

HISTORICAL BENCHMARKS OF POWER DELEGATION (II)¹

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Abstract

Our pursuit aims to perform a historical excursion in the matter of legislative delegation considering the fact that the adoption of laws is exclusively the Parliament's capacity, but, under certain constitutional provisioned circumstances the Government may also adopt normative deeds with law value, although these are not called laws but Government ordinances. Two conclusions stand out, namely that legislative delegation was sometimes practiced but not regulated, as well as that normative legal deeds featuring law's legal force could also be adopted by other public authorities, arguing on the constitutional principle of the existence of a sole centre for legislative impulses.

Keywords: *delegation, empowerment, decrees, legislator, ruler.*

Following the course of history and analyzing the '30s from the perspective of power delegation, as seen in the first study, we will analyze the moment of February 20th, 1938, when, by Royal Decree², King Carol II of Romania instates the new Romanian Constitution, in motion starting February 27th, 1938, thusly rendering the Constitution of 1923³ obsolete. This instated royal dictatorship, in many ways similar to the Statute Expanding the Paris Convention of 1864, without, obviously, identifying with it.⁴ Both meant an authoritarian, personal regime, but in contrast with Al. I. Cuza, who resorted to the Statute in order to stimulate constitutional life for the benefit, at least declaratively, of the many, Carol II ended the parliamentary regime, creating a regime completely subservient to him, characterized by the confusion of powers, with the executive being central. The king was "the Head of the State" (art. 30), having both legislative power (art. 31) and executive power (art. 32). He had, according to art. 46, the right to pass out laws – and here we speak of self-delegation – in any domain and was conditioned by no extraordinary situation, specific to a state of necessity. The only condition imposed on himself was that the decree-laws could only be emitted inbetween sessions or during the time in which the Parliament was dissolved⁵, with their ratification being done retroactively by the Parliament.

¹ The first part of this study „Juridical consequences of the submission of emergency decrees between parliamentary sessions”, was published in *Fiat Iustitia* review no 1/2015.

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² Published in the *Official Gazette*, Part I, issue no. 42, February 20th, 1938.

³ Published in the *Official Gazette*, Part I, issue no. 48, February 27th, 1938.

⁴ P. Negulescu, *Principiile fundamentale ale Constituției din 27 februarie 1938*, Bucharest, 1939, p. 65.

⁵ Except that the king only summoned the Parliament once for a brief session, so we can say, without the fear of being wrong, that the creation and implementation of laws was done exclusively through decree-laws.

The dictatorship ended along with the repeal by Decree-law no. 3052 from September 5th, 1940 of the Constitution of 1938.⁶ Decree-law no. 3053, published the same day, named General I. Antonescu as President of the Ministry Council, with full powers to govern over Romania. It ended a dictatorship in order to replace it with another. From our point of view, what matters is only the fact that, as is usual with the rules of dictatorship, absolute power, thusly one that is also legislative, belongs to a single person. As such, lawmaking was carried through with decree-laws in this time as well.

After this second dictatorship was overturned, on August 23rd, 1944, the 1923 Constitution was reinstated for the most part. The document that made this official return to democracy was Decree-law no. 1626, of August 31st, 1944⁷, which invested the king with the power to be the lawmaker through decree-laws, with the aid of the Ministry Council, until a Representative Assembly was formed. Subsequently, the Constitution of 1948⁸, the start of a long dark time for our democracy, was instated, in which political power was exercised by the Communist Party exclusively. Neither this, nor the Constitution of 1952 did mention regulations that might in any case award legislative decisions towards a legislative body outside the executive power. Yet, the Constitution of 1965⁹, also a totalitarian communist one, addresses delegation, in the general sense of the term, as being commissioned to introduce legal documents as laws. In the view of the lawmaker of the time, the Great National Assembly, the supreme body of power within the state, was the only legislative entity within the Socialist Republic of Romania. According to its constitutional prerogatives, it adopted laws and decisions. The Assembly had a substructure, a state power chosen by it called the State Council. The State Council was chosen by the Great National Assembly from their members, for the entirety of the legislature. Its attributions were of two kinds: permanent (art. 63) and temporary, inbetween Great National Assembly sessions (art. 64). Among the attributions of the second category was that the Council could establish norms which had the statute of law, with the exception of norms that could modify constitutional provisions. Adopting normative decrees was censored *a posteriori* by the "mother" state organ, on the occasion of the first session. All attributions of the Council inbetween sessions could be exercised during the sessions as well "should economic and social necessities impose undelayed measures and the Great National Assembly is not present in its entirety."¹⁰ The delegation of power in this form leads us to believe that such delegation is a form of delegation in general, different from proper legislative delegation. If the other Constitutions mentioned or only practiced a delegation of legislative attributions from one power (legislative) to another (executive), here the problem is different. It is indeed a delegation regulated by the Constitution, but within the frame of the same power, the legislative power. The Constitutional Court went even further, referring in the context to the "juridical regime of legislative delegation, contained within the Constitution of

⁶ Published in the *Official Gazette*, Part I. Issue no. 205, September 5th, 1940.

⁷ Published in the *Official Gazette*, Part I, no. 202, September 2nd, 1944.

⁸ Published in the *Official Gazette*, Part I, no. 87 bis, April 13th, 1948.

⁹ Published in the *Official Bulletin of the Socialist Republic of Romania*, no. 1, August 21st 1965.

¹⁰ Art. 64, par. (2).

1965¹¹." Obviously, there is no issue with the infringement of the principle of separation within the state, which did not exist, or of the principle of *delegate potestas non delegator*, because the supreme state administration body, the Ministry Council, only adopted decisions on the basis of and in order to execute the laws. The doctrine has highlighted a law, to which we can also attribute, theoretically, the quality of "habilitation law", through which the government allocated itself the power "to regulate, experimentally, even in legislated domains, which had, as an effect, the suspension of the application of existing laws within these domains, by accumulating the experience thus gained, after which new regulations would be defined as laws."¹²

On December 22nd, 1989, through the Official Statement to the Country by the National Salvation Front¹³, the disintegration of all power structures founded by the 1965 Constitution was commenced. Until the new Constitution of December 8th, 1991¹⁴, power within the state was organized and respected constitutional documents¹⁵. According to them, the National Salvation Front, and after that, the Provisional National Unity Council¹⁶ and, finally, the Parliament had full legislative power. No legal text indicated in any way the possibility for legislative delegation, understood by us as an assignment given to the government to adopt juridical documents that functioned as laws. That is why the observation made by the Romanian Constitutional Court, in one of its decisions, is surprising, as it states that it would be "irrefutable that at the official date of promulgation for Law no. 68/1991 – November 26th, 1991 – legislative delegation was completely constitutional.¹⁷" We believe that, at that date, although the Constitution was, indeed, approved by the Constituent Assembly (November 21st, 1991), it had not come into force. It is only when it came into force (December 8th, 1991) that legislative delegation would have been possible, in the terms and conditions stated within art. 114 of the Constitution. Also, the promulgation of a law is not the same as its coming into force, the law being published within the Romanian Official Gazette on November 28th, 1991¹⁸, and so, the promulgation date has no contextual relevance. Because it was adopted based on Law no. 68/1991, after the Constitution came into force, Ordinance no. 1 of March 13th, 1992¹⁹, the

¹¹ Decision no. 148 of the Constitutional Court, June 3rd, 1997, published in the *Official Gazette of Romania*, no. 252, September 25th, 1997.

¹² I. Muraru, M. Constantinescu, *Ordonanța guvernamentală. Doctrină și jurisprudență*, 2nd edition, revised and annotated, Lumina Lex Publishing House, Bucharest, 2002, p. 15.

¹³ Published in the *Official Gazette*, no. 1, December 22nd, 1989.

¹⁴ The Romanian Constitution came into force when it was adopted by referendum. We believe it would have been fairer for it to be accepted the day the Central Electoral Office proclaimed its adoption by referendum. One opinion states that the date when the 1991 Constitution came into force was actually December 13th, 1991 (Ionescu Cristian, *Drept constitutional și instituții politice*", vol. II, Lumina Lex Publishing House, Bucharest, 1997, pp. 101).

¹⁵ We are referring to Decree-law no. 2/1989, published in the *Romanian Official Gazette*, no. 4, December 27th, 1989 and Decree-law no. 92/1990, published in the *Romanian Official Gazette*, no. 35, March 18th, 1990.

¹⁶ The Provisional National Unity Council was created by virtue of Decree-law no. 81, February 9th, 1990, published in the *Romanian Official Gazette*, no. 27, February 9th, 1990.

¹⁷ Decision no. 148 by the Constitutional Court, June 3rd, 1997, published in the *Romanian Official Gazette*, no. 252, September 25th, 1997.

¹⁸ No. 240, November 28th, 1991

¹⁹ Published in the *Official Gazette*, no. 60, April 7th, 1992.

Constitutional Court categorized the law as being a “habilitation” law, although, when it was adopted, this denomination was completely foreign to our legislation. Thus, the research done by the Court to establish whether “the habilitation law answers the conditions of art. 107 and 114 from the current Constitution, respectively if the habilitation law of the government stems from the Parliament as a competent public authority, if through the adopted law some conditions were set in place and, if so, if they have been respected and, finally, if the object of the ordinance is an object of organic law,” seems pointless. The Court however decided that no constitutional dispositions were breached and that the “habilitation” was approved by the Parliament, the ordinance did not need a subsequent approval from the Parliament and did not contain a special disposition “concerning the deadline”. Noting however the constitutional conditions of the habilitation (art. 114), we see that a habilitation law must establish mandatorily the deadline up until which such ordinances can be adopted. Its lack makes the habilitation law non-constitutional. As the law in discussion, considered to be of habilitation, does not state an end date until which ordinances can be adopted, it is irrefutably unconstitutional.²⁰ As a result, the legal documents adopted on its basis have the same juridical treatment. In conclusion, whichever the premise may be, the law is not of habilitation (in our opinion) or it is of habilitation (in the Court’s opinion), Ordinance no. 1/1992 is unconstitutional, either according to the first opinion, because of the lack of juridical grounds for adoption, or because the law upon which it was created was not constitutional. The conclusion we can draw about the December 22th, 1989 – December 8, 1991 time period is clear: there was no legislative delegation practically or theoretically.

Another example which sheds light upon the lack of constitutionality of some parliamentary actions on legislative delegation comes from Law no. 36 of December 7th, 1990.²¹ Without any legal grounds, the Romanian Parliament authorizes the Government by way of a decision to establish and modify taxes, soliciting a “law for the approval of taxes” to be handed in for approval to the lawmaker. In other words, here we have a delegation of power from the Parliament to the Government – to adopt legislative documents – , a right they abusively exercised, as they are not constitutionally fit to do so. The right to create laws in this case could not be passed to the Government, as the decree-laws aforementioned, which stated that the Parliament, by the Constitution of 1991, is the only legislative body, were breached. Government Decision no. 1295 of 1990²² was contested by the Constitutional Court as it did not fulfill the constitutional terms – art. 114 – established after its adoption.

Of course, the Court could not rule without taking under their consideration the fact that this decision was adopted according to the juridical order existing at that time, before the Constitution of 1991, “such that this decision cannot be under trial

²⁰ The law has two articles, without establishing through their content a habilitation end date: art. 1 – In order to ensure the primary statistical evidence in agriculture, by Government Decision, a new agricultural record will be introduced, starting July 1st, 1991; art. 2 – Decree no. 692/1973 concerning the agricultural records, republished in the *Official Gazette*, Part I, no. 47/April 17th, 1982, afterwards Law no. 23/1974, are abrogated.

²¹ Published in the *Official Gazette*, Part I, no. 137, December 8th, 1990.

²² Published in the *Official Gazette*, Part I, no. 148, December 20th, 1990.

because it does not fulfill terms that the law did not request.” Except that the constitutional jurisdiction authority did not take the argument further, an argument mandatorily dominated by an obvious reality, namely that this so-called habilitation law and the government decision stemming from it are subject to the constitutional terms corresponding to the time in which they were adopted. It is true that the Government adopted the decision in light of the dispositions of the aforementioned law, but the question is, especially, if that law was or was not constitutional, because, if it were considered unconstitutional, it would have been obvious that the decision adopted in its virtue would have had the same legal fate. The Court limited itself only to decide that “the Government adopted Decision no. 1295/1990 due to the habilitation awarded by the Parliament by Law no. 36/1990.” Yet, the constitutional regime generated by the decree-laws of that time did not afford legislative delegation. That is why the Court’s conclusion is surprising, as it states that “Government Decision no. 1295/1990 was emitted according to the existing juridical order before the adoption of the Constitution of 1991, on the grounds of the habilitation awarded to the Government by Law no. 36/1990, the system of legislative delegation being preserved in the Constitution as well (art. 114).” This suggests that the juridical institution of legislative delegation existed prior to the adoption of the 1991 Constitution, as it was “preserved” after December 8th, 1991 as well, a fact we do not agree with.

Yet, taking the “shortcut”, we can see something undeniable: the contrariety between the texts in force at the date of the adoption of the decision, proclaiming the Parliament as the only lawmaking body, and the analyzed decision, acting as a law in a domain that only concerned the legislative body.

Starting with the Romanian Constitution of 1991 and continuing with its revised form from 2003, legislative delegation was both constitutionalized and rationalized. The instatement of “rules that can afford a legal and not an improvised reaction”²³ in the case of special circumstances, to which Parliament could not have reacted for various reasons, is fully justified. In the thought of the post-1989 constituent lawmaker, legislative power is awarded to Parliament and the executive power to the President and the Government. The source of parliamentary legislative competence and also the impossibility for other authorities to primarily regulate different social relationships, no matter the importance, result from two fundamental articles of the law: art. 61, which attributes Parliament with the title of “sole lawmaking authority” and art. 108 which regulated the Government’s possibility to adopt decisions in order to organize how the laws are enforced. However, art. 115 of the Constitution, through the juridical institution of legislative delegation, allows the Government, within the limits and conditions stated within the Constitution, to adopt juridical texts with the juridical content of law, ordinary or organic, by case.

It is interesting to understand what the revision brought or maybe should have brought and if the revised form is, as it was declared, indeed a step forward towards a perfect constitutional democracy in what concerns legislative delegation. From the start, we must note that now, legislative delegation is the object of art. 115²⁴, which

²³ M. Constantinescu, *Conținutul ordonanței de urgență a Guvernului*, in *Dreptul* Journal, no. 8/1998, p. 34.

²⁴ The Romanian Constitution of 2003 is the republished form of the 1991 Constitution, revised through Law no. 429/2003, approved by the 18-19 October 2003 national referendum, confirmed by

has 8 paragraphs²⁵. The juridical text of the Government emitted on the basis of legislative delegation or, metaphorically speaking, the “fruit” of it is the ordinance. This is “the expression of a delegated legislative competence, it exceeds the strict sphere of general management of public administration, being a means of participation by the Government at realizing legislative power, a participation that is imperative due to its very political reason of existence, that of consolidating internal and external policies, as stated within art. 101, par. 1 of the Constitution.”²⁶ The term “ordinance” was introduced in the Romanian legal lexicon when the Constitution of 1991 was adopted, probably a term from the French constitutional system, which itself “exhumed” it for the Constitution of 1958, as it was specific mostly to French monarchies.

The forms legislative delegation takes in light of the current constitutional dispositions result from the current art. 115, stemming from the 2003 revision, which modified art. 114. The current iteration reflects the same idea that the constituent lawmaker of 1991 emphasized, that there are two categories of ordinance²⁷ in our constitutional system, adopted on the basis of legislative delegation:

a) simple ordinances, adopted by the Government on the basis of a special habilitation law. These can be also affected by a subsequent parliamentary inspection, if there is such a specification within the habilitation law. Until now, no ordinances have been adopted on the basis of any habilitation laws not assessed and approved by the Parliament;

b) emergency ordinances, adopted by the Government in exceptional circumstances, in the absence of a special habilitation law, a case which presumes that they are adopted by virtue of a constitutional legislative delegation. Concerning this aspect, the Constitutional Court²⁸ considers that Government ordinances, no matter if they are adopted based on a habilitation law or in the absence of a law for exceptional cases, are the expression of legislative delegation, the case of emergency ordinances benefitting from “the Constitution itself” of legislative delegation. Part of the literature states that “...the ordinance is the expression of a habilitation awarded by the Parliament or, in the case of emergency ordinances, directly by the Constitution...”²⁹ or that exceptional situations “which objectively call for the emergency adoption of a legal regulation, provide a basis for constitutional provisions that habilitate the Government to emit primary legal regulations, by virtue of the necessity of constitutional legislative delegation.”³⁰ From the perspective of the latter

Constitutional Court Decision no. 3 of October 22rd, 2003. Law no. 429/2003 was published in the *Romanian Official Gazette*, part I, no. 758 of October 29rd, 2003. The text of the Constitution was published in the *Romanian Official Gazette*, part I, no. 767 of October 31rd, 2003.

²⁵ In its initial form, art. 114 regulated this juridical institution and was 5 paragraphs long.

²⁶ A. Iorgovan, *Tratat de drept administrativ*, All Beck Publishing House, Bucharest, the third edition, vol I, 2001, p. 401.

²⁷ The ordinance is defined as a normative text “through which the government intervenes with regulations in domains specific to an ordinary law.” (T. Drăganu, *Drept constituțional și instituții politice*, Lumina Lex Publishing House, Bucharest, vol II, 1998, pp. 316).

²⁸ Constitutional Court Decision no. 34, February 17rd, 1998, published in the *Romanian Official Gazette*, Part I, no. 88, February 25rd, 1998.

²⁹ I. Muraru, M. Constantinescu, *Ordonanța guvernamentală. Doctrină și jurisprudență*, Lumina Lex Publishing House, Bucharest, 2000, p. 162.

³⁰ I. Vida, *Procedura legislativă*, Crater Publishing House, Bucharest, 1999, p. 147.

opinion, legislative delegation can take on three forms: 1. legislative delegation for the Government, based on a habilitation law; 2. constitutional legislative delegation, in the case of emergency ordinances; 3. legislative delegation which operates “in the favor of the head of state, in the case of siege or emergency or the command for partial or general mobilization of armed forces”³¹. Also, it has been concluded that, for emergency ordinances, legislative delegation is awarded “directly by the Constituent, for extraordinary situations that require undelayed regulation...”³²

The issue of legislative delegation is complex, and its justification needs an analysis of our society. It is undeniable that the complexity, the effervescence of life, in all of its aspects, calls for a similar legislative activity. More and more of the aspects of our society request to be regulated legally, which sometimes means fast, operative measures which the Parliament cannot handle on its own. That is because of the hefty and slow parliamentary procedures, because of the progressive distance from all standpoints between the Parliament and the electorate, which they consider only once every four years. We will not speak of the existence of a bicameral Parliament, on top of which, as if it were not enough, we have an impressive number of Parliament members, which should obviously be able to meet in a weir in order to work dynamically, creatively and efficiently. All of these “alterations to the legislative power”, it has been said, finally lead to its “perversion,” as the Parliament does not deal with “anything other than secondary issues truly, with a vague possibility for more urgent matters,” leading to the inevitable dissolution of “the integrity of the legislative power” to the benefit of other state bodies.³³

Legislative delegation, which can only be temporary and justified by circumstantial and sectorial necessity, has grown out of its “criterium of exceptional circumstances”, becoming “a remedy towards the incapacity of the legislative power to adopt the entire necessary legislation and especially the technical and circumstantial measures requested by the economic situation at an efficient pace.”³⁴ Nothing more true. The dynamic time we live in needs a dynamic normative system. It is very clear that, first of all, economic expansion sits at the basis of the multiplication of legislative texts, and as a consequence and because of its complexity, it cannot be regulated except if there is a multiplication of legislative bodies.

This being the situation, the literature has considered the ordinances adopted by the Government on the basis of legislative delegation as a “necessary evil”³⁵, as their adoption is thought to lead, in the end, to “the unity of the normative process, halved by the existence of a domain of lawmaking and a domain that is subject to the law”. Also, parliamentary holidays and laden procedures constitute reasons which lie at the basis of the necessity for continuity in regulation, which can be done without a doubt more efficiently through ordinances that “operatively solve a due regulation.”³⁶

³¹ *Ibidem*, p. 138.

³² C. L. Popescu, *Data intrării în vigoare a actelor normative, în lumina dispozițiilor constituționale revizuite*, in *Dreptul* Journal, no. 4/2004, pp. 35-36.

³³ J.M. Cotteret, *Le pouvoir législative en France*, Paris, 1962, p. 45.

³⁴ A. Iorgovan, D.A. Tofan, *Delegarea legislativă în România. Analiză comparativă în raport cu statele occidentale* in *Revista de drept public*, no. 1/2001, p. 63.

³⁵ I. Deleanu, *Instituții și proceduri constituționale*, Servo-Sat Publishing House, Arad, 2003, p. 613.

³⁶ *Ibidem*.

It is undeniable that not all members of the Parliament are competent in some domains that are, for example, technical, which are not “appropriated by the Parliament,”³⁷ the lawmaker being too “clumsy”³⁸ to regulate by themselves. Finally, any time the parliamentary opposition makes use of all of the tricks of parliamentary work to impede or delay the adoption of a legislative act, the Government, a representative of the majority at the level of Parliament, will have the right to resort to such legislative material juridical acts to annihilate its “obstacles and machinations”³⁹. It is what the French literature has characterized as obstructionist activities, an ensemble of parliamentary practices and behaviors which have the objective of creating obstacles in the Parliamentary decision-making process in the terms settled upon by the parliamentary majority.⁴⁰

Conclusions

We can thus conclude that there is a steady chronicization, in our opinion irreversible, of the legislative preponderance of the Government in its relationship with the Parliament. Life demonstrates to us, inexorably, that, in the end, this is where we are heading: the Parliament will transform, at some point, in spite of its opposition, merely into the “architect” of the normative system, leaving its “construction” in the “hands” of the Government. This “trend” was anticipated during the second half of the last century, when Romania only dreamt of a Western constitutional democracy, as it was considered, correctly in our opinion, that inevitably “the Parliament tends to only debate general principles of legislative work and give power to the Government.”⁴¹ Except that such a juridical regime also imposes serious constitutional mutations, because, in the philosophy of our current legal system, the preeminence of the Parliament in its relationship with other state powers cannot be denied, resulting from the controversial constitutional disposition that names the Parliament as being “the representative supreme body of the Romanian people.” We return, thus, to the wise considerations on the matter from the inter-war period⁴², when it was stated that, if the Parliament is in the impossibility to award the Government with legislative attributions [in any other way except legislative delegation (s.n.)], then it can “abandon certain matters from its area of competence to the area of competence” of the Government, which will be able to pass regulations as a result of its own competence validated by the very text of the Constitution.

³⁷ *Ibidem*.

³⁸ J.M. Cotteret, *Le pouvoir législatif en France*, Paris, 1962, p. 110.

³⁹ I. Deleanu, *Instituții...*, *cit. supra*, the 2003 edition, p. 613.

⁴⁰ M. Villiers, *Dictionnaire de droit constitutionnel*, Armand Colin / Masson, Éd. Paris, 1998, p. 140.

⁴¹ S.B. Chrimes, *English Constitutional History*, London, 1965, p. 27.

⁴² P. Negulescu, *Regulamente*, in *Revista de drept public*, 1933, p. 285.