposals in respect of persons designated to hold the offices of ministers, then the candidate for Prime Minister is obliged to make further proposals. In other words if the Government that the Parliament gave the vote of confidence proves to be incompetent to manage the state, then fault rests entirely on the Parliament, since this is one that practically invests it by giving his vote of confidence.

Consequently, resulting in the spirit of Constitution and democracy, that the President of Romania must take into account, primarily the will of the majority of parliamentarians, that is to respect the wishes and proposals made by the electoral competitors that were expressed during the The consultations of the President of Romania with these electoral competitors should not remain without significance for the presidency, but should be the basis for designating the candidate for prime minister, especially since the President's role is mediating between the state institutions.⁵

We continue to strengthen this theory by analyzing other articles of the Constitution of Romania, Article 85, letter 3 of the Constitution specifies that if the reshuffle proposal changes the structure or political composition of government, the Romanian President exercises the power of revocation and appointment of members of the Government, only by the approval of Parliament, given the proposal of the Prime Minister.⁶

⁵ Romanian Constitution adopted in 1991 and revised in 2003, Art. 80, al. 2: "The President of Romania shall ensure that the Constitution and the proper functioning of public authorities. To this end, he shall act as a mediator between state powers and between state and society. "

⁶ Romanian Constitution adopted in 1991 and revised in 2003, Art. 85, al. 2 and 3: "(2) In the event of government reshuffle or vacancy of office, the President shall dismiss and appoint, on proposal of the Prime Minister, some members of the Government. (3) If, through the reshuffle proposal changes the structure or political composition of government, the Romanian President may exercise the power under paragraph (2) only by the approval of Parliament, given the proposal of the Prime Minister. "

This reveals that when it comes to important changes in the Government, Parliament is also the grantor of trust and approves changes and not President of Romania, who will fulfill a formality. The responsibility of Government on changes, belongs again to the Parliament.

Article 109, par.1 of the Romanian Constitution regulates that: "The Government is politically responsible only to Parliament for its entire business."

This text clearly emphasizes the close link between Government and Parliament. Even if that President of Romania is the authority that designates the candidate for prime minister and appoints the Government, still the Government is living together with the Romanian Parliament and not the President. It results again that the option of the Romanian President on nominations for prime minister must be based on the will of a majority of Parliament and not on his own will, because as we showed above he should mediate between state powers.

There is no other text like Art. 109, par. 1, from the Romanian Constitution, regarding the report between the President of Romania and the Romanian Government, on the contrary, there is a totally antagonistic constitutional text - Art. 7, par. 2 stating: "The President of Romania can not dismiss the Prime Minister". Thus we conclude that the Basic Law of the Romanian state, does not give the President any powers in respect of Government control. This role is exclusively of the Parliament which can express control on the government actions by motion of censure, simple motions, questions, and interpellation.

All the President can do is to dissolve Parliament if the conditions required by art. 89 of the Constitution of Romania are complied: "(1) After consultation with the Presidents of both Chambers and the leaders of parliamentary groups, the President of Romania may dissolve Parliament if it did not give the vote of confidence to form a government within 60 days after the first request and only after rejection of at least two requests for investiture.

(2) During the year, the Parliament can be dissolved only once.

(3) Parliament may not be dissolved during the last six months the mandate of the President of Romania, or during a state of mobilization, war, siege or emergency."

We will first consider the first paragraph, moreover, the most important, of this article and the fact that for the President to dissolve Parliament there must be met simultaneously two conditions:

1. To pass at least 60 days after the first request of investiture of the Government;

2. Parliament has to reject at least two requests for investiture of the Government.

We will dwell on the second condition that must be met to dissolve the Parliament and we will take as a working hypothesis the reasoning given by Adrian Nastase (Prime Minister of Romania 2000-2004), both in 2004 and 2008 before the Governments being sworn.

Thus on December 17, 2004 daily newspaper "Curentul" wrote that: "Adrian Nastase is on top of despair. Seeing that the chances of forming government are significantly reducing and the party that he leads is about to lose the support of PUR and UDMR, Nastase began to threaten the future president of the country. He said that if Traian Băsescu will not take into account the parliamentary majority, which PSD is negotiating these days, it means that he defies the votes of the electorate, suggesting no more, no less that such executive meeting of investing may not meet the necessary quorum. He stressed that it would be inappropriate and against the logic of the text of the Constitution for the president to nominate a candidate known to be supported by a minority. "Such a gesture could lead to certain types of reaction from PSD," said the defeated from the presidential elections on a threatening tone, suggesting that virtually the PSD people will boycott the inauguration of a PNL-PD Alliance government."⁷

And on November 11, 2008, the television station Realitatea TV broadcasted: "Adrian Nastase said Tuesday on his blog that if President Basescu will respect the prime minister election results, then the parliamentary majority created after the elections might not appear at the investiture of the new Government.

Adrian Nastase said on his blog that if Basescu will not take seriously the popular will, meaning the point of view of parties, to form a government then "the parliamentary majority created after the elections, to whom the right to form government might be denied (due to arbitrary designation) may not be present to the vote for investiture, the Tariceanu Government continuing to operate under art.110. par. 4 of the Constitution until Basescu should take seriously the consulting of parties."

Nastase said that in these circumstances "Basescu could take home the candidate whom he gave his confidence", adding that if Basescu will not take into account the election results for appointing a prime minister, this would generate an unprecedented constitutional crisis. "⁸

⁷<http://www.9am.ro/stiri-revista-presei/Politica/1683/Nastase-il-ameninta-pe-Basescu-cu-boicotarea-investirii-guvernului.html>

⁸http://www.realitatea.net/nastase-il-ameninta-pe-basescu-cu-boicotarea-procedurii-de-investitura-a-noului-guvern_387981.html

This reasoning shows that if Parliament is not satisfied with the person designated by the President to the office of Prime Minister, then the MPs (over half plus one of them) may not be present, and thus boycott the joint meeting of both Chambers, in which the Government is presented to apply for the investiture vote, as there is no meeting quorum.

It is clear that Parliament does not reject requests for investiture. It just happens that the meeting of government investing is not legally constituted. Going down the same reasoning we can assume that Parliament does not meet the legal for the following meetings.

In 2004 and in 2008 that was not the case. But what would happen if in future such a situation should arise.

We can assume that the first condition, for the dissolution of the Parliament of Romania has been met, ie the 60 days have passed since the first investment application, but the second condition can not be met indefinitely if parliamentarians, electoral competition in fund who hold the majority in Parliament, do not like the person nominated by the Romanian President for the office of Prime Minister. Therefore the Government can not be invested, and Parliament cannot be dissolved since the dissolution of Parliament second condition is not met. Thus we find a new conflict between the state institutions, of which apparently is not way out, unless the two authorities designed to perform the procedure for establishing and investing the Government reach an agreement.

Finally, we go back to our theory and show by this working hypothesis that the President may not propose for the office of Prime Minister any person whom he wants, but must take into account the preference and the wishes of electoral competitors who were consulted before designating the nominations, because they occupy a central role in the inauguration of the Romanian Government.

We get the same results also from paragraphs 2 and 3 of art. 89 of the Constitution. Assuming that we are under these texts is evident that Parliament cannot be dissolved, even if the two prerequisites are met as set out above. The President would therefore have to take into account the desire of political actors regarding the appointment of candidates for Prime Minister, not to trigger a new conflict between state institutions.

Article 110, par. 1 shows that: “Government shall exercise his office until validation of the general parliamentary elections.”

We can conclude according to this text that the Government is linked with a "cord" by the Romanian Parliament. In other words, the existence of the Romanian Government is as long as the existence of the Parliament who granted the trust, ie, which it has invested.

This constitutional text demonstrates again, if proof were needed, that the principal role in nominating for the position of Prime Minister and the inauguration of the Government is of Parliament and not President.

We take as a working hypothesis that the President of Romania may be changed annually (through anticipated elections), but the Government of Romania remains the same, but if Parliament changes each year (through anticipated elections), then there has to be constituted and invested another Government.

Finally to complete our study on the formation and investment of the Government, we will stop at art. 110, par. 2 of the Romanian Constitution which states that: "The Government is deposed by Parliament on the withdrawal of confidence". This confidence can be removed by adopting a motion of censure. Again it is emphasized the close relationship between the Government and Parliament and also the control that can be exercised by Parliament over the Government.

In conclusion we consider that taking into account the three aspects mentioned in the title of the study ie: letter of the Constitution, the spirit of the Constitution and the spirit of democratic principles, the central role in the creation and vesting of the Government is of the Romanian Parliament and the President of Romania has to fulfill a more formal role in the nomination of candidates for the office of Prime Minister and appointing the Government. We say that the President must take into account at the nominations for the position of Prime Minister, first, the electoral competitors wishes who have representatives in the Romanian Parliament and then his affinities for other persons.

We hope that this study should be useful to state authorities not to create constitutional crisis and to be considered a possible revision of the Constitution of Romania to complete the gaps on this issue.

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