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ORIGINAL PAPER

The President: the mediator of the conflicts between public authorities or part of a legal conflict of a constitutional nature?

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Abstract:
The legal conflicts of constitutional nature have always been controversial, but nowadays, due to the fact that the situations in which the President of Romania is directly involved in the conflicts constituted within the state are more and more frequent, it is inevitable not to analyze the President's role of mediator of conflicts between the public authorities by reference to his quality of being an active subject of the legal conflicts of constitutional nature. Although this situation in which the President is placed seems relatively absurd because these two qualities (that of mediator and that of a party of a legal conflict of a constitutional nature) seem to exclude each other, in fact things are completely different. Both these conditions punctually and gently delimit the nature of the President's function, distinguishing himself as a representative of the state, when he is on a separate position from the other authorities and as an executive body as part of a bicephalous executive, specifically pointing out that the President exerts the power of mediation only in the first position, whereas as an executive body, the President can generate a legal conflict of a constitutional nature.

Keywords: *legal conflicts; the President; role of mediator; public authorities; Constitutional Court; fundamental law.*

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Introduction

Romania is a democratic state in which, according to the Constitution, the power is divided based on the principle of separation and balance of powers in the state. Regarding the executive power, it is being exercised by the Government and the President, each of them having established in the fundamental law specific attributions, which are exercised relatively independently.

Therefore, these two institutions, the Head of State and the Government, are, in principle, independent one of other, but, certain relations of collaboration are established between them in terms of internal and external politics of the state. This is due to the fact that the President has not only a purely honorific role, but real and concrete powers that he can exercise in relation to the Parliament through messages, in relation to the judiciary but also in relation to the Government or together with this one inside an bicephalous executive.

Throught out the article 80, the fundamental law of Romania defines the role of the President, specifically stipulating that the President of Romania represents the Romanian state and he is the guarantor of the country's national independence, unity and territorial integrity and that he assures the compliance with the provisions of the Constitution and in the same time the proper functioning of public authorities. To this end, the President exercises the attribution of mediation between the powers of the state, as well as between the state and society. (The Constitution of Romania, art. 80. paragraphs 1 and 2).

Constitutional provisions

A brief analysis of this article reveals that, according to paragraph 2, the President, in accordance with his duty to ensure compliance with the Constitutional provisions and the proper functioning of public authorities, may intervene, for example, when a particular institution deviates from the democratic course.

Moreover, the same paragraph grants the President the role of the mediator between state powers, as well as between the state and society, a role that implies on the one hand that the President can facilitate the collaboration between public authorities, and on the other hand, that he can intervene in order to prevent or reduce the tensions between the authorities or between them and society.

Although the provisions of this article summarize the entire configuration of the presidential function from its definition to the substantiation of the President's actions, I appreciate that, in fact, it represents one of the contradictions of the Constitution, because it overestimates the role of the President in the state by using certain statements that go beyond the duties which are being conferred on him in reality.

Reverting to the constitutional attribution of mediation conferred to the President of Romania, I am of the opinion that the attribute of mediator between the public powers and between the state and society must be understood from a double point of view, taking into account the dual quality of the President, that of the state representative, when he is in a special position compared to the other authorities and that of an executive body, specifically pointing out that the President exerts the power of mediation only in the first position.

This means that, as an executive body, the President can generate a legal conflict of a constitutional nature that affects the proper functioning of the rule of law, he can be an active subject of such a conflict (Gîrleşteanu, 2012: 42), without this quality coming into contradiction with his attribution of mediation.

The role of mediator is limited to its own domain within the attributions of the President of Romania, concretized through well-defined procedures in the Constitution: The President sends messages to the Parliament regarding the main political issues of the nation (The Constitution of Romania, art.88); The President may request the Parliament to re-examine the adopted law before its promulgation (The Constitution of Romania, art. 77, paragraph 2); The President may dissolve the Parliament if he has not casted a vote of confidence in the formation of the Government within 60 days from the first request, after the rejection of at least two requests of investiture (The Constitution of Romania, art. 89, paragraph 1); after consultating the parties that have an absolute majority in the Parliament or the parties represented there, if there is no such majority, the President of Romania nominates a candidate for the position of Prime Minister; in case of governmental reshuffle or vacancy of the position, the President revokes or appoints, under the conditions provided in art. 85, para. 2, some members of the Government; The President may consult the Government on urgent matters of particular importance (The Constitution of Romania, art. 86), and additionally he may take part in the Government meetings if issues of national interest concerning external politics are debated.

Taking all mentioned above into account, the attribution of mediation was emphasized in the doctrine (Vrabie, 1995: 69) as representing one of the three fundamental roles of the head of state, from which two consequences arise: firstly, the President must be an impartial arbitrator in the mediation process, and for this reason the position of Head of State is incompatible with the position of a member of a political party or with any other public or private office (provided by art. 84 paragraph 1 of the Constitution), interdiction which is both legitimate and reasonable; and secondly, the provisions of art. 80 paragraph 2 from the fundamental law do not establish the possibility for the President to intervene in other conflicts between public authorities apart from the political ones.

Therefore, the Head of State cannot mediate legal conflicts of a constitutional nature that have as effects institutional blockages generated by the improper fulfillment or even by the infringement of the attributions established by the fundamental law in charge of the public authorities. This point of view is also highlighted by the current form of the Constitution of Romania, which establishes as an exclusive attribution in charge of the Constitutional Court of Romania the settlement of legal conflicts of a constitutional nature between public authorities (The Constitution of Romania, art. 146 letter e)).

In the exercise of the mediation prerogative conferred by the Constitution, the President acts as a mediator and conciliator between the powers of the state and between the interests of the state and society, having an active and positive role in coordinating and correlating the various relations between public authorities which, in the end, leads to the efficient functioning of the state structures, to the respect of the law and to the human rights, but also to the consideration of the legitimate aspirations of the members of the society.

The means of exercising the function of mediation do not convert the President into a supreme magistrate; he does not settle the conflicts between the organs of state power, but makes every effort to find ways to prevent them, to avoid or alleviate the institutional blockages that may occur in their activity.

It should be mentioned, therefore, that the President is only the mediator of some conflicts between the public authorities, but he does not have an obligation to

settle this type of disputes in the way in which the Constitutional Court of Romania is obliged, in accordance with the provisions of art. 146 lit. e) from the fundamental law, to solve a legal conflict of a constitutional nature, namely by pronouncing a final and binding decision.

Thus, the President performs rather an arbitration function that concretely implies reciprocal concessions between the divergent parties, but he does not settle the conflict by indicating the conduct to be followed by the authorities in order to avoid the occurrence of similar situations in the future, as it happens in any situation in which the Constitutional Court of Romania has to solve a legal conflict of a constitutional nature.

The jurisprudence of the Constitutional Court of Romania

Starting from the nature of the conflicts between public authorities, feature that delimits the sphere of action of those who have the attribution of mediation and that of the settlement of public conflicts -the President mediates only political conflicts, the Constitutional Court of Romania solves exclusively legal conflicts of a constitutional nature (Valea, 2020: 98) -; I would like to recall a situation in which the Constitutional Court of Romania (by virtue of the attribution provided by art. 146 letter e) of the fundamental law) was invested with the resolution of a presumed legal conflict of a constitutional nature, arisen between the President of Romania and the Parliament, "determined by the President's actions contrary to the Constitution, conduct which, at that time, was able to generate states of conflict between public authorities and within them" (Decision no. 53/2005, published in the Official Journal no. 144 from 17th of February 2005: 1).

Specifically, the object of the request through which the President of the Chamber of Deputies and that of the Senate notified the Constitutional Court was represented by the public statements made by the President of Romania regarding the Parliament and the political parties.

In their opinion, the fact that the President stated that certain political parties had "elevated the mafia-type system of government to the rank of state policy, calling them immoral solutions" (Decision no. 53/2005, published in the Official Journal no. 144 from 17th of February 2005: 1) indicates a behavior contrary to the spirit of the Constitution which is able to trigger conflicts within the rule of law.

Thus, taking into account the fact that the only authorities that have provided in their task the attribution to mediate respectively to resolve the conflicts between the public authorities are the Constitutional Court of Romania and the President of Romania, and considering the fact that in this situation the head of state, being a party involved in this dispute, obviously he could not exercise his constitutional prerogative of mediation, the president of the Chamber of Deputies and that of the Senate considered necessary the intervention of the Constitutional Court in the resolution of this conflict.

Being notified with such a request, the Constitutional Court had to examine each partie's point of view, to establish the criteria based on which a conflict between public authorities can be perceived as a legal conflict of a constitutional nature and to pronounce a solution in regard to this dispute.

Examining the entire situation, the circumstances of the case, the causing factors of the conflict and the previous case-law (Decision No. 339/2004; Advisory Opinion No 1 of 5 July 1994), the Constitutional Court decided that "the President's allegations are not acts, actions or omissions, but simple political statements"(Decision no. 53/2005, published in the Official Journal no. 144 from 17th of February 2005: 2), which are

related exclusively to the scope and limits of the freedom of expression and do not disturb the proper functioning of the rule of law.

Moreover, the Court considered that "public statements of the representatives of different authorities, in relation to the context in which they are made and their concrete content, may create states of confusion, uncertainty or tension, which could subsequently create between the public authorities even conflicts of a legal nature.
However, the Constitutional Court has the competence to intervene only in the situations where a legal conflict of a constitutional nature has actually been created between two or more public authorities and consequently it considered that the President's statements, published in the newspaper "Adevărul" no. 4,513 from 6th of January 2005, did not give rise to a legal conflict of a constitutional nature between the President of Romania and the presidents of the two Chambers of the Romanian Parliament, as perceived according to the provisions of art. 146 lit. e) of the Constitution" (Decision no. 53/2005, published in the Official Journal no. 144 from 17th of February 2005: 6).

By pronouncing such a decision, the Court secured its position regarding the attribution of resolving legal conflicts of a constitutional nature, eliminating from the beginning the possibility of its involvement in resolving political conflicts. As a result of this fact, the mediation of the political conflicts and, in fact, of the disputes of any nature arisen between public authorities, except for those of a constitutional nature, is exclusively the responsibility of the President of Romania according to the provisions of art. 80 paragraph 2 of the fundamental law.

However, it is kind of tricky that on the one hand, the Constitution of Romania provides the President the assignment of mediating conflicts between state powers, as well as between state and society in order to ensure the proper functioning of public authorities and compliance with the provisions of the fundamental law, and in the same time to grant him the possibility to constitute himself as a party of a legal conflict of a constitutional nature, which has as an effect the occurrence of an institutional blockage within the rule of law.

With respect to these two hypotheses, certain clarifications are required: on the one hand, although the fundamental law establishes for the President the attribution of mediation between the state powers, it does not provide for him an obligation in this regard- thus, the President has an abosulte power when deciding to mediate a public conflict; on the other hand, although the President has, according to the fundamental law, the posibility to become an active subject of a legal conflict of a constitutional nature, still the situations in which he generated or he was involved in such a dispute have been numerous from 2003 until now, the proof in this respect being the case-law of the Constitutional Court of Romania.

Therefore, I strongly believe that in this point of the research it is compulsory to mention the situations when legal conflicts of a constitutional nature appeared either between:

- the *President of Romania and the Government* (Decision no. 356/2007, published in the Official Journal no. 322 from 14th of May 2007- regarding the existence of a legal conflict of a constitutional nature as a result of the President's refusal to appoint a member of the Government at the proposal of the Prime Minister. Thus, the Court determined that the refusal of the President of Romania to appoint a member of the Government at the proposal of the Prime Minister triggered a legal conflict of a constitutional nature, which ceased to exist as a result of the issuance of the Presidential Decrees no. 193/12 from March 2007, no. 237/22 from March 2007 and no. 379/4 from

April 2007. At the same time, the Court stated that when exercising the attributions provided by art. 85 paragraph (2) of the fundamental law, the President of Romania does not have the right to vote, but he can only examine if the candidate meets the conditions of the position (Costinescu, 2020: 192) – that means that, he may ask the Prime Minister to drop the proposal when he finds that the proposed person for the position does not meet the legal conditions for exercising the function of a member of the Government. Through this decision, the Constitutional Court responded to the Prime Minister's request to establish the occurrence of a legal conflict of a constitutional nature between the President of Romania and the Government of Romania, restoring the constitutional legality of the institutional relations between the Head of State and the Romanian Government;

Decision no. 98/2008, published in the Official Journal no. 140 from 28th of February 2008 - with reference to the presence of a legal conflict of a constitutional nature generated by the President's refusal to comply with the proposal submitted by the Prime Minister regarding the appointment of a person as a member of the Government - namely the appointment of Mrs. Norica Nicolai as Minister of Justice. Therefore, the Constitutional Court held that, in the exercise of his constitutional powers, the President may, only for certain reasons and on a one-time basis, refuse the Prime Minister's proposal to appoint a person to the post of a member of the Government and ask him to make another proposal. Moreover, in order to resolve the dispute, the Court specified that the reasons for the refusal cannot be censored by the Prime Minister (Costinescu, 2020: 193), who has the obligation to propose another person, precisely in order to avoid the appearance in future of a similar legal conflict of a constitutional nature that would generate institutional blockages as a result, on the one hand, of the constant refusal of the President to appoint the person proposed by the Prime Minister as member of the Government, and on the other hand, of the Prime Minister's persistence in proposing the same person for the same position;

Decision no.683/2012, published in the Official Journal no. 479 from 12tth of July 2012- regarding the existence of a legal conflict of a constitutional nature between the Government, on the one hand, and the President of Romania, on the other hand, generated by the Government and the Prime Minister's actions to exclude the President of Romania from the delegation that represented Romania in the European Council on 28-29 June 2012. According to its role of guarantor of the fundamental law and to the task of resolving the legal conflict of a constitutional nature between public authorities, the Constitutional Court stated that the President of Romania participates in the meetings of the European Council as the Head of State, an attribution that may be delegated only by him, explicitly and clearly to the Prime Minister. In the absence of such a delegation, any attempt from the Prime Minister to assume the attribution to represent the Romanian state at the European Council generates a legal conflict of a constitutional nature because through such actions the Prime Minister arrogates himself attributions that do not belong to him and infringes a constitutional power that belongs exclusively to the President;

Decision no. 358/2018 published in the Official Journal no. 473 from 7th of June 2018 - with respect to the legal conflict of a constitutional nature between the Minister of Justice, on the one hand, and the President of Romania, on the other hand generated by the President's refusal to accept the proposal of revocation of the Chief Prosecutor of the General Anticorruption Directorate submitted by the Minister of Justice. In order to resolve this dispute, the Constitutional Court established that the President of Romania has the right to verify the legality of the proposal to revoke the Chief Prosecutor of the

General Anticorruption Directorate and to refuse it only if he does not comply with legal provisions (to be seen in this regard art. 51 in conjunction with 54 of Law No. 304/2004). Given the fact that in this situation, the President did not object to the legality of the procedure initiated by the Minister of Justice, but simply refused, without any basis, to issue the revocation decree, the Court stated that acting in such a manner, the Head of State generated a legal conflict of a constitutional nature with the consequence of creating an institutional blockage, as the Minister of Justice did not have the opportunity to exercise one of his constitutional attributions;

Decision no. 875/2018 published in the Official Journal no. 1093 from 21st of December 2018 - about the existence of a legal conflict of a constitutional nature caused by the President's refusal to issue the revoking decrees of two Members of the Government, the refusal to issue decrees establishing the vacancy of the ministerial positions as a result of the resignations of two ministers, as well as the refusal to appoint a member of the Government on the proposal of the Prime Minister. When resolving this dispute, the Constitutional Court considered that the President cannot censure the reasons invoked by the Prime Minister in the revocation proposals, the latter being the only one who can appreciate the necessity and opportunity of such a measure - the President's revocation decree being only the act through which a certain function ceased to be exercised (Costinescu, 2020: 192). Moreover, with regard to the President's refusal to issue the decrees establishing the vacancy of two ministerial positions as a result of the resignations of the incumbents, the Court stated that such conduct is contrary to the constitutional provisions - by an unjustified refusal, the President does not exercise a constitutional power established exclusively in his attributions – namely that of taking note and ascertaining by decree the vacancy of the positions by resignation, given the fact that those resignations had become, in the meantime, irrevocable (the term provided by the law – namely 15 days- having ran out). For all these reasons, the Constitutional Court declared that there is a legal conflict of constitutional nature and decided that the President of Romania had to issue immediately the decrees establishing the vacancy of the ministerial positions and to respond, promptly, in writing and motivated, to the proposals submitted by the Prime Minister of Romania in regard to the appointments to the position of a member of the Government (Decision no. 875/2018, Official Journal no. 1093 from 21st of December 2018: 14);

Decision no. 504/2019 published in the Official Journal no. 801 from 3rd of October 2019– referring to the occurance of a legal conflict of constitutional nature determined by the refusal of the President to issue the revoking decrees of some members of the Government, the written and immediate non-motivation of the refusal to appoint certain members of the Government, the President's unstated refusal to appoint interim members of the Government, at the proposal of the Prime Minister. Analyzing this dispute, the Constitutional Court stated that there was indeed a legal conflict of constitutional nature that was due to the fact that the President did not comply with the revocation proposal submitted by the Prime Minister, did not take note of the vacancy of the position of member of Government and did not issue vacancy decrees, actions that demonstrate an unloyal behavior and through which the President did not accomplish his constitutional attributions.

- *or between the President of Romania and the High Court of Cassation and Justice* (Decision no. 1,222/2008 published in the Official Journal no. 864 from 22nd of December 2008 - according to which there is a legal conflict of a constitutional nature between the President of Romania, on the one hand, and the judiciary, represented by the

High Court of Cassation and Justice, on the other hand, within the meaning of art. 146 lit. e) of the Constitution and of the case law of the Constitutional Court in the domain, produced as a result of the fact that the High Court of Cassation and Justice did not take into consideration the Decision of the Constitutional Court no. 384 from 4th of May, 2006, published in the Official Journal of Romania no. 451 from 24th of May 2006, as well as the legal provisions that were in effect at that time; (…) the Decision no. 2,289/2007, pronounced by the High Court of Cassation and Justice - Administrative and Fiscal Litigation Section in the File no. 34.763/2/2005 is not opposable to the President of Romania, who was not a party to the process; (…) That, according to art. 94 lit. b) of the Constitution, the granting of the rank of general represents an exclusive attribution of the President of Romania *"(* Decision No. 1,222/2008, Official Journal no.864 from 22nd of December 2008: 5). By pronouncing this type of solution, The Court responded to the request to state upon the existence of a legal conflict of a constitutional nature between the President of Romania, on the one hand, and the judiciary, represented by the High Court of Cassation and Justice, a conflict arisen as a consequence of the Supreme Court's disregard of the Decision of the Constitutional Court no. 384 from *4th* of May, 2006. Thus, the way of action of the High Court of Cassation and Justice makes it impossible for the President of Romania to respect both the decision of the court and that of the Constitutional Court which, in the end, leads to the occurence of a legal conflict of a constitutional nature.

The jurisprudence of the Constitutional Court demonstrates that most of the cases in which the President was involved as an active subject of a legal conflict of a constitutional nature were those constituted between the Government on the one hand and the President on the other, as a direct consequence of the fact that the executive power has a bicephalous structure.

Conclusions

I do consider that these situations are extremely inadequate and that they should not have taken place, or at least not with such frequency, and that for the proper functioning of the rule of law and as a result of being part of the same power, the Government and the President should have cooperated and collaborated to a greater extent.

Taking into account all the aboved mentioned, I appreciate that the two constitutional qualities of the President of Romania, that of being the mediator of conflicts between public authorities and that of being an active subject of legal conflicts of a constitutional nature between public authorities, do not mutually exclude themselves. On the contrary, they punctually and gently delimit the nature of the President's function, distinguishing himself as a representative of the state, when he is on a separate position from the other authorities and as an executive body as part of a bicephalous executive.

As the Head of the state, the President fulfills the atribution of mediation of the political disputes between public authorities (Gîrleșteanu, 2012: 317), which involves ameliorating the disputes through institutional dialogue, negotiations between the authorities involved in constitutional relations, institutional cooperation and, last but not the least, political compromise.

Reaching this stage of research and considering the fact that almost all conflicts between public authorities have a more or less accentuated political nature, I made an attempt to analyze in a brief manner the President's attribution of mediation from the

perspective of the Constitutional Court's attribution of solving legal conflicts of a constitutional nature, stating that if the first one involves only the power of arbitration at the state level, the second one, respectively the resolution of conflicts does not represent an academic exercise, purely theoretical, but it means understanding the constitutional rules that public authorities must respect/apply and establishing the conduct to be followed by the parties involved in the conflict.

If this had not been the aim of the regulation, there would have been no need for a complex procedure involving the presence of the parties, adversarial debates, a final and binding decision, the mere expression of the Court upon the interpretation of the constitutional texts on which the conflict relates being more than enough.

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