

NATURE AND CONTROL OF LEGALITY OF THE LEGAL ACTS OF THE PRESIDENT OF ROMANIA

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Abstract:

The competence of the administrative contentious courts with regard to the control of legality of the acts issued by the President of Romania should be analyzed from case to case, as the legal nature and the field in which they produce effects being very different

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In the exercise of the attributions conferred by the Constitution, the head of the state issued decrees that are published in the Official Journal of Romania. Failure to publish such acts is provided under the sanction of considering the decree as a non-existing legal act. Presidential decrees may have normative or individual character. In coordinating the Presidential Administration, the President issues dispositions. The competence of the administrative contentious courts with regard to such acts should be analyzed from case to case, as the legal nature and the field in which they produce effects being very different.² An opinion considers that “*presidential decrees, especially those of appointment in public positions or of conferring a certain personal status have the nature of individual administrative acts of authority, which are not excepted from the jurisdictional control exercised by the way of the administrative contentious.*”³

Decrees of dissolution of the Parliament. Another attribute of the head of the state regards the dissolution of the Parliament. After consultations with the presidents of the two chambers and with the leaders of the parliamentary groups, the President of Romania may dissolve the Parliament, if the latter has not given its vote of confidence for the formation of the Government within 60 days from the first demand and only after the rejection of at least two demands of investiture. The

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²To that end, see I. Deleanu, [“Constitutional Law and Political Institutions, Treaty, volume II”], Editura Europa Mare, 1996, p.360.

³To that end, see I.Vida, [“Executive Power and Public Administration”], Editura Regia Autonomă “Monitorul Oficial”, Bucharest, 1994, p.69 and A.Iorgovan, [“Administrative Law, Elementary Treaty, Volume I”, Ed.Nemira, Bucharest, 1996, p.420.

Parliament may be dissolved a single time during one year, but not during the last 6 months of the presidential mandate, or during a state of mobilization, war, siege, or emergency. To accomplish this attribution, the President is assisted by the Legislative Constitutional Department within the Presidential Administration. In relation to the accomplishment of this attribution, this department has the following tasks: the analysis of constitutionality of the dissolution and the drafting of the dissolution decree.

Decrees for law promulgation. After being adopted by the Parliament, a law is sent to the President of Romania in view of promulgation. It is appreciated that *“promulgation has the significance of a final operation of the legislative procedure, which allows the head of state to invest the law with enforceable formula, obligating the public authorities to enforce its provisions.”*⁴ Before promulgation (operation which may not exceed the delay of 20 days from receiving the law), the President may request, one time only, to the Parliament to reexamine the law. In the hypothesis that the head of the state has exercised this attribution, or if the verification of the constitutionality of the law has been requested, the promulgation must take place within 10 days from receiving the law adopted after reexamination or from receiving the decision of the constitutional contentious court by which the conformity of the law with the Constitution was confirmed.

Decrees regarding partial or total mobilization of the armed forces. The issuance of such decree is conditioned by the prior approval of the Parliament. Only in exceptional cases, the President’s decision is subsequently submitted to the approval of the Parliament, within 5 day from adoption. In case of armed aggression against the country, the President of Romania takes steps toward the rejection of such aggression and informs the Parliament on such steps by sending it a message without delay. If the Parliament is not in session, it is convened in law within 24 hours from the onset of the aggression. In case of mobilization or war, the Parliament continues its activity for the whole duration of such states, and if it is not in session, it is convened in law within 24 hours from the declaration of war.

Decrees instituting the state of siege or state of emergency. These may regard the entire country or just some administrative-territorial units and involve the request of the Parliament for the approval of the measure adopted, within 5 days from such adoption. If the Parliament is not in session, it is convened in law within 48 hours from instituting the state of siege or of the state of emergency and it functions for the whole duration of such states.

⁴ M.Constantinescu, I.Deleanu, A.Iorgovan, I.Muraru, F.Vasilescu, I.Vida, [“The Constitution of Romania commented and annotated”], p.177.

Decrees conferring some decorations and honors. In that sense, the Chancery of Orders within the Presidential Administration has the following main tasks:

- it proposes to the President of Romania the annual quota of decorations on types, grades, or classes, according to the legal provisions;
- in accordance with the annual quota of decorations, it proposes to the President of Romania the number of decorations on types, grades, or classes, to be distributed to each ministry or central institution authorized to make proposals for decoration, it draws up the decoration decrees;
- it draws up the decrees and the accompanying notes related to the decorations conferred by the President of Romania;
- it monitors and checks, in point of observance of the legal provisions and of the quality of execution of the decorations and the accessories thereof (boxes, patents etc.), the reception and management thereof;
- it takes over the decoration proposals made by the authorized institutions, checks the observance of the legal norms for conferring of such decorations and draws up the centralized tables on types, grades, or classes, and submits them for the approval of the President of Romania long with the decree drafts related to their conferring;
- it drafts the documentaries (short history of the decoration and the main legal provisions related thereto) which, by the care of the Protocol Division, are transmitted to the similar foreign divisions in the event that the President of Romania decorates some high personalities;
- it proposes for approval and follows up the production of the specific forms (ledgers, records, data sheets regarding the persons proposed to be decorated, the head of tables for decoration proposals a.s.o.);
- it records the decorated persons on paper and on magnetic support, in the general ledger on types, grades, or classes;
- it organizes the ceremonies for conferring decorations to high foreign personalities in cooperation with the Protocol Division and the Financial and Logistics Department;
- it transmits to the ministries and central institutions authorized according to the law, the proposals for decoration, the amounts required for each decoration, rank, or class for which decoration proposals are to be made;
- it draws up, in cooperation with the Ministry of Foreign Affairs, the lists of Romanian citizens that were decorated by other states, in view of granting them the right to wear such decorations;
- it ensures the up-to-date record of the lists of persons decorated and the publication thereof on the site of the Presidential Administration;

- it keeps the record of vacancies for each decoration, on ranks and classes;
- it cooperates with all Councils of Honor with a view to ensure a good development of the activity thereof and exercises the activity of secretariat during the meetings thereof.

Decrees conferring the military ranks of marshal, general, and admiral. In that sense, the Secretariat of the Supreme Council for the Defense of the Country is the structure within the Presidential Administration that specializes in assisting the President of Romania in carrying out some attributions related to conferring such ranks. For such purpose, the Secretariat of the Supreme Council for the Defense of the Country presents the President with proposals for appointing militaries in functions provided in the organizational charts with the rank of general-lieutenant, vice admiral, ranks similar and superior to these, and presents the President with proposals related to the participation in the examination and granting the rank of general of brigade (and other assimilated ranks), as well as advancing generals to the next rank.

Decrees of appointment in public functions. They are issued under the conditions provided by various special laws. The doctrine gives as example the proposal of the Parliament related to the appointment of the director of the Romanian Intelligence Service, to the appointment of the judges of the Court of Accounts, or to the appointment of two members of the National Audiovisual Council.⁵

The constitutional text uses a wide sense of the notion of public function. The positive law defines the public servant as *“the person appointed under the conditions provided by Law no.188/1999 (with the subsequent modifications) in a public function”*. We note that the lawmaker wanted to expressly exclude from the notions of public servants the state employees that provide public service, but who are not the object of Law no.188/1999. Comparing the legal definition of the public servant institution to that of public function, it results that the public servant is the person who, under the conditions of the Statutes of public servants, carries out the attributions and the responsibilities established by the Law, with a view to ensure the fulfillment of the public power by the central and local public administration. The notion of public servant has two meanings. In the sense of positive law, the notion of public servant designated those public employees remunerated from public funds, who carry out their activity within the bodies, public institutions, and services, with a view to satisfy the general and legitimate interests of the member of the state society; they are

⁵ Romeo Paul Postelnicu, [The Institutional Structure of the Public Administrative System of Romania], Bucharest, 2007, pag.28-30.

subject to the dispositions of the Statutes of the public servant and of the special statutes derogated from the Statutes of the public servant. Nevertheless, not only the public servants under the incidence of Law no.188/1999 carry out activities of public interest and are in the public service. For example, the dignitaries (to whom the provisions of this legal act do not apply) envisage by their activity to satisfy and accomplish the public interest. Obviously, the Constitution and the Regulation for the organization and functioning of the Presidential Administration do not take into consideration the strictly legal sense of the notion of public function.

Decrees for individual pardon. In carrying out this attribution, the President is assisted by the staff of the Constitutional Legislative Department within the Presidential Administration. The attributions of this department include the analysis of the demands of pardon positively endorsed by the Ministry of Justice or those that the Division of Citizens' issues considers founded, even if they got a negative endorsement from the Ministry of Justice, and also drawing up notes containing the demands of pardon mentioned above, drafting the decree and presenting such documents to the President of Romania.

The Supreme Court established by the Decisin no. 4416/2005, passed in the case file no. 1303/2005 that *"granting pardon is an exclusive prerogative of the President of Romania, expressly provided by art. 94 letter "d" of the Constitution of Romania, while by the effects it produces, pardon being at the same time an institution of criminal law."*⁶ In the exercise of his prerogatives, as provided by art. 80-94 of the Constitution, granting or revoking the individual pardon, the President of Romania acts not only as the representative of the executive, but also as the head of the state exercising the function of mediator between the state and the society. In other words, between the person who applied for individual pardon and the President there is no typical relation of administrative law, subject to the censure of the administrative contentious court, the decree for granting, respectively revocation of pardon being, as defined in the doctrine, some complex legal acts subject to a regime of constitutional law, with implications at the level of criminal proceedings law.

Decrees concerning referendums. The President of Romania, after consulting with the Parliament, may ask the people to express, by referendum, its will with regard to issues of national interest. In carrying out this attribution, the President is assisted by the staff of the Constitutional Legislative Department within the Presidential Administration. The attributions of this department include the finalization of the object of the consultation by referendum with the specialized

⁶Culegere de spete-Dreptadministrativ-Dreptulmediului, Editia I-a, Lucia Giosan, Liviu Giurgiu, Iulian Ionita, Cristian Giuseppe Zaharie, Oana Giosan, Ed. Pro Universitaria, Bucuresti, 2007, p.43.

departments within the Presidential Administration, drawing up the works preparing for the debate in Parliament of the issues that make the object of the referendum and monitor, together with the department of political issues, the onset of the referendum and signaling to the President of Romania of the eventual shortcomings occurred in relation thereto.

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