

ACTS EXEMPT FROM THE JUDICIAL CONTROL OF THE CONTENTIOUS ADMINISTRATIVE

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Abstract

The decrees of the country President have been contemplated by many theoretical and practical discussions on their classification within the field of the administrative acts likely to be appealed before the contentious administrative. Actually, this is the base of this study, therefore, we will assess a certain category of administrative acts in terms of their possibility to be appealed before the contentious administrative court, in relation to the current provisions of the legislation. We will also point out the directions of the case law in relation to this category of administrative acts.

Keywords: *Constitution, decree, Law no. 554/2004 of the contentious administrative, the Constitutional Court of Romania, administrative act.*

1. Introduction

According to the Constitution, the executive power in Romania is bicephalous¹, consisting of the President of Romania and the Government of Romania. In what concerns their work, both the President and the Government of Romania rule by means of political acts and legal acts. In relation to the subject matter proposed by this study, we will only analyze a category of acts of the President of Romania, namely the legal acts. Therefore, by reading the revised Constitution of Romania, we note that the acts of the President are referred to in two articles, namely: art. 88 (entitled messages) and in art. 100 (entitled decrees). According to art. 100 par. (1) of the Constitution, „In the exercise of his powers, the President of Romania shall issue *decrees* which shall be published in the Official Journal of Romania. Absence of publicity entails the non-existence of a decree”. Moreover, the Constitution provides that the legal regime of the decrees of the President of Romania entails their classification in two categories: the first category which, in order to be valid, bears the signature of the head of the state and the second category which must be countersigned by the Prime Minister.

According to art. 100 par. (2) of the revised Constitution of Romania, the following acts shall be countersigned by the Prime Minister, under the penalty of the nullity thereof: „ *The decrees issued by the President of Romania in the exercise of his powers,*

as provided under Article 91 paragraphs (1) and (2), Article 92 paragraphs (2) and (3), Article 93 paragraph (1), and Article 94 subparagraphs a), b) and d) shall be countersigned by the Prime Minister”.

As pointed out in an opinion, most of the decrees which are not countersigned by the Prime Minister shall fall under the scope of the relations of the President of Romania with the Parliament, and another category of decrees, especially those on investiture, shall be subject to the conditions established by the law². The Constitutional Court of Romania provides that the decree of the President is an administrative act (legal nature established both by the doctrine and case law of the Constitutional Court – decision no. 399/2013), subject to the review of legality, not being provided in the situations expressly referred to in art. 126 par. (6) of the Constitution, of the acts exempt from such a control³.

Therefore, the decrees of the President of Romania are administrative acts, according to Law no. 554/2004 of the contentious administrative which defines administrative act in art. 2 letter c) first thesis, as follows: „an unilateral act with individual or regulatory nature issued by a public authority, in the capacity of public power, in order to organize the implementation of the law or to actually implement the law, which creates, modifies or terminates legal relations (...)”.⁴ According to the doctrine, the administrative act is the main legal form of the activity of local government bodies, which consists of an unilateral and express manifestation of will to create, modify or terminate

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¹ It is worth to mention that, at the level of the European Union, there is a sole institution with executive competences, namely the European Commission. We have to point out that this fact does not entail the idea according to which Romania, as a European Union member state, fails to comply with the European Union legislation. For details on the European Commission, see Augustina Dumitrașcu, **Roxana-Mariana Popescu**, *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Bucharest, 2015, p. 65 and the following.

² **R.N.Petrescu**, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 71

³ The Constitutional Court of Romania, Decision no. 459/2014, Published in Official Journal no. 712/2014.

⁴ Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 on the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related regulatory instruments, published in Official Journal no.753/2014).

rights and obligations, in order to fulfill public power, under the main review of legality of the courts of law⁵. The specialized literature⁶ provides that "the value represents the mark of the responsibility and the validity of the rules of law falls under the conditions of the acceptance. According to the quoted author, those who disregard the rules of law defy the values involving them. Therefore, the author emphasizes that, the fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. The coercion is not the one which essentially ensures the force of the law, but the power to valorize the rules of law imposed on the individuals. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values"⁷.

2. The Decrees of the President of Romania

2.1. Are the decrees of the President subject to the control of the contentious administrative courts?

In order to answer the question whether the decrees issued by the President of Romania are subject to the control of the contentious administrative courts, two theses were established under law no. 29/1990: the first one admitted this control⁸, and the second one provided a negative answer, by showing that the presidential decrees are exempt from the control of the contentious administrative courts⁹. It is provided that most of the President's powers are fulfilled by means of the issuance of decrees which must be countersigned by the Prime Minister, and therefore, an indirect parliamentary control is exercised over the President by means of the Prime Minister, who is politically liable before the Parliament exclusively¹⁰. Following the extensive debates and arguments which took place in the doctrine and case law, it was provided that the decrees of the President countersigned by the Prime Minister are complex legal acts, which indicate a constitutional relation between the two

heads of the executive, on the one side, and the Parliament, on the other side, by falling under the scope of the motion to dismiss on grounds of inadmissibility¹¹ provided for by art. 126 par. (6) of the Constitution, republished, namely of the acts which concern the relations with the Parliament.¹²

The specialized literature notes that the idea of categories of administrative acts exempt from the control de contentious administrative courts of law originated in French administrative case law¹³. According to Tudor Drăganu, the patriarch of the Romanian public law, the legal acts of the President of Romania, as administrative acts of authority, shall be exempt from the judicial control of legality if they fall under the scope of one of the motions to dismiss provided by law no. 554/2004 of the contentious administrative and if the provisions of this law were not repealed or amended by the enforcement of Constitution of 1991¹⁴. The Constitutional Court reiterated in its case law that according to the provisions of art. 100 par. (2) of the Constitution, certain decrees of the President shall be countersigned by the Prime Minister¹⁵. These legal acts shall be subject to the provisions of art. 126 par. (6) of the Constitution (...). Furthermore, in another decision, the Constitutional Court noted that under Law no. 554/2004 the decrees of the President can be appealed before the contentious administrative, except the decrees falling under the scope of the motions to dismiss on grounds of inadmissibility established by this law¹⁶.

According to the legal definition provided for by art. 2 par. (1) letter k) of Law no. 554/2004, the acts which concern the relations with the Parliament are the acts issued by a public authority in exercising its powers, provided by the Constitution or by an organic law, within the political relations with the Parliament¹⁷. Under the current constitutional provisions¹⁸, the administrative acts concerning the relations of public authorities with the Parliament, relate either to the direct relation between the executive and legislative power (for example – Government investiture - art. 85 of the Constitution;

⁵ A. Iorgovan, *Tratat de drept administrativ*, vol. I, Nemira Publishing House, Bucharest 1996, p. 274.

⁶ Elena Anghel, *Values and valorization*, in *Lex Et Scientia International Journal (LESIJ) XXII*, no. 2/2015, p.103-113.

⁷ Idem.

⁸ R.N.Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 71, apud A.Iorgovan, *Tratat de drept administrativ*, vol.I, All Beck Publishing House, Bucharest, 2005, p.322.

⁹ Idem.

¹⁰ I. Rîciu, *Procedura contenciosului administrativ.Aspecte teoretice și jurisprudențiale*, Hamangiu Publishing House, Bucharest, 2012, p. 174, apud A Iorgovan, *op.cit.*, 2005, p. 612-614.

¹¹ In what concerns the scope of the motions to dismiss on grounds of inadmissibility, see, Marta Claudia Cliza, *Drept administrativ, Part II*, Universul Juridic Publishing House, Bucharest, 2012, p.102-109.

¹² Idem, p. 614.

¹³ G. Bogasiu, *Justiția actului administrativ.O abordare biunivocă*, Universul Juridic Publishing House, Bucharest, 2013, p.157.

¹⁴ T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, vol. II, Lumina Lex Publishing House, Bucharest, 1998, pp. 297 and 298.

¹⁵ The Constitutional Court of Romania, Decision no. 459, published in Official Journal no. 712/2014.

¹⁶ R. N. Petrescu, *op. cit.*, p. 72. In the same respect see also Ștefan Deaconu, *Constituția României.Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p.930.

¹⁷ The Constitutional Court of Romania, Decision no. 88/2009, published in Official Journal no. 131/1999.

¹⁸ G. Bogasiu, *Legea contenciosului administrativ nr. 554/2004.Comentată și adnotată*, edition III revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p. 196.

Dissolution of Parliament - art. 89 of the Constitution, or to the indirect relation, which grants them the character of complex administrative acts, such as the case of the decrees of the President which must be countersigned by the Prime Minister, subject in his turn to the control of the Parliament [art 100 par. (2) of the Constitution]¹⁹. The Constitutional Court notes that the complexity of the powers provided in Title III, Chapter II of the Constitution of Romania, the different areas where they are regulated do not allow the inclusion of all decrees in the category of the motion to dismiss on grounds of inadmissibility exclusively from the perspective of the countersignature, as a modality available to the Prime Minister in order to take political accountability, without an actual assessment of their legal nature in terms of their scope, effects and the real existence of a connection with the political field.

2.2. Case study

Furthermore, in order to develop the proposed topic, we would like to expose a selection of certain decrees of the President of Romania which were contemplated by the review of the case law of the Constitutional Courts and of the national contentious administrative courts. The decrees which were assessed fall under the scope of both categories, respectively the decrees signed exclusively by the President of the country and the decrees countersigned by the Prime Minister.

*Case study no. 1. The Decree of the President on the appointment of a judge of the Constitutional Court*²⁰

In this case, the President of Romania issued Decree no. 326/2013 on the appointment of a judge of the Constitutional Court, decree which was published in Official Journal no. 159/2013. Romanian Magistrates Association filed action before the contentious administrative court against the President of Romania and the Presidential Administration whereby it requested the annulment of the administrative act – namely, the aforementioned decree of the President of Romania.

This type of decree questions the fulfillment of the conditions by the person appointed as judge of the Constitutional Court. Therefore, according to the legal provisions in force, the appointment of the judge of the Constitutional Court entails the fulfillment of three cumulative conditions, respectively: higher legal education, at least 18 years of length of service within higher legal education, high professional competence. The Constitutional Court notes that Law no. 47/1992²¹ does not provide the procedural steps involved in the appointment of publicly-appointed office holders, but it is obvious

that the assessment of the fulfillment of the three conditions provided for by art. 143 of the Constitution is the exclusive prerogative of the President of Romania. Therefore, the Court notes that the discretion of the President of Romania, the Senate and the Chambers of Deputies in the fulfillment of the power to appoint constitutional judges is not limited to the assessment of the lawfulness issues that the fulfillment of objective and quantifiable conditions entails, but also concerns opportunity issues, the competent authority having in this case, absolute freedom, to choose a certain person who, in its opinion, meets the condition of *high professional competence*.

Therefore, the Court notes that the provisions of art. 8 par. (1) in relation to art. 2 par. (1) letter c) of Law no. 554/2004, are constitutional provided that the decrees of the President on the appointment of the judges of the Constitutional Court are constructed as excluded from the judicial control in terms of the control of the fulfillment of *high professional competence* condition.

Case study no. 2. The decree of the President on the withdrawal of decorations

In one case, the scope of the statement of claim was the annulment of Decree no. 567/May 24th, 2007 issued by the President of Romania whereby knight National Order Steaua României (Star of Romania) was withdrawn²². The plaintiff was given the national decoration by Decree no. 1109 of December 10th, 2004 “as a special token of appreciation for the meritorious contribution to the performance of the legislative act, to the adoption of fundamental laws necessary for the development of the country and to the Euro-Atlantic integration of Romania”. By decree no. 567/May 24th, 2007 the President of Romania withdrew the decoration of the plaintiff “by taking into account resolution of the Council of Honor of National Order Steaua României of May 15th, 2007”.

The High Court of Cassation and Justice notes that the President of Romania can issue the decree on the withdrawal of order or medal only upon the proposal of the Council of Honor, which adopts the resolution after having fulfilled an administrative procedure expressly regulated by the Regulation on the organization and operation of the Councils of Honor of National Orders Steaua României, Serviciul Credincios și Pentru Merit (Order of Faithful Service and for Merit), approved by Government Resolution no. 1511/2005, for the application of art. III of Government Emergency Ordinance no. 13/2005 for the amendment and supplementation of Law no. 29/2000 on the

¹⁹ Idem.

²⁰ The Constitutional Court of Romania, Decision 459/2014, published in Official Journal no. 712/2014.

²¹ Law no. 47/1992 on the organization and operation of the Constitutional Court, republished in Official Journal no.807/2010.

²² Decision no. 3165/2012 of the High Court of Cassation and Justice, published on <http://legeaz.net/spete-contencios-inalta-curte-iccj-2012/decizia-3165-2012>, accessed on February 20th, 2016.

Romanian national system of decorations, approved by means of Law no. 15/2005.

The High Court of Cassation and Justice, following the specific assessment of the decree nature and the content of the legal report, by noting that the withdrawal of a decoration of a person without powers in what concerns the legal relations with the Parliament, shows that the withdrawal is not exempt from the judicial control of the contentious administrative (...) ²³. Even if it is unchallenged that the President of Romania benefits from a high discretion, the High Court noted that the abuse of power, as defined in the Law of the contentious administrative, art. 2 par. (1) letter n) of the same law, provides a regulatory definition of the court power to investigate the conduct of public authorities, including from the perspective of the way of exercising the discretion and to investigate if it falls under the limits established by the law, by responding to the imperative of maintaining a reasonable balance between public interest and private rights or legitimate interests which may be prejudiced by means of the administrative acts.

This topic, respectively whether the President is entitled to withdraw a granted decoration, was also contemplated by the motion to dismiss on grounds of unconstitutionality ²⁴. The Constitutional Court considers that the withdrawal of a decoration may occur, on the one side, due to dishonorable deeds which were performed prior to decoration only to the extent that, for various reasons, they could not have been known at the time of granting the decoration and, on the other side, due to subsequent dishonorable deeds, incompatible with the capacity of member of the order, but only under the consideration of establishing a fair relation of proportionality between the facts which resulted in the granting of an order and those which resulted in the proposal of the decoration withdrawal.

According to the legal provisions, both the granting and the withdrawal of the decorations are performed under the decree of the President of Romania, upon the proposal of the authorities established by the law. According to the Court, it is obvious that the proposal submitted to the President is not mandatory for the President and does not prevent the President to exercise his discretion right. Under the law, the President has broad discretion on the proposals submitted to him, for the granting of a decoration, and on the grounds provided in the proposals on the decoration withdrawal. Therefore, by taking into account the nature of the offences, due to which, once committed, a decoration may be withdrawn, there is the possibility that a decoration

granted by a particular head of state, to be withdrawn by the following head of state, as both of them would act within the same constitutional status, in the capacity of head of the state.

Case study no. 3. The President decree on the granting of individual pardon

The scope of the statement of claim filed before the High Court of Cassation and Justice consisted of the nullity of Decree no. 1164/2004, on the granting of an individual pardon, the issuer being the President of Romania ²⁵. The legal issue raised in this case was whether the individual pardon decree was an administrative act subject to the control of the contentious administrative control. The legal regime of individual pardon is established by Law no. 546/2002 ²⁶ and by the Constitution of Romania.

According to art. 100 par. (2) of the Constitution, the decree issued by the President of Romania whereby individual pardon is granted, shall be countersigned by the Prime Minister, by the countersignature institution, the Parliament exercising an indirect control by means of the Prime Minister which is held liable before the legislative power. Therefore, the granting of individual pardon, as an act of leniency, is an exclusive prerogative of the President of Romania, provided for by art. 94 letter d) of the Constitution of Romania, due to its effects, the pardon being also a criminal law institution. In exercising his prerogatives, provided for by art. 80-94 of the Constitution, by granting or revoking individual pardon, the President of Romania acts not only as a representative of the executive power, but as the head of the state, by playing the role of mediator between the state and society, but in the same time acting as a guarantor of the Constitution, according to the High Court.

In issuing (granting or revoking) individual pardon acts, the President of Romania has broad discretion, by being entitled to request, only when he deems necessary, advisory and not legal opinions from the Ministry of Justice or information from other authorities, the convicted person not being entitled to the subjective right of being or not being pardoned or to a legitimate interest as defined by art. 52 of the Constitution, but only to a factual right. In other words, there is no specific administrative law relation, subject to the control of contentious administrative court, between the person requesting individual pardon and the President, the decree of granting the pardon being deemed by the doctrine as a complex legal act which is subject to constitutional law regime, with deep implication in the field of criminal procedural law. Therefore, according to the High Court of Cassation and Justice, the court of first

²³ Idem.

²⁴ The Constitutional Court of Romania, Decision no. 88/2009, published in Official Journal no. 131/2009.

²⁵ High Court of Cassation and Justice, decision no. 3585/2006, Division of the Contentious administrative, <http://legeaz.net/spete-contentios-inalta-curte-iccj-2006/decizia-3585-2006>, accessed on February 19th, 2016.

²⁶ Pardon Law no. 546/2002 on pardon and procedure of granting pardon, published in Official Journal no.755/2002.

instance was right in holding that pardon decree is not an administrative act subject to the review of legality of the contentious administrative court (...), therefore the petition filed for the ascertainment of the nullity of the decree not being admissible (...).

3 Conclusions

This study contemplated the acts exempt from the control of the contentious administrative courts, respectively those legal acts of the President of Romania, namely the decrees. The presidential

decree has an unique nature and a complex legal regime, therefore it is deemed an administrative act under Law no. 554/2004 of the contentious administrative. Generally, the decrees of the President can be appealed before the contentious administrative, except those which fall under the scope of the motions to dismiss on grounds of inadmissibility established by the law, a thorough analysis being performed by the judge of the case submitted for judgment, on a case-by-case basis. In conclusion, as provided by the doctrine, every state has its own enacted law according to its own social and political requirements, traditions and values²⁷.

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²⁷ See Elena Anghel, *Constant aspects of law*, în proceedings-ul CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.