

THE PRESIDENT OF ROMANIA - THE RELATIONSHIP BETWEEN ELIGIBILITY CONDITIONS AND INCOMPATIBILITIES

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***Abstract:** Along with the eligibility conditions, the one who exercises the position of President of Romania is also subject to some incompatibilities. The eligibility conditions are required to be fulfilled on the date of submission of the candidacy, and the states of incompatibility must cease after the elections, until the beginning of the exercise of the mandate.*

***Keywords:** President, President, Constitution, Candidacy, Eligibility, Incompatibility, Parliament*

INTRODUCTION

The position of the President of Romania is incompatible with any belonging to a politic party. The position of President of Romania is incompatible with any membership of a political party. At the same time, the President of Romania, during the exercise of his mandate, cannot perform any other public or private function.

The appointment of the President is made by uninominal majority voting in two rounds. In the first round, the candidate who obtained the absolute majority, i.e. at least half plus one of the votes of the voters registered in the electoral lists, is declared elected. If none of the candidates has achieved this majority, the second voting round is organized, between the first two candidates established in the order of the number of votes obtained in the first round, and the candidate who obtained the highest number of votes will be declared elected. So, even only a relative majority.

This system leads to a designation, and if the designation occurs in the first round, the representative character of the presidency is peremptory, imposing that respect based on legitimacy sought through this way of electing the head of state. The opening of the second round, necessary of course after the failure of the first, attracts at least two consequences, not negligible: the first is the postulation of a President as the representative of the nation through the relative majority of its members with the right to decide, which will diminish considerably the moral authority of the President and will be a continuous source of ambiguities and reluctance and the second, the constraining of the electoral body to bipolarization, despite the diversity of aspirations and wills of its members.

1. Eligibility conditions

In principle, access to the position of President of Romania cannot be restricted to any Romanian citizen who enjoys the right to vote and has reached the age of 35, respecting the conditions provided by the Constitution and the law. This universal vocation of the Romanian citizen to accede to the highest position in the state is circumscribed by some eligibility, substantive and formal conditions, which must be fulfilled at the time of submitting the candidacy.

1.1. Background conditions

1. to be a Romanian citizen

According to Law no. 21/1991, any person can also hold a citizenship other than the Romanian one, so we can ask ourselves if the one who has several citizenships is entitled to run for the position of President. The text of article 16 of the fundamental law gives us a positive answer to the question raised, since public, civil and military positions and dignities can be occupied by persons who have Romanian citizenship and domicile in the country.

The nuance of the terminology on public functions and dignities is explained by the legislator's intention to determine as precisely as possible the scope of applicability of the principle. Thus, the mission of deputy, senator, head of state, minister is, however, something else than a public office, both in terms of occupation, as well as in terms of the size of the attributions and, of course, in terms of termination. For constitutional law, such a distinction is not purely terminological, but substantive, because dignitaries are not simple civil servants.

Public dignity is par excellence a category of constitutional law, this main branch of law that is individualized in the entire legal system not only by its regulatory object, but also by the specifics of the notions and legal categories with which it operates. Without proceeding to rigid delimitations, we find that public functions and dignities are indisputably connected, but without being confused.

The condition imposed to have Romanian citizenship must be correlated with the provisions of the Romanian law that allows dual citizenship.

The amendment brought by the Constitution revision law is of major importance. In the old version, the text allowed access to public positions and dignities to those who only had Romanian citizenship. Considering the reality of Romania's integration into the European Union, it was considered that the prohibition of access to these functions and dignities of Romanian citizens who also have another citizenship is no longer justified.

2. to be a Romanian citizen residing in the country

By virtue of this eligibility condition, the Central Electoral Bureau is obliged not to accept the candidacy of the Romanian citizen domiciled abroad, because Article 16 of the Constitution establishes the obligation of domicile in Romania. Although it has the appearance of an incompatibility, this condition, by reference to Article 37 of the Constitution, represents an eligibility condition.

The condition of domicile in the territory of the country is a natural condition. It is practiced in most constitutional systems, the domicile being, along with citizenship, a guarantee of personal attachment to the country in whose governance the candidate wishes to participate.

An addition, with deep legal significance, was brought on the occasion of the revision of the Constitution. Thus, a new sentence was added to paragraph 3 in the sense that the Romanian state guarantees equal opportunities between women and men for the occupation of public, civil and military positions. This is how part of the evolution of the principle of equality is expressed at the constitutional level. The legislator will have to identify the most suitable legal formulas so that this text does not remain only at the declarative level (Ioan Muraru, op. cit., page 23).

3. to be a Romanian citizen who benefits from the right to vote

Regardless of the age at which he is running, the Romanian citizen who wants to access the supreme office in the state must benefit from the right to vote, i.e. not be prohibited from exercising it, either as a result of a judicial decision to place it under prohibition, or of a definitive criminal conviction to the complementary penalty of the prohibition of the exercise of electoral rights.

4. to be a Romanian citizen who has reached the age of 35

The Central Electoral Bureau is empowered to refuse the candidacy of persons who have not reached the age of 35 or who do not reach this age by the day of the elections.

5. not to have already fulfilled, twice, the position of President of Romania

This condition is intended to stop any tendency of people to take over the supreme magistracy in the state for life or to allow the accumulation of dictatorial tendencies in the exercise of the position. According to Article 10 of Law 370/2004, persons who have been elected twice as head of state cannot be candidates (Article 10 of Law 370/2004).

The text deviates from the constitutional provisions by the fact that the prohibition is aimed at the fulfillment of at most two mandates. But, the text of the law refers to the election, which can only be prior to the exercise of the mandate. There is thus the possibility that a person was elected twice, but did not fulfill two mandates; this situation can occur if, after the confirmation of the results of the election by the Constitutional Court and until the exercise of the mandate, the elected person resigns or refuses to take the oath prescribed by the Constitution.

6. not to be prohibited from joining political parties

The Central Electoral Office will reject the candidacy of people who cannot be part of political parties, either by virtue of Article 40 of the Constitution, or by virtue of organic laws, which regulate the status of certain legal categories: the Court of Accounts, the Statute of civil servants, the Legislative Council.

This last condition must be interpreted in the sense that, if the candidate is part of a category indicated in the fundamental law, he must renounce the quality that constitutes an impediment to candidacy. The motivation of the constitutional text is relatively obvious and relates to the need to have free and fair elections.

Given that the listed are constitutional conditions of eligibility, their fulfillment must be verified very carefully, starting from the proposal and registration of candidacies in the elections. Any disregard of these conditions leads to the nullity of the election, therefore the registration of candidacies must be done only with careful verification of the fulfillment of the legal conditions.

1.2. Form conditions

Some of these formal conditions can be considered as preselection criteria for potential candidates, contrary to the democratic principle of general vocation to this position. However, they are necessary. This is the only way to observe the real meaning of elections, which are not a pretext for communicating opinions, but a means of appointment to elective positions. Only in this way can numerous, improvised and fanciful candidacies be prevented, as well as the danger of distortion and devaluation of the presidential campaign.

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1. submission of candidacy by a political party or by a political formation registered in the elections

Political parties can propose alone or together with others a candidate for the supreme office in the state. In order to make political parties have a clear choice regarding the candidate they support in the elections, the law prohibits any political party from proposing more than one candidate in the elections. This condition is valid both when a party proposes a candidate in the elections by itself, and when it proposes together with other parties such a candidate. The mixed solution, to propose several candidates, is not allowed by law.

Candidate proposals for the election of the President of Romania are submitted to the Central Electoral Bureau, at the latest 30 days before the date of the elections.

Proposals are made in writing and will only be accepted if:

a) are signed by the leadership of the party or the political alliance or their leaders, who proposed the candidate or, as the case may be, by the independent candidate;

b) include the first name and surname, place and date of birth, marital status, residence, studies, occupation and profession of the candidate and the specification that he meets the conditions provided by law to be a candidate;

c) are accompanied by the declaration of acceptance of the candidacy, written, signed and dated by the candidate, by the declaration of assets, by an authentic declaration, on one's own responsibility, according to the criminal law, regarding membership or non-belonging as an agent or collaborator of the security bodies, as political police, as well as the list or lists of supporters, whose number cannot be less than 200,000 voters.

The list of supporters is a public act, under the sanction provided by art. 292 of the Criminal Code. The list or lists of supporters must include the date of the elections, the first and last name of the candidate, as well as the first and last name, date of birth, address, name, series and number of the identity document and the signature of the voters who support the candidacy. At the end of the list, the person who drew it up is obliged to make a declaration on his own responsibility to attest to the veracity of the supporters' signatures.

The candidacy proposal is submitted and registered at the Central Electoral Office in 4 copies, one original copy and 3 copies. The original copy and a copy are kept at the Central Electoral Bureau, another copy is forwarded to the Constitutional Court, and one, certified by the president of the Central Electoral Bureau, is returned to the applicant.

The Central Electoral Office brings to public knowledge, through the press, and displays, at its headquarters, the candidate proposals it has received, within 24 hours of registration. Up to 20 days before the date of the elections, the candidate, political parties, political alliances and citizens can challenge the registration or non-registration of the candidacy. The appeal is submitted to the Central Electoral Bureau, which forwards it together with the candidacy file, within 24 hours, to the Constitutional Court for resolution.

The Constitutional Court resolves the appeal within 48 hours of registration. The solution is final and is published in the Official Gazette of Romania, Part I. The day after the expiry of the deadline for resolving appeals, the Central Electoral Bureau communicates the final registered candidates to the constituency electoral offices, in the order in which they were submitted.

2. the declaration of acceptance of the candidacy - must be accompanied by the declaration of wealth, by an authentic declaration, on one's own responsibility, according to the criminal law, regarding the membership or non-membership as an agent or collaborator of the security bodies, as the political police.

2. The ratio between eligibility conditions and incompatibilities

The provisions of the 84th Article of the Constitution have a double importance. The first situation refers to citizens who are in a state of incompatibility with the exercise of the position of President of Romania and who candidate for it. The second situation concerns the incumbent President, who is running for a second term.

In the first situation there can be people who occupy, by the virtue of their political affiliation, different public positions in the state: president of the Chamber of Deputies, of the Senate, prime minister. These persons, by the nature of the function they exercise, can create inequalities between the candidates in the elections, either through the demagogic and populist measures that they can influence, or through preferential access to the mass media communication or other means of propaganda. Juridically, nothing prevents these people from applying for such a position, being known that in the public law any limitation of exercising a fundamental right can only be the work of the law. On the other hand, from a moral and political point of view, ceasing to exercise a public function, during the electoral campaign, represents a solution that places the candidate above any doubts.

The second situation, which concerns the double candidacy, presidential and parliamentary, no constitutional or legal text prevents this. In the electoral practice until now, this procedure has been used. This double candidacy can only be used if the presidential and parliamentary elections are concurrent. If the parliamentary elections take place before the presidential elections, the President of Romania can run for the parliamentary elections. In all cases, after the elections, the President must resign from the position that he has because it is inadmissible to cumulate the mandate of President of Romania with the mandate of deputy or senator. These possible controversies were solved by Law no. 373/2004, which provides in art. 5 that the incumbent President of Romania, on the date of the election of the Chamber of Deputies and the Senate, if he is in the last 3 months of his mandate, can run as an independent candidate on the lists of a political party, political or electoral alliance to obtain a deputy or senator mandate. If he is elected as deputy or senator, the President of Romania is obliged, after validation, to choose between being a deputy, a senator or being a president (Law 373 of 2004).

The independent candidate, registered on the list of a political party, is considered in a doctrinal opinion as being "bizarre or electoral fraud" (Ioan Deleanu, quoted work., page 297). This possibility inserted in the legal text was contested at the Constitutional Court (Decision no. 339 from September 17, 2004).

In essence, the critique of unconstitutionality formulated by the 51 deputies regarding the provisions of article 5 paragraph 7 of the Law for the election of the Chamber of Deputies and the Senate consists in the assertion that, under the conditions in which the President of Romania can run as an independent candidate on the lists of a political party, political alliance or an electoral alliance in order to obtain a deputy or senator mandate, "cannot maintain the neutrality and equidistance" necessary "to fulfil its constitutional responsibility of mediating between the state powers, between these ones and society".

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It was also argued that as a candidate on the list of a political party, even as an "independent", The President of Romania will be involved in part, will be identified with the party on whose lists he is running, with the doctrine, the political and electoral program, with the message and the political-public action of that party, with his election campaign actions". At the same time, the authors of the notice of unconstitutionality, in conjunctions with the provisions of art. 84 paragraph 1 of the revised Constitution, regarding the incompatibility between the function of President of Romania and quality of being a member of a political party, with the provisions of art. 37 paragraph 1 and art. 40 paragraph 3 claimed that the President "is restricted - by virtue of this function – also the right to be elected on the list of a political party".

In our opinion, examining the text of the law criticized, by reference to the provisions of the Constitution invoked by the authors of the notification as being violated, there is no incompatibility between these.

The constitutional provisions invoked by the authors of the exception do not prohibit, neither explicitly nor implicitly, the possibility that the incumbent President of Romania, on the date of the election of the Chamber of Deputies and the Senate, if he is in the last 3 months of his mandate, to run as an independent candidate on the lists of a political party, of a political or an electoral alliance for a deputy or senator mandate.

The problem that is being raised is whether, under the terms of the criticized law, the President of Romania has the right to be elected or not, as provided by art. 37 of the revised Constitution. One of the conditions provided by Article 37 paragraph 1 of the Constitution, republished, for the fundamental right to be elected, is correlated with the right of association. From the corroboration of the provisions of art.37 paragraph 1 and of art.40 paragraph 3 of the Constitution, republished, it is clear that the right to be elected is forbidden to the judges of the Constitutional Court, to the Ombudsmen, magistrates, active members of the army, policemen and other civil servants established by organic law, who may not be part of political parties.

It was found that the President of Romania is not provided between the categories of citizens, established limitatively by the two constitutional texts, which are forbidden the fundamental right to be elected, although, during his term of office, he cannot be a member of a party (Constitution of Romania, art.84 paragraph.1)

By virtue of the principle that the exceptions are of strict interpretation, it cannot be considered that the situation provided for in Article 84 paragraph 1 of the Constitution which establishes a temporary political incompatibility for the President of Romania, could, in the absence of a constitutional provision, to have the consequence of banning the right to be elected for the President of Romania, given that he does not become a member of a political party.

Only by a forced interpretation - by adding to the constitutional norms -the situation stipulated in the text of the criticized law could be converted into the incompatibility provided by art.84 paragraph 1 and in the prohibition of the right to be elected established by art.37 paragraph 1 corroborated with art.40 paragraph 3 of the revised Constitution, as stated in the complaint of unconstitutionality. Such an interpretation, which would disguise a genuine creation of a constitutional norm, is contrary to the principle of supremacy of the Constitution, provided by Article 1 paragraph 5 of the Fundamental Law, as well as the constitutional and legal status of the Court, which prohibits him from being a positive legislator.

Moreover, the invoked text of Article 80 paragraph 2 of the revised Constitution, does not have the content shown by the authors of the complaint, only partially, and does not concern relations between the President and political parties. In reality, the text refers only to the role of the President of Romania within the state. The question of how the President exercises this role is related to the extent to which the President fulfils his obligations, the ethics of exercising the presidential mandate, which, in case it is seriously violated, entails the constitutional responsibility of the holder of this mandate.

The issue raised by the authors of the complaint could also be raised regarding the situation in which the President of Romania would run for a second successive term, as provided in Article 81 paragraph 4 Of the revised Constitution. However, it cannot be conceived to prohibit the President from running for office on the lists of a political party, political alliance or electoral alliances for the second successive term of office, whereas, thus, the text in question would become inapplicable, devoid of content. The Constitutional Court found that the provisions of Article 5 paragraph 7 of the Law on the election of the Chamber of Deputies and the Senate do not contradict the provisions of the Constitution and rejected the exception of unconstitutionality.

CONCLUSIONS

The Constitutional Court is forbidden, in its capacity as guarantor of the supremacy of the Constitution, provided by art.142 paragraph 1 of the revised Constitution and according to the provisions of art.2 of its organic law (Law no. 47 / 1992), in the exercise of constitutionality control, to amend or supplement the provisions subject to control. Moreover, the Court is forbidden to proceed, even by a necessary act of interpretation, to the modification and completion of constitutional provisions, operations subject exclusively to the strictly regulated regime of constitutional review.

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