

CONSIDERATIONS ABOUT THE DECREES AND OTHER LEGAL ACTS OF THE PRESIDENT OF ROMANIA

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ABSTRACT: *The terminology of legal acts through which the public administration acts was disputed between the Romanian doctrine and jurisprudence. Acts of authority perpetrated by the President of Romania, in the exercise of its duties, may be exclusively legal or political. Powers of the President of Romania are laid down in the Constitution and the various laws detailing the constitutional provisions. In exercising his powers, the President expresses also through administrative operations.*

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The terminology of legal acts through which the public administration acts was disputed between the Romanian doctrine and jurisprudence. Thus, over time, it has been discussed both about acts of administrative law (Drăganu, 1970, pp.1959) and administrative acts (Ionescu, 1958). The Romanian Constitution clarifies the friction, using in art. 52, the expression of *administrative act*.

The notion of administrative act is complex, as is noted in the juridical literature. Thus, both the formal sense of the term, which covers the fact that this act emanates from the administrative authorities (Negulescu, 1934, pp. 304), as well as the meaning, which refers to its contents (Rarincescu, 1937, pp.22), they relate in the Romanian Constitution and in the law on administrative courts. Thus, art. 52. (1) of the basic law expressly provides that the administrative act emanates from public authorities and art. 2 (b) of the law no. 554/2004¹ on administrative courts states that public authority means any organ of the State or of the administrative territorial units operating under State authority to meet the public interest.

The expression of will, which produces legal effects under State authority, outlines the definition of administrative act as "legal act of power " (Podaru, 2010, pp.9). In this

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regard, the regime of public authority of administrative acts means also the exercise of legality supervision over them done by the courts.

Acts of authority perpetrated by the President of Romania, in the exercise of its duties, may be exclusively legal or political. Powers of the President of Romania are laid down in the Constitution and the various laws detailing the constitutional provisions.

Exclusive political acts are the messages the President addressing Parliament on the major political issues of the nation by virtue of art. 88 of the Constitution, as well as messages, declarations, applications, interviews, etc.

Alongside with these are powers that allow the President to issue legal acts, which, in principle, take the form of presidential decrees (Drăganu, 1998, pp.279). In accordance with this opinion from the doctrine, art.100 of the Constitution of Romania stipulates that the President of Romania, in the exercise of its duties, issues decrees, whose publication in the Official Gazette of Romania is compulsory under penalty of the lack of the act. Thus, the presidential decrees are unilateral manifestations of will to produce legal effects, which occur as a result of the exercise of powers under the Constitution and laws. The constitutional character of presidential decrees shall determine the legal nature of these, and the nature of administrative legal acts (Santai, 2005, pp. 284), (Ionescu, 2003, pp.743-744), (Rusu, 1996, pp.53-54).

In exercising his powers, the President expresses also through administrative operations. The French doctrine is emphasized that administrative tasks are past deeds and for preparing decisions (Waline, 2010, pp. 385). In this connection we ask to what extent one can characterize "materials concrete deeds" (Vedinaş, 2011, pp. 318) of the head of State to participate in the meetings of the Government or of the receipt of letters of accreditation as administrative operations, if they are pursued in accordance with a constitutional provision? Keep in mind that the constitutional powers of the President are defined in the basic law, but their execution must be made immediately. In this connection we ask whether the effective form that the constitutional provision is materialized in facts not run or exist by them as a mirror, not being necessary a theoretical framing.

The literature is rather reserved in to rule on the legal nature of that dress up the other manifestations in which the Romanian President chooses to define a task.

Thus, in our opinion, "the manifestation of presidential duties relating to the Government's consultation on the urgent problems and critical may be the subject of a decree of the President of Romania, but of a request addressed to the Government" (Vida & Vida, 2012, pp. 125 and following). Also, "in the exercise of presidential powers concerning the partial or total mobilization of the armed forces, the President of Romania shall issue and other legal acts, as *decisions*, that are issued prior to a presidential decree" (Vida & Vida, 2012, pp.126).

A separate issue subjected to the attention of the literature concerns *the President acts by which it manages the activity of the Presidential Administration*.

In this sense, the law no. 47/1994² regulates the organization and functioning of the Romanian Presidency.

A first criticized aspect in the literature is the Regulation on organization and operation of the Presidential Administration, approved by the President of Romania, by Decision no. 7 on 15 May 2008, not published in the Official Gazette. It is noted that the

² Republished in the Official Gazette no. 210 of 25 April 2001.

failure to publish the Decision attract the sanction of the lack of the act. It also notes that "one of the situations of lack of the act is issuing an administrative act by a non-competent power" (Vedinaş, 2012). Thus, according to the same opinion, supports the idea that Romania's President does not have jurisdiction to sue decisions. In the same vein, it is shown that the President has committed an excess of power, which can be declared absolutely null by the administrative courts.

Also, according to the article. 4 of the Law no. 47/1994 on the organization and functioning of the Romanian Presidency, head of State appoints or dismisses presidential advisers.

The Presidential Administration is a public administrative authority, which lead us to ask ourselves in virtue of which the constitutional or legal bases can the President to appoint and revoke the presidential advisers?

According to the article 5.(1) of Law no. 47/1994 on the organization and functioning of the Romanian Presidency, Presidential Administration staff is made up of persons on secondment, at the request of the President of Romania, within the ministries and other public authorities, as well as of persons falling directly on the posts or functions that are intended to satisfy. Paragraph (2) of the same article stipulates that staff can be employed only on the basis of trust granted by the Romanian President and provided a commitment of loyalty laid down in the Regulation on organization and operation of the Presidential Administration, which shall be approved by the President of Romania. Symmetrically, the trust has withdrawn as an equivalent classification, cancellation and termination of the posting, release or dismissal from office or termination of employment, if applicable.

Law no. 47/1994 on the organization and functioning of the Romanian Presidency awarded the President's few powers, who seem to be specific to an "own housekeeping". Even though in the literature was held that, although the basic law proclaiming as legal acts of the President's decrees, this does not mean that the President is unable to express themselves and otherwise. It should be noted that the law does not specify the legal form in which they can exercise their duties. Practice has shown that the President has chosen to appoint and revoke their advisers through decrees. As such, we appreciate that the act of appointment of presidential advisers is the decree. The bases of their appointment is the law no. 47/1994.

Instead, the Rules of organization and functioning of the Presidential Administration is a simple act came into law no. 47/1994 enforcement, which sets out the powers of the Presidential Administration, organization of services, departments and divisions attributes etc. This Regulation constitutes, by its content, a genuine regulatory act because its rules set out a number of legal effects, some extra-law. In this respect it should be noted that the Regulation also provides that in the category of legal acts of the President are also decisions which go beyond the constitutional procedures. Furthermore, this enactment was not published in the Official Gazette which causes his qualification as a regulatory act which does not exist.

As regards the legal nature of presidential decrees, the literature is quite controversial.

Art. 100 of the Basic Law stipulates that, in the exercise of his powers, the President of Romania shall issue decrees, but without specifying their legal nature, this constitutional text, resulting in a series of controversies and doctrinal explanations. Taking

into account the fact that these decrees emanates from an authority of executive power that they produce legal effects and, in their great majority, are subject to administrative courts, we appreciate that there are administrative, as, moreover, it was noted in the literature and how it follows from art. 52 of the Constitution. The Constitution does not define the legal nature of power act even if in the case of ordinances or Government decisions. This mission comes to the doctrine and jurisprudence.

An issue that has been discussed in the literature concerned *the normative or individual character of the presidential decrees*.

Some authors consider that these may not have a normative character, taking into account their individual character only (Iorgovan, 2005). It is true that the vast majority of presidential decrees are individual administrative acts (the recipient is a person by individual, determine rights and obligations, not to regulate social relations, etc.), but a number of them can be normative. It issued decrees to dissolve the Parliament, decrees approving the establishment, abolition or change of rank of diplomatic missions, the decrees stating that the partial or total mobilization of the armed forces, the decrees establishing the State of siege or state of emergency, or those which take measures to repel armed aggression against Romania, to give only a few examples. In such cases, the presidential decrees are normative, since concern an unspecified number of persons (as such are impersonal), change the status to persons and shall apply on a significant part or on the whole territory of the country or are considering relations with other States. In some cases, these decrees are taken following the discussions on the endorsement or approval by the Supreme Council of National Defence. These acts of the Council, prior to the issuance of a presidential decree, are not likely to change its regulatory status, but on the contrary, it confirms it. Such opinions are required in the legislative process.

In a separate opinion it is shown that the presidential decrees may have both a normative and an individual character (Deleanu, 2006, pp. 743 and following).

It is interesting to ask whether a decree establishing the state of emergency, decree which has the restriction of certain rights and freedoms provided for in the basic law or even the suspension of the Constitution has or not a normative character? Obviously, even if such act is issued pursuant to the Constitution or law, normative character cannot be disregarded because of the legal consequences it produces. This question appears justified, since, according to the article. 53 of the Constitution, the restriction of certain rights or freedoms may be submitted only by law. To resolve this, we consider that article. 53 shall not apply to emergency situations, which require the issuance of a presidential decree, with all the consequences that arise from here.

In the category of presidential decrees with normative character we recall a presidential decree ordering the general or partial mobilization of the armed forces, which requires the countersignature of the Prime Minister to produce legal effects and which cannot be challenged in the administrative court.

In the same category is framed also the presidential decree that establishes the date and subject matter of the referendum. The effects of this decree are *erga omnes*, aimed at the entire population, which has the right to be present at the vote.

Individual character of the presidential decrees concerns the decrees of pardon, decrees of appointment to public offices or to grant some decorations or honorary titles.

The decree by which it confers decorations or granting general or by which the President appoints public officials also has individual character.

The difference between the individual character and the normative character of the decrees are related to the criterion of organic emanation of presidential authority will.

The complex role of counter-signing of the presidential decrees was subject of the spotlight of the literature due to the importance of assuming responsibility for the act.

According to an opinion, the counter-signing of the presidential decrees by the Prime Minister determines their transformation into complex administrative acts, which take rise through two manifestations of the will of the various State bodies, but converge to produce the same legal effects, forming a single juridical unit (Drăganu, 1970, pp. 275).

Some decrees countersigned by the Prime Minister, involving legal liability. Presidential decrees which shall be countersigned by the Prime Minister within the scope of presidential powers that are carried out in collaboration with the Government or its proposal and which will be implemented by it.

Counter-signing is not only a constitutional guarantee for the elimination of discretionary powers of the President, but also making the acquaintance of the measures ordered by the authority called upon to implement them.

It's about the decrees issued in the exercise of the powers provided for in article 91. (1) and (2), art. 92. (2) and (3), art. 93. (1) and art. 94. a), b) and (d)).

Therefore, the protection of presidential tenure is a significant feature of the structure overview of the Romanian Government, which makes the responsibility for acts of the head of State to the Prime Minister, countersigned them. Lack of counter-signing by the Prime Minister's of decrees requiring this lead to invalidity of the act (Trăilescu, 2010, pp. 200). The constitutional regulation states that "the rule is no counter-signing of the decrees by the Prime Minister, and the exception is represented by counter-signing of the decrees." (Muraru, et al., 2008, pp. 927) This situation we find in practice, the revocation of decrees of pardon or of other nature.

Thus, by Decree no. 1 of 7 January 2002 concerning the revocation of a pardon³ was partially repealed the Decree no. 1101 of 28 December 2001 on the granting of pardons⁴.

In this case, through the Decree no. 1101 of 28 December 2001, the President of Romania, Mr. Ion Iliescu, pardoned on humanitarian grounds 12 people sentenced to jail, so this act of clemency would lead to social integration of those to whom it was granted. The Act of clemency has been applied for the crime of qualified theft (B.M.), the crime of deception in the form of the coup (C.R), for the crime of outrage (C.T.), for the crime of deception, in the form described (F.E.), for the offence of family abandonment (H.S.), for the crime of taking bribes in the form of continued (I. S), for the crime of qualified theft (M.E.)(O.L.) for the crime of trafficking in narcotic drugs (M.I.), for committing the offence of aggravated theft and driving on the public roads of a car with false number plates (S.V.), for the crime of taking bribes (T.G.). Also, through the same decree, was pardoned and the rest remained unfulfilled of imprisonment imposed for the crime of deception in the form of hijack or (B.N.), for the crime of theft in the form of continued (C. R.), for committing the crime of counterfeiting coins or money and deceit, both in form continued (M.F.), for the crimes of aggravated theft and bribery (M.N.), for committing to the offenses of driving on the public roads of a motor vehicle not registered

³ Published in the Official Gazette of Romania no. 5 of 8 January 2002.

⁴ Published in the Official Gazette of Romania no. 844 of 28 December 2001.

and two offences of driving a motor vehicle on public roads, driver's license suspended (P.I.).

Decree No. 1 of 7 January 2002 concerning the revocation of a pardon⁵ was partially repealed the Decree no. 1101 of 28 December 2001, respectively, has been canceled the provision under which he was granted as individual detainee T.G. pardon.

Partial cancellation of the Decree no. 1101 of 28 December 2001 stepped in because he was sentenced for the offence T.G. of bribery, a crime which, according to law No. 137/1997 concerning the pardon of sentence⁶, could not be pardoned, as provided for in the penal code.

A much publicized case regarded the Decree no. 1173 of 16 December 2004⁷ which cancelled the Decree of pardon no.1164 of 15 December 2004⁸.

By the Decree no. 1164, the Romanian President pardoned imprisonment imposed for a convicted and pardoned the rest remained unfulfilled of imprisonment imposed for the 41 detainees, and by Decree no. 1173 of 16 December 2004, the Chief of State has revoked the pardon given to all persons found in the Decree of pardon no. 1164.

In our opinion, the revocation of the decree by which grace the imprisonment and the rest remained unfulfilled of imprisonment imposed for 42 people convicted of contravening article. 62. (3) of law No. 24/2000⁹. The essence of this provision takes into account the fact that the act repealing the previous enactment must not reach the previous situation. Or, in our case, just so happens, the repeal of the decree of pardon makes the previous situation to persist, the execution of the sentence of imprisonment.

The literature has pointed out, in this case, the fact that from the cancellation rule of the administrative act imposes the exception concerning presidential decree with individual character, that in certain situations it becomes irrevocable (Drăganu, 1970, pp. 201 and following). By applying these considerations to a situation deriving from constitutional norms, some authors consider that the publication of the Decree no. 1164/2004 in the Official Gazette, (...) was conducted, (...) and the manifestation of the will of the President of Romania has materialised through the overdue clemency granted and, therefore, constitute a publication, no longer can, or even cancel, restore the previous situation (Chiriac, 2009).

In another opinion (Popescu, 2005), the Decree no. 1173 of 16 December 2004, that canceled the Decree of pardon no. 1164 of 15 December 2004, is invalid due to reasons of wrongdoing. First, the irrevocability of the individual administrative acts implies that persons concerned or the Administration itself could not address to jurisdictions, which could dispose the cancellation of the individual administrative act. Secondly, the unconditional nature of individual pardon may not be associated with the irrevocable character of this measure. Thirdly, an administrative act which has entered the legal circuit, and which *a fortiori* was possibly executed has become irrevocably to the issuing administrative authority.

To the contrary, it shows that if a presidential decree created serious social disruption, conflict between social classes and between citizens and authorities, then it can

⁵ Published in the Official Gazette of Romania no. 5 of 8 January 2002.

⁶ Published in the Official Gazette of Romania no. 170 of 25 July 1997.

⁷ Published in the Official Gazette of Romania no. 1219 of 17 December 2004.

⁸ Published in the Official Gazette of Romania no. 1207 of 16 December 2004.

⁹ Republished in the Official Gazette of Romania no. 777 of 25 August 2004.

be revoked. In the virtue of the role of mediator between the State and society, the President has the obligation to revoke the pardon, which does not meet the public benefit of leniency.

Furthermore, in the same opinion it points out that, "the presidential decrees concerning revocation of pardon should be even more so if we take into account the circumstance that a decree revoking the pardon corresponding to that of granting pardon being countersigned by the Prime Minister, belong to the so-called " end of non-legal ", covered by article 126. (6) of the Constitution " (Iorgovan, 2005). In other words, the decree of pardon, published in the Official Gazette and that produced legal effects, is guaranteed both in front of the Court, as well as control in the event of a cancellation. The decrees of clemency, countersigned by the Prime Minister and that they produced legal effects may no longer be diverted away from civilian circuit as are in accordance with the legal provisions and reflects the will of the President and the Prime Minister, what draws them the end of non-legal by the court.

From this point of view, one wonders if the President just may, "test", thus, the public opinion, "playing" with the decrees of pardon and cancel. We believe that this situation has created a precedent susceptible, especially with regard to the protection of the rights of persons running a prison sentence.

Under the law, it is obvious that only the court of the administrative court is able to ascertain the nullity of such act, which came into the circuit of juridical acts, and produced legal effects.

In view of the rule of law, according to which administrative regulations are revocable (Trăilescu, 2010, pp. 191), (Brad, 2009, pp.42), except individual administrative acts, which, in some cases, become irrevocable, consider justified reactions to the contrary reactions of the doctrine. In this regard it was noted that the presidential decree is a unilateral individual administrative act, which represents the expression of a single will, exercised by virtue of a constitutional powers. Therefore, in drafting the decree of pardon were not two separate wills, the President has exercised its constitutional powers, to which the will of the Prime Minister can not intervene, change or remove the first manifestation of will. Thus, we consider the corroboration of constitutional provisions of art. 126. (6) with the art. 5 paragraph (1) a) of law no. 554/2004 on administrative courts, to conclude that the decree of pardon is not an individual act that relates to the President's relations with the Parliament and cannot be removed from the administrative control. In this sense it was reiterated the rule according to which there is a practical impossibility to change a situation actually consumed by a simple manifestation of will (Drăganu, 1970, pp. 235). Thus, Decree no. 1164/2004, once published, was the manifestation of the will of the President, becoming irrevocable.

The *legal nature of the decree of individual pardon* was also the subject of a debate in the doctrine. Thus, in an opinion that the presidential decree on granting individual pardon has a complex nature, being, in equal measure, the act of constitutional law, administrative law and criminal law legal act (Niculeanu, 2007). To the contrary, it shows that "the legal nature of the legal act should be set out in the report on the effects of the act or the constitutional basis or legal under which it is issued, but the report at its substantive elements and form and authority from which emanated " (Vedinaş, 2011, pp. 18).

In our opinion, a presidential decree for granting individual pardon is, indeed, a complex character, held even by the Romanian Constitution. The Romanian President has

a constitutional responsibility by means of an administrative act, which produces legal effects in relation to criminal law. At the accomplishment of this presidential constitutional duty are in line legal provisions within the administrative law and criminal law, which competes in the implementation stage of the principles of legality, necessity and humanity.

The other controversy in the doctrine has viewed the *causal link between the acts issued by the head of State and political or legal liability to which he is subjected* (Iordache, 2011).

The President, in the exercise of his powers, is subject to the immunity, the question arises to what extent his acts, in the exercise of the powers provided for in the Basic Law or other laws, are subject to the provisions of the Law on administrative courts no.545/2004? This question seems natural to us given that, according to art. 21 of the Basic Law, free access to justice is guaranteed to every citizen. Under this article, any person may apply to justice for the protection of rights, freedoms and legitimate interests. Paragraph (2) of the same article stipulates that no law may restrict the exercise of this right. Here is the conclusion that the legal acts of the President of Romania, which violates the freedoms and legitimate interests of citizens, are subjected to the censorship of justice. Another constitutional argument, in this sense, provides art. 52 of the Constitution of Romania, by virtue of which any person injured in his rights, or in a vested interest by a public authority through an administrative act, or by the failure within the time limit of an application is entitled to obtain acknowledgement of those rights or legitimate interest in the annulment of the act and the repair of the damage.

Acts not subject to control of administrative courts are administrative acts, which because of the parties may not be subject to that jurisdiction, administrative acts, which by procedural reasons, can't be controlled this way and that, due to administrative acts, may be subject to administrative courts only for excess of power. Judicial control of administrative acts of the public authorities shall be exempt on the way the constitutional provisions that concern the public authorities relations with Parliament¹⁰ and those of the military headquarters (Niculeasa, 2005). Legal channels are exempt from judicial control of administrative acts for amendment or abolition of which it provides, through the organic law, another judicial proceeding, administrative provisions for the Declaration of the state of war, State of siege or emergency, administrative work involving national security, defense and administrative issued to restore law and order and elimination of consequences of natural disasters, epidemics (Trăilescu, 2009), (Chiriac, 2009). In this context, the literature is that the legal acts of the President of Romania may not be removed from judicial control, that some presidential decrees do not constitute administrative acts issued in consideration of the relationship between the President and Parliament, and, on the other hand, it is shown that an act of such nature, excluded from direct control by the action for annulment cannot be prevented may be the object of the illegality exception (Chiriac, 2009, pp.109 and following).

In these conditions, one may find that the President's immunity does not exclude liability for legal acts issued and which produces an injury to a right or a legitimate interest of a person. In a different vein, the hypothesis of the presence, as a witness, of the

¹⁰We consider the Decree of promulgation of a law, the judgment granting the Government a vote of confidence, etc.

President of Romanian within a process has led to various opinions in the literature. In an opinion it argues that the President may respond to its citation, as a witness in front of justice, by virtue of the bases can be represented, when it's part in the process, in accordance with the principle of free access to justice (Criste, 2010, pp. 277).

As follows from the case-law, cases of this kind are of the competence of the High Court of Cassation and Justice and, so far, there have been many disputes, the Romanian President was quoted in court. In the court proceedings, the head of State was represented by counsel from the Presidential Administration, but the results were not always those desired by the authors of the supreme court appeal. Note that this representation is made by an act non-existent, the Regulation for the organisation and operation of the Presidential Administration, approved by the Presidential Decision no. 7 of 15 May 2008. The President's decisions do not fall within its constitutional powers. In addition, the Regulation was not published in the Official Gazette which brings the lack of the act.

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