Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 17(66) No. 2 - 2024
https://doi.org/10.31926/but.ssl.2024.17.66.2.19

ASPECTS REGARDING THE POSSIBLE DISCRETIONARY POWER OF THE PRESIDENT OF ROMANIA IN EXERCISING THE POWER TO PROMULGATE LAWS

Oana ȘARAMET[1]

Abstract: *The Constitution of Romania, republished, provides, in art. 1 paragraph (4), that the organization and functioning of our state is based on the principle of separation and balance of powers in the state. The true functioning of this principle is conditioned by the configuration of control mechanisms and mutual collaboration, especially between the most important exponents of these powers, such as the Parliament and the President of Romania. One of the powers exercised by the President of Romania in his relations with Parliament is the promulgation of laws. Through this article we aim to analyze whether this is a genuine attribution, as well as whether it can be exercised at the discretion of the head of state.*

Key words: *President of Romania, promulgation, balance of powers, discretionary power, Parliament.*

1. Introduction

Through our 1991 Constitution, a semi-presidential political regime was configured in which, as far as the actors representing the three classical powers, namely the legislative power, the executive power and the judicial power, the emphasis was placed on the separation and balance of powers in the state. The 2003 constitutional revision did not radically change this constitutional configuration, but it emphasized, from our point of view, this character of the political regime, the doctrine mentioning that it could be considered "an attenuated semi-presidential political regime or even a semi-parliamentary political regime" (Apostol Tofan, 2020, p.114; Iorgovan, 2005, p. 294). In support of such an assessment of the type of our political regime, a series of arguments are brought forward that mainly concern the authorities in the sphere of legislative and executive power, namely the Parliament, on the one hand, and the President of Romania and the Government, on the other hand, and in relation to these, aspects such as: the method of designation, political and legal responsibility, the exercise of other

[1] *Transilvania* University of Braşov, oana.saramet@unitbv.ro, corresponding author

constitutional powers, highlighting the forms of collaboration and mutual control between these authorities within the limits of their constitutional powers (Muraru, Tănăsescu, 2019, p. 718; Iorgovan, 2005, p. 295 and next). In this regard, the Constitutional Court of Romania also ruled, showing that "the principle of separation and balance of powers - legislative, executive and judicial - presupposes the existence of mutual control between the state powers in terms of the exercise in accordance with the law of their specific attributions, this being a specific mechanism of the rule of law and democracy to avoid abuses by one or another of the state powers" (DCCR no. 700/2008).

One of the most important functions exercised, mainly, by the Parliament of Romania, but with the participation of the Government and the President of Romania, through specific attributions, is the legislative one.

The adoption of primary norms, through organic and ordinary laws, is the essential mission of the aforementioned state authorities, especially the Romanian Parliament. However, including in order to prevent the Romanian Parliament from exceeding constitutional and regulatory limits in exercising this function, the President of Romania has a specific attribution recognized by constitutional norms, namely that of promulgating. Thus, as is evident from the provisions of art. 77 of the Romanian Constitution, republished, the promulgation of laws is an attribution recognized exclusively to the head of state, on the one hand. On the other hand, we must note that the promulgation is exercised by a public authority within the executive branch, thus being able to appreciate that it also represents a control mechanism of the President of Romania towards the Romanian Parliament, as regards the exercise of this attribution precisely because "the separation of powers in the state.... presupposes the existence of mutual control, as well as the achievement of a balance of forces between them" (DCCR no. 594/2008). This is how the constitutionally configured mechanism is, through which Parliament can be prevented from exercising, in an abusive, discretionary manner, the power of legislation.

Given that the Romanian Parliament consistently legislates to satisfy the need for regulation, which is increasingly growing and more diversified, and the promulgation is exercised by a single-person body represented by the head of state, would there be a risk that this constitutional attribution would become merely formal, remaining just a traditional residue transmitted over time and constitutions?!

2. Assessments regarding the Promulgation of Laws, a Constitutional Attribution of the President of Romania

In the approach we have proposed through this work, we will first of all make some assessments regarding the promulgation of laws by the President of Romania.

In the foregoing, we have already shown that the constitutional regime in Romania is a semi-presidential one in an attenuated form.

Some of the pertinent arguments from the perspective of the president of Romania are: neutrality of the president, the principle power of mediator, arbiter between state powers, between state and society.

According to article 80 of Romanian Constitution, some of dimensions of the constitutional role of the Romanian President are also the following:
- acting as a mediator between the Powers in the State, as well as between the State and society;
- guarding the observance of the Constitution and the proper functioning of the public authorities.

In our opinion, the promulgation of laws is one of the President's powers in order to achieve the two above mentioned functions, those two representing dimensions of the constitutional role of our President.

In order to exercise the power of promulgation, according to article 77 of the Constitution, the law is sent to the President of Romania who has a maximum period of 20 days in which to promulgate the law. However, prior to promulgation, the President of Romania has the recognized possibility of requesting Parliament to re-examine the law, respectively to request the verification of its constitutionality by the Constitutional Court of Romania. Following the exercise of these specific forms of control or one of them – when the request for review is rejected or the law is reviewed by the President of Romania, or if the law is considered to be constitutional, the President of Romania is obliged to promulgate the law.

Therefore, by virtue of the constitutional norms, the President of Romania is in a position to exercise the right to promulgate the law, respectively to fulfil his obligation to promulgate the law, as the case may be. However, the assessment related to the right to promulgate the law must be understood in the sense that at the time of receiving it for promulgation, the President of Romania may exercise a right of appreciation in the sense of promulgating it or not, and in the event that he decides not to promulgate it, he must address the Romanian Parliament, or the Constitutional Court, or both, as provided for by the constitutional norms. Consequently, we are not in a situation of exercising a genuine discretionary power by virtue of which the President of Romania would have the recognized possibility of refusing, without justification, without taking any other steps, the promulgation of the law, implicitly refusing, without the right of appeal, its entry into force.

However, once either the specific parliamentary control or the constitutionality control, or both, has been exercised, the notifications made have not been confirmed or following the resolution of those notified by Parliament, in principle, precisely because the President of Romania is not granted the possibility of definitively and irrevocably refusing to promulgate the law, the President will be obliged to promulgate the law.

Such an assessment seems pertinent to us given the fact that the law cannot be published in the Official Gazette of Romania and, implicitly, cannot enter into force, without its promulgation being carried out, a fact attested by the decree issued in this regard by the President of Romania. In this sense, there are also the assessments in the doctrine, in our opinion, according to which “the enactment ....consists in the recognition in favour of the head of state .... of the right to invest the laws adopted by Parliament with an enforceable formula, obliging public authorities to proceed to the execution of its provisions” (Apostol Tofan, 2020, p.126).

In view of the above, we agree with the opinions expressed in the specialized

literature according to which "The President cannot simply refuse to promulgate. ”The unjustified refusal to promulgate may be considered a deviation from constitutional duties” (Muraru, Tănăsescu, 2019, p. 679), we adding that the fulfilment of this constitutional obligation is proven by the decree issued in this regard by the President, a decree that will be published, together with the promulgated law, in the Official Gazette. Supporting such a point of view, we consider that the law should not be published in the Official Gazette, in the absence of an act of promulgation, not even upon the expiration of the constitutional deadlines provided for by article 77 (Drăganu, 1998, 249). In such a situation, we could identify a discretionary exercise of the power to promulgate the law by the President of Romania, in which case we consider that the provisions of art. 146 letter e) of the Constitution are applicable, with the constitutional solution being identified by the Constitutional Court by resolving the legal conflict of a constitutional nature between the President and Parliament, which could even lead to the opening of the specific procedure for holding the President of Romania politically liability, in accordance with the provisions of article 95 of the fundamental law.

In the same sense, we can appreciate that "proclamation represents the act by which the head of state authenticates the text of the law..., ascertains and certifies the regularity of its adoption". (Muraru, Tănăsescu, 2017, p. 234)

Moreover, such assessments are indirectly supported by the options that the President of Romania has when the parliamentary procedure for adopting the law is finalized and the law is sent for promulgation, as I have synthetically explained above, aspects to which we will return.

3. The Promulgation of Laws – Formal Attribution / Discretionary Power?

Therefore, “promulgation is the declaration of a law, the formal statement or proclamation of new legislation. It is the act by which the authorised official (for example the Head of State) attests that a given text has been approved as a law. Promulgation hence attests the creation and validity of a law” (Grant, 2006, p. 326).

Starting from the provisions of art. 77 of the Constitution, the possibilities of the President of Romania when he receives a law for promulgation are:

1) The promulgation of the law if he appreciates that it is constitutional and adopted in compliance with the principle of legality, and it is appropriate for those times and social, economics, etc. conditions. However, considering the provisions of article 146 letter a) of the Romanian Constitution, and the article 15 para. (2) from Law no. 47/1992, and provisions from Standing Order (Regulation) of the Chamber of Deputies [article 32 para. (1) letter l), article 34 letter e)] and Standing Order (Regulation) of the Senate [article 38 letter g), article 154] – even other legal subjects may request the exercise of constitutionality control, before promulgation, by the Constitutional Court of Romania (hereinafter referred to as CCR). Therefore, it is impossible for the President to exercise the discretionary power of promulgating the law.

As a result of notifying the CCR, 2 situations may arise:

- the objection of unconstitutionality is rejected - the law can be promulgated (the same is the situation if the CCR is not notified), or

- the objection of unconstitutionality is admitted = the law is sent back to Parliament or the legislative procedure is resumed (if the law in its entirety is declared unconstitutional).

2) Even the President of Romania notifies the CCR when he is exercising his discretion power in this regard, for reasons of possible unconstitutionality. In this case, the notification of the CCR must be made within the 20 days. This term is the deadline for exercising the right of promulgation by the President of Romania. As a result of notifying the CCR, the same situations as those mentioned above, at point 1), may arise.

In this situation, although the President of Romania would apparently exercise a discretionary power, we nevertheless consider that even at such a moment we cannot speak of the exercise of such power because the President could not knowingly, in bad faith, ignore unconstitutional aspects of the law, and thus would not notify the CCR. Arguments for such a statement would be: the existence of other legal issues that can be referred to the CCR, as well as the possibility of holding the President politically liability, according to the provisions of art. 95 of the Constitution.

3) The President may also resubmit, just one time, the law to Parliament for reconsideration, exercising his discretionary power in this regard. Possible reasons for such a decision by the President are: the non-compliance with the principle of legality, the objections of opportunity (these may concern economic, social, environmental, legislative, budgetary aspects/effects), the inconsistencies with the internal or international regulations in force, the non-correlation or non-harmonization with European legislation, CJEU or ECHR jurisprudence, or the non-compliance with substantive or formal drafting rules (See, for example, DCCR no. 624/2016, point 26). The identification of one or more of these reasons to resubmit the law for re-examination to Parliament is a decision that belongs exclusively to the President of Romania, and it can be said that he is exercising a right of appreciation (See, also: Săraru, 2023, p. 61, but, also, for example: DCCR no. 355/2007).

The situations that may arise as a result of the law being resubmitted to Parliament for re-examination are the following:

- the Parliament decides to re-examine the aspects indicated by the President, but also the provisions in close correlation with them (See, for example, DCCR no. 81/2013). After re-examination, the law is sent for promulgation, and in that case the law is promulgated, or CCR is notified by the President;
- the law is not re-examined by the President, in which case it will be sent back to the President for promulgation.

In support of, but also in addition to, what has been said above, we emphasize that the CCR has established, through its jurisprudence, that the provisions of art. 77 paragraph (2) of the Constitution, according to which "before promulgation, the President may request Parliament, once, to review the law", "do not provide for the provisions that must be reviewed, following the request formulated by the President of Romania", and "from the analysis of the text it results that the texts included in the request of the President of Romania, as well as those related to them, must be reviewed, being necessary the technical-legislative correlation of all the provisions of the law.... [thus] even some provisions of the law that were not expressly included in the

request for re-examination can be modified" (DCCR no. 991/2008). "Parliament deliberates only within the limits of the request for reconsideration, but is obliged to express its opinion on all texts of the law that refer to an issue raised by the President of Romania, even in the absence of an express mention in his request" (DCCR no. 991/2008). However, after the law has been reviewed, the President of Romania cannot re-address Parliament with a new request for re-examination. If the President does so, outside the constitutional limits, we will find ourselves in a situation where he exercises, in a discretionary manner, constitutional powers. However, he will have the possibility to address the CCR.

On the other hand, regarding the situations presented above, we must mention that the constitutional provisions are unclear because the President of Romania can notify the Parliament and the CCR successively, or he can notify them simultaneously (See also, for example: Muraru, Tănăsescu, 2019, p. 683).

The notification of the Parliament in order to re-examine the law is equivalent to suspensive veto during the review period because: the law cannot be promulgated, and also the law cannot be sent to the CCR for constitutionality control.

Thus, as stated in the doctrine, "… for law to be able to guide human conduct, it must be promulgated to its subjects [because] [p]eople can only be guided by rules or prescriptions if they know about the existence of the rule or prescription" (Marmor, 2014, p. 5). Accordingly, "the promulgation of a normative act is a complex and yet particularly important conventional action of making this act (and not just information about it) public in the form provided by the legal system" (Wronkowska, 2001, p. 10-11, quoted by Preisner, 2015, p. 32). This is why the promulgation of the law by the President of Romania cannot be an attribution that he exercises in a discretionary manner, but he has the possibility of exercising a right of appreciation under certain conditions and limits, as is evident from the above mentions. For the same reasons, we cannot state that this attribution is only a formal one.

4. Conclusions

The promulgation of laws is the right of the executive power (represented in this context by the President of Romania) to check, to verify whether the law has been adopted in compliance with the constitutional and legal provisions and whether it is appropriate to adopt the law in the respective field of regulation.

The promulgation of laws is a tool and a mechanism, at the same time, effective for:

- the collaboration between the Romanian President and the Romanian Parliament;
- the mutual control between the President of Romania and the Parliament of Romania, but also between the Parliament and the President;
- the possibility of exercising constitutionality control by the CCR. In our opinion, the constitutionality review of laws is and must always be an objective and impartial control because the CCR is not part of any of the state's powers and thus can ensure, through its specific attributions, the compliance with the principle of separation and balance of powers in the state.

The President of Romania does not benefit from absolute, unlimited discretionary power in the sense that he cannot simply refuse the promulgation of the law. Within certain limits, conditions and terms, as I mentioned above, the President may exercise not a discretionary power, but rather a right of appreciation by choosing: the promulgation of the law, or the notification of the CCR, or resubmitting the law for re-examination to the Parliament.

But if the President of Romania does not exercise his right to promulgate the CCR, or the Parliament of Romania, or both, as permitted by the constitutional, regulatory and legal provisions in force, he will have to fulfil his obligation to promulgate the law. The same solution is also in the event that the Constitutional Court finds the constitutionality of the law, as well as if the Parliament rejects the request for re-examination of the law.

Any other option the President of Romania would choose would put him in the position of exercising, in a discretionary manner, his power to promulgate laws. But, "[t]he process of promulgating laws consists of three steps: enactment, dissemination, and enforcement….[t]he enactment of a law determined the beginning of its dissemination" (Jingrong, Songchang, 2021, 417) to all its recipients.

Consequently, the failure to exercise this power or its inadequate exercise, in a discretionary manner, may result in the sanctioning of the President, according to the constitutional norms in force, or at least the emergence of a legal conflict of a constitutional nature that will be resolved by the CCR.

Acknowledgements

Aspects of this paper were presented at the TRANSILVANIA INTERNATIONAL LAW CONFERENCE - 2023 "Current Issues within EU and EU Member States: Converging and Diverging Legal Trends", 6th edition, organized by the Faculty of Law of Transilvania University of Brașov, on November 17th , 2023.

References

Apostol Tofan, D. (2020). *Drept administrativ*. Volumul I. [Administrative Law]. București: C.H. Beck.

Decision of the Constitutional Court of Romania (DCCR) no. 355/2007 on the constitutionality of the Law amending and supplementing Law no. 3/2000 on the organization and conduct of the referendum, published in the Official Gazette of Romania, Part I, no. 318 of 11.05.2007.

Decision of the Constitutional Court of Romania (DCCR) no. 991/2008 on the constitutionality of the Law amending and supplementing Law no. 3/2000 on the organization and conduct of the referendum, published in the Official Gazette of Romania, Part I, no. 318 of 11.05.2007.

Decision of the Constitutional Court of Romania (DCCR) no. 594/2008 regarding the exception of unconstitutionality of the provisions of art. 14 para. (1) and (2) of the Administrative Litigation Law no. 554/2004, published in the Official Journal of Romania, Part I, no. 455 of 20.05.2008.

Decision of the Constitutional Court of Romania (DCCR) no. 700/2008 regarding the exception of unconstitutionality of the provisions of art. 15 par. (1) of the Administrative Litigation Law no. 554/2004, published in the Official Journal of Romania, Part I, no. 570 of 29.07.2008.

Decision of the Constitutional Court of Romania (DCCR) no. 81/2013 on the objection of unconstitutionality of the Law amending and supplementing Law no. 96/2006 on the Statute of Deputies and Senators, as a whole, as well as, in particular, the provisions of art. I point 3 (relating to the amendment of art. 7) and art. I point 14 (relating to the introduction of art. 19^1) of the law, published in the Official Journal of Romania, Part I, no. 136 of 14.03.2013.

Decision of the Constitutional Court of Romania (DCCR) no. 624/2016 regarding the objection of unconstitutionality of the provisions of the Law for the approval of the Government Emergency Ordinance no. 4/2016 on the amendment and completion of the National Education Law no. 1/2011, published in the Official Journal of Romania, Part I, no. 937 of 22.11.2016.

Drăganu, T. (1998*). Drept constituțional și instituții politice. Tratat elementar.* Volumul II. [Constitutional law and political institutions. Basic treatise]. Buurești Lumina Lex.

Grant, C. (2006). Promulgation and the law. *International Journal of Law in Context*, 2,3, pp. 321-329. Cambridge University Press. Retrieved from: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/D7D2AA2EC4A25DB13D1B87F6E2A88327/S1744552306003089a.pdf/promulgation_and_the_law.pdf

Iorgovan, A. (2005). Tratat de drept administrativ. Volumul I. [Administrative Law Treaty]. Bucharest: All Beck.

Jingrong, L., Songchang, C. (2021). The promulgation of law in Qin and Western Han China. *Early China*, vol. 44. pp. 393–418. The Society for the Study of Early China and Cambridge University Press. Retrieved from: https://www.cambridge.org/core/journals/early-china/article/promulgation-of-law-in-qin-and-western-han-china/D5EE31803D74CDE3E0B8746E714155EC

Marmor, A. (2004). The Rule of Law and Its Limits. *Law and Philosophy*, vol. 23, no. 1. JSTOR pp. 1–43. Retrieved from: http://www.jstor.org/stable/4150562

Muraru, I., Tănăsescu, E. S., coordinators (2019). *Constituția României. Comentariu pe articole* [The Constitution of Romania. Commentary on articles]. București: C.H. Beck.

Muraru, I., Tănăsescu, E. S., coordinators (2017). *Drept constituțional și instituții politice*. Volumul II [Constitutional law and political institutions]. București: C.H. Beck.

Săraru, C. (2023). *Drept administrativ.* Volumul I. [administrative Law]. București Universul Juridic.

Wronkowska, S. (2001). Ustawa o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnym. *Przegląd Sejmowy* no. 5, quoted by Preisner, A. The promulgation of normative acts – the legal basis and practice. *Globalization, the State and the Individual*, 4(8), pp.39-44. Retrieved from: https://europub.co.uk/articles/the-promulgation-of-normative-acts-the-legal-basis-and-practice-A-282412