Rule of law vs. presidential power: the case of exculpation decrees

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Rule of Law vs. Presidential Power
The Case of Exculpation Decrees

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The decrees issued by the President of Romania represent one of the few displays of presidential will that possess a legal character. In the same category falls the adoption of the Regulation on the organisation and functioning of the Presidential Administration, issued according to Art. 2 of the Law no. 47/1994 concerning the organisation and functioning of the Romanian Presidency[1]. The President may act through material actions with legal character, may carry out material operations or may issue exclusively political acts.

The Romanian doctrine did not pay enough attention to the President's decrees, as administrative acts, because the common practice enjoined no ample debates, until the moment when the issuing and the subsequent revoking of a presidential decree for exculpation came to the forefront of the public opinion, in December 2004. The purpose of this study is to analyse the situation at hand from a legal point of view, by reference to the existing norms at that time, as well as by reference to the legislation adopted at a later date and the drafts for normative acts, which may have an impact on the special category of administrative acts, namely the presidential decrees.

The Romanian Constitution offers only scant details with respect to the presidential decrees. Only a general rule is stated according to which the President, in the exercise of his duties, may issue decrees. In the reading it was emphasised that, from a constitutional point of view, it is unclear exactly when the President may use decrees and when must he employ other forms by which he can express his will[2]. There are situations, such as the promulgation of laws, when the constitutional involvement of the President can only be made by means of issuing decrees. It is stimulating to analyse from a legal point of view the President's duty, described by the Art. 4 of the Law no. 47/1994, to appoint and release from office the presidential advisers. This expression of Presidential will, although the law gives no clear account, can only be done by means of a legal act. There is no

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[1] Republished in *Monitorul Oficial,* no. 210 from April 25th 2001, modified by Emergency Ordinance no. 176/2001, in *Monitorul Oficial,* no. 839 from December 27th 2001, approved by Law no. 226/2002, in *Monitorul Oficial*, no. 290 from April 29th 2002. Law no. 47/1994 refers only to the "approval" of the respective Regulation by the President, without clarifying what kind of normative act needs such an operation in order to materialise. We consider that the President cannot approve the Regulation on the organisation and functioning of the Presidential Administration by means of a presidential decree. This conclusion concurs with an institutional common practice, the text of the Regulation is not published in *Monitorul Oficial,* unlike the presidential decrees for which the obligation to be published exists, according to Art. 100 § 1 of the Constitution. On the same grounds, the President cannot modify, reject or revoke the respective Regulation through a presidential decree.

[2] Tudor DRĂGANU, *Drept constituțional și instituții politice*, vol. I, Lumina Lex, București, 1998, p. 281.

contradiction to the solution that the President may employ in this situation a legal act other than the presidential decree, but the institutional practice demonstrated that even in this situation the President would rather issue presidential decrees. The clarification must be made that, in what concerns the constitutional provisions, the President may issue acts other than decrees, but we join in the opinion that a subsequent change of the institutional practice up to this day must be reflected in the legislation concerning the organisation and the functioning of the President of Romania and of the Presidential Administration.

The decrees of the President of Romania can be individual or normative. This conclusion is almost unanimously shared in the public law literature[1]. There are other authors who consider that the presidential decrees cannot possess a normative character[2]. We support the view that the decrees for exculpation are individual in character in the sense that, through their issuing, the President cannot give birth to legal norms. First of all, it concerns with the situations which have been deliberately described in a general manner by the constitutional authority. Thus, according to Art. 92 § 3 of the Constitution "In the event of an armed aggression against the country, the President of Romania shall take measures to repel the aggression". The Constitution makes no clear reference about the kind of actions that can be pursued, however it is taken for granted that in extraordinary situations the President is allotted the right to take decisions that would correspond to the gravity of the situation and through which he could enjoy the highest possible degree of involvement within the settlement of the dispute. The measures mentioned by the constitutional text may take the shape of acts, both individual and normative. Declaring total or partial mobilisation of the armed forces, a prerogative of the President contained in Art. 99 § 2 of the Constitution, can only be made by means of a normative act. By this expression of will the President gives birth to a new legal situation, his act being at the origin of the mobilisation of the armed forces. Some decrees of the President, like those that involve the application of Art. 99 § 2 of the Constitution, enjoy an uncontested normative character as they "affect large categories of subjects, and the dispositions they contain have repetitive application"[3].

In what concerns the legal nature of the President's decrees, the literature unanimously admits that these are administrative acts and thus, they can be challenged in the administrative courts[4]. Consequently, the decrees for exculpation can be challenged in court, this issue however will be dealt with later in this article.

Art. 100 § 2 of the Constitution requires the countersignature of some of the President's decrees, in this category falling also the exculpation decrees. In connection with the situation that occurred on December 2004, the acting Prime Minister

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[1] Ion DELEANU, *Drept constituțional și instituții politice*, vol. II, Europa Nova, București, 1996, p. 359; Genoveva VRABIE, *Organizarea politico-etatică a României. Drept constituțional și instituții politice*, Cugetarea, Iași, 1996, p. 265; Mircea PREDA, *Tratat elementar de drept administrativ român*, Lumina Lex, București, 1996, p. 324; Ioan VIDA, *Puterea executivă și administrația publică*, Regia Autonomă "Monitorul Oficial", București, 1994, p. 68.

[2] Antonie IORGOVAN, *Tratat de drept administrativ*, vol. I, All-Beck, București, 2002, p. 322; Dana APOSTOL TOFAN, *Drept administrativ*, vol. I, All-Beck, București, 2003, p. 137; Ioan VIDA, *op. cit.*, p. 68; Emil BĂLAN, *Drept administrativ și procedură administrativă*, Editura Universitară, București, 2002, p. 71.

[3] Verginia VEDINAȘ, *Drept administrativ și instituții politico-administrative*, Lumina Lex, București, 2002, p. 272.

[4] The opinions expressed by the literature concerning this problem will be dealt with in a special section of this article.

at the time, Adrian Năstase, initially declared that he did not recall whether he countersigned or not Decree no. 1164 from December 15th 2004[1], and some commentators tried to impose the view that, only by countersigning some acts, there can be no complete, political and administrative responsibility for the Prime Minister due to the consequences of the decree in question. If the Prime Minister's amnesia is grounded only on political motives the second above-mentioned rationale may be proved to have no juridical grounds.

Initially, during the time in which the relations between the powers in the state were not rigorously accounted for by normative acts of constitutional character, it was considered that the head of state is entirely absolved of responsibility. Thus, Jean Bodin, in *The Six Books of the Republic* considers that the sovereign enjoys almost absolute immunity, having to answer for his acts "[to] no one, except for the God almighty"[2]. According to Bodin, "the sovereign doesn't actually fulfil any function, being above all functions his subjects may have"[3]. Once the modern states with a constitutionalised public life appeared, the idea that the head of state has no responsibility has been gradually given up, however all modern Constitutions guarantee a certain form of immunity for the head of state, as a reminder of the period when the responsibility had a privileged regime, intangible, by comparison with the responsibility of other persons that were in leadership positions. The Romanian constitutional regime made no exception from this general tendency. In the period 1858-1938 it was considered that all the acts issued by the head of state must be countersigned either by the Prime Minister or the minister in charge with the pursuit of the respective act. Even the decree by which a new Prime Minister was appointed had to be countersigned by the former Prime Minister[4]. Only the Prime Minister could be held responsible for countersigning acts issued by the king, thus instating the rule of the sovereign's inviolability. The 1866 Constitution stated in Art. 92: "*The Sovereign's person is inviolable. His ministers are responsible. No act of the Sovereign can hold power without being counter-signed by a minister who, in so doing, becomes responsible for that act*". The 1923 and 1938 Constitutions adopted these provisions in their entirety in Art. 87 and, respectively, Art. 44[5].

In the public debates that surrounded the revoking of Decree no. 1164/2004 it was mentioned the existence of an alleged decree issued by King Michael in 1946 so that those condemned in the "high national treason" trial, especially Marshall Ion Antonescu, could be exculpated, but it was never put in practice due to the an inexisting countersignature from the Prime Minister. This historical reference was made in order to underline the role of the counter-signature, which is decisive for the application of the head of state's expression of will and to help reveal the consequences of those options that were available to the Prime Minister who held office in the first half of December 2004. The example mentioned above has no factual of legal endorsement: such a royal decree did never exist.

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[1] *Monitorul Oficial,* no. 1207 from December 16th 2004.

[2] Jean BODIN, *Les six livres de la République*, Librairie Générale Française, Paris, 1993, p. 111.

[3] Radu CARP, *Responsabilitatea ministerială. Studiu de drept public comparat*, All-Beck, București, 2003, pp. 10-11.

[4] Tudor DRĂGANU, *Drept constituțional și instituții politice*, cit., p. 274.

[5] See Ioan MURARU, Gheorghe IANCU, *Constituțiile române – Texte. Note. Prezentare comparativă*, Regia Autonomă "Monitorul Oficial", București, 1995; Cristian IONESCU, *Dezvoltarea constituțională a României. Acte și documente – 1741-1991*, Lumina Lex, București, 1998.

Through the ruling from May 17th 1946 of the People's Tribunal, established by Law no. 312/1945, Marshall Ion Antonescu, along with three other accused, were condemned to death and other 20 accused received incarceration punishment and the complementary penalty of military or civic disgrace. The attorneys of those convicted appealed to the High Court of Justice, invoking the unconstitutionality of the law according to which the People's Tribunal was functioning. The appeal was however rejected. In the same time these attorneys pleaded with the King Michael for the issuing of a decree by which the punishment of their convicted clients should be reduced[1]. Since Petru Groza, the acting Prime Minister, opposed King Michael could not issue the decree. In exchange for these modified intentions of the sovereign the Prime Minister did not oppose to counter-signing another royal decree by which the punishment of other former high-ranking officials convicted by the People's Tribunal was reduced (Eugen Cristescu, Radu Lecca).

This episode show that often times the decrees issued by the head of state are the result of a compromise struck with the one who has to countersign the document. *A previous consultation, at informal level, between the head of state and the Prime Minister before the issuing of a decree can only benefit the actual implementation of the head of state's expression of will, albeit without any constitutional obligation in the matter.*

Such a consultation must have been necessary before the issuing of Decree no. 1164/2004. The Prime Minister might have had the possibility to decline countersigning the decree (even at the moment when it was only a draft), which, in turn, would have made the decree void of its content. In the period between the counter-signing and the revoking of Decree no. 1164/2004 by Decree 1173/2004 the Prime Minister held the entire responsibility in what concerns all the aspects related to the actual application of the first decree.

The 1991 Constitution is the first fundamental act of the Romanian State, in which the rule of countersigning applies only to a certain category of acts issued by the head of state. This rule is expressly stated in Art. 100 § 2. For all the other individual or normative acts of the President, the countersigning is not a compulsory condition for them to produce legal effects. The President's decrees need not be countersigned by the Prime Minister unless the Constitution clearly stipulates it. Art. 100 § 2 from the Constitution must be restrictively interpreted and cannot be considered as a reference norm[2]. This leads to the conclusion that the Prime Minister cannot be compelled by any public authority (the President included) to countersign decrees other than the ones mentioned in the Constitution.

The decrees of exculpation fall into the category of presidential administrative acts for which the Prime Minister's countersignature is required, which comes to show that exculpation, indifferent to other normative regulations inferior to the Constitution or to the fact that the act in question can be censured by administrative courts, is considered as a reminder of the head of state's absolute inviolability, an attribute that under no circumstances can be delegated to other state authorities. What are transmitted to the Prime Minister are only the responsibility, and not the possibility to issue a similar normative act. The best support to the conclusion that only responsibility is transmissible to the Prime Minister in case of exculpation decrees is the fact that he has no power over the content of the decree. He cannot

[1] The 1923 Constitution stated (art. 88) that the king could ease ("reduce") definitive punishments.

[2] Dana APOSTOL TOFAN, *op. cit.*, p. 273.

modify or reject it. The Prime Minister has only two options: either to countersign it, or to refuse it altogether.

The responsibility is transmitted to the Prime Minister but only in what concerns the political aspect. Even the transmission of political responsibility is partial, inasmuch as *nothing can prevent the Parliament from invoking as an excuse for the impeachment of the President, according to Art. 95 from the Constitution, the content of a decree, even when it has been countersigned by the Prime Minister.* Meanwhile, *the Parliament can invoke as reason for withdrawing the confidence granted to the Government, by means of a motion of censure, adopted under the conditions laid by Art. 113 from the Constitution, the content of a countersigned presidential decree.* The President, even after the Prime Minister's countersignature still holds a "residual" political responsibility, as well as the full administrative responsibility (or civil, criminal, according to each case). *Rejecting an exculpation decree by administrative courts cannot infringe on the Prime Minister, only on the President.* The legislation on the administrative courts does not forbid challenging a presidential decree, nor does it contain any special references to such an action. Consequently, the Prime Minister cannot be sued, in principal or by an accessory demand, because there are no legal grounds for such an action, and the whole juridical construct that lays at the basis of administrative norms contains mechanisms through which the citizen is guaranteed protection only from the delivering administrative authority.

The President's decrees for which an obligation exists for countersignature have been qualified in the literature as "complex administrative acts"[1], as they appear following an expression of will of two public authorities. This category of administrative acts has an autonomous existence and in particular the decrees that require the Prime Minister's counter-signature cannot be assimilated to any other category of administrative acts. It would be helpful that this category be expressly mentioned in a future Code for administrative procedure. Unfortunately, the current draft of such a Code[2] makes no clear reference to this distinct category of administrative acts in connection with which, as we have seen, the regime of administrative responsibility is different.

To the previous theoretical considerations must be added a picture of the current situation relevant to the purpose of this article. On December 15th 2004 the acting President at that moment, Ion Iliescu, in the final days of his constitutional mandate issued a decree of exculpation for 35 persons, among which stood Miron Cozma and others convicted for serious acts of corruption. The decree was affected by major flaws that will be subsequently presented. The rejection reaction of this decree coming from the civil society was prompt and a general mobilisation against its application ensued. It must also be stressed that the decree was issued in a time when the negotiations among parties for a future majority in the Parliament were only at the beginning, and its issuing undoubtedly had a strong influence on the reorientation of political alliances. On December 17th 2004 the President issued the following press release:

> "Following the consultations between the President of Romania, mister Ion Iliescu, and the Prime Minister, mister Adrian Năstase – taking into

[1] Tudor DRĂGANU, *Drept constituțional și instituții politice*, cit., p. 275.

[2] Ministry for Administration and Interior, National Institute for Administration, Regional Centre for Continual Development for Local Public Administration Sibiu, *Code for administrative procedure of Romania (draft).*

consideration the observations of the Ministry of Justice, as well as the reactions of the public opinion – the President of Romania, mister Ion Iliescu, has decided the annulment of Decree no. 1164 from December 15th 2004, concerning the granting of individual exculpations".

Previously, on the same day, the Presidency issued another press release in which it was stated that the ways through which the annulment of the above-mentioned decree were being analysed at the institutional level, and that a decision would follow based on the constitution. On the same date the President decided to revoke Decree no. 1164/2004 by Decree no. 1173/2004[1]. This latter decree makes only one reference to the reasons why Decree no. 1164/2004 was revoked. The President wished that the legal effects of the decree that granted individual exculpation would not take place and it is obvious that discussions took place concerning the language in which it should be written besides the revoking there was also the option of annulment that had been taken into consideration.

The decision to revoke Decree no. 1164/2004 had an enormous impact on the public opinion. This time it was debated whether the President can or cannot revoke its own decrees.

In analysing whether, from a constitutional point of view and in what concerns legal norms that apply in this case, the President's decrees can or cannot be revoked one must also consider the fact that President Ion Iliescu was not, in December 2004, at his first operation of revoking his decrees of exculpation. Thus, on December 30th 2001, the President issued Decree no. 1101/2001[2], which exculpated from imprisonment several convicts, as well as exculpating from the rest of imprisonment time those who had been already punished. On January 7th 2002 the President issued Decree no. 1/2002[3], which revoked the individual exculpation of one of the convicts. Decree no. 1101/2001 continued thus to produce effects with respect to the other beneficiaries of presidential compassion. Since the names of the people included in Decree no. 1101/2001 were less well-known than those that were included in Decree no. 1164/2004, and the political climate was less tensed, the contradictory measures adopted by the President in December 2001 and January 2002, respectively, were not subjected to a debate by the public opinion, the two decrees not being even mentioned in the public law literature. We consider that a general, theoretic discussion would have been fruitful at the time, especially in what concerns the revoking of presidential decrees, as the conclusions such a discussion might have reached could have served well in the moment when, at the end of 2004, the problem that was not carefully considered when it should, surfaced again.

Following the issuing of the two decrees of 2001 and 2002 a special law was adopted in the field of exculpation granted by the Romanian President, Law no. 546/2002 concerning the exculpation and the procedure for individual exculpation[4], which in its turn was not subjected to a doctrinaire debate. We consider that, following the events from the end of 2004, a serious discussion is needed concerning this law which should be modified and even more so, rigorously applied.

Law no. 546/2002 mentions two types of exculpation: individual and collective. It contains some rules that an exculpation request must fulfil. It mentions

[1] *Monitorul Oficial*, no. 1219 from December 17th 2004.
[2] *Monitorul Oficial*, no. 844 from December 28th 2001.
[3] *Monitorul Oficial*, no. 5 from January 8th 2002.
[4] *Monitorul Oficial*, no. 755 from October 16th 2002.

identification data of the convicted person and the penalty for which the exculpation is requested, and attached to this request must be the final decission of conviction, the police records, marital documents, medical certificates, social inquiry reports, and other documentation the solicitor deems necessary in support of his request (Art. 5). The President may require in support of his exculpation prerogative an advisory opinion from the Ministry of Justice (Art. 6). In the situation when the two exculpation decrees were issued on December 2004, the President did not exercise this prerogative. Given the large number of persons who were the subjects of the decrees, as well as the social menace these persons presented for the society, the President should have asked for the advisory opinion mentioned by Law no. 546/2002. *De lege ferenda,* a transformation should occur in what concerns this presidential prerogative, it should no longer be optional, but rather compulsory, in order to avoid any suspicions related to the discretionary character of the exculpation.

The above-mentioned Law details in Art. 8 what elements should an exculpation decree enclose. In our opinion, the lack of any such element enclosed to the exculpation decree published in *Monitorul Oficial* is a good-enough reason for requesting the annulment of the act in an administrative court.

This law does not tough upon the issue of revoking (or, depending on the terminology, annulment or retraction) exculpation decrees issued by the President. *De lege ferenda,* the legal authority should assert whether this complex administrative act conforms to the legal regime commonly applicable to all other administrative acts. Likewise, should the President be granted *expressis verbis* the prerogative to modify the legal effects of his own exculpation decrees, than it should be stated the limit up to which this prerogative can be dully exercised.

It is necessary to clarify this issue so that the decisions the President takes concerning the exculpation concord with the legal provisions. For the time being, the public law literature did not look upon the issue of revoking the exculpation decrees as a distinct subject, yet some doctrinaire considerations in the field can be employed in what concerns the revoking of administrative acts.

Thus, Rodica Narcisa Petrescu, starting from the observation that there is no [legal] text that contains a clear account of how to revoke an administrative act, it cannot be contested, and so "it spawned as a principle, which was determined by the specificity of the organisational activity and the concrete application of legal provisions, by means of administrative acts with unilateral character"[1]. The principle of revoking administrative acts has, according to the author, an absolute character in what concerns normative administrative acts. However, in what concerns individual administrative acts it ceases to be absolute. Some administrative acts, under situations explicitly described by the law or as effects of the nature of rights and obligations that establish themselves as part of the content, are irrevocable[2]. Rodica Narcisa Petrescu identifies four exceptions from the principle of irrevocability of administrative acts, among which "administrative acts that materialised"[3].

Verginia Verdinaș considers that revoking administrative acts is a legal operation that might consist of retraction (when the issuing organ does the dismissal of the act) or of revoking (when a hierarchically superior authority does the dismissal

[1] Rodica Narcisa PETRESCU, *Drept administrativ*, Accent, Cluj-Napoca, 2004, p. 325.
[2] *Ibidem,* p. 327.
[3] *Ibidem,* p. 329.

of the act)[1]. The distinction made by this author is very useful, and agreeing with it involves the clarification of the operation through which the President intends to annul the effects of an exculpation decree in the category of retraction. Verginia Verdinaș takes for granted the opinion expressed by the literature according to which there is a principle for revoking administrative acts and enumerates six categories of acts that constitute themselves as exceptions from this principle. Among these are the administrative acts materially executed which, according to the author, are exempted "on grounds of material effects, economic [ones] that they produced, and by the inefficiency a revoking act might have under conditions in which the material accomplishment of the act has been realised"[2]. Verginia Verdinaș undertakes a special analysis of the President's decrees, explaining how administrative courts can check them on legal grounds[3], except some categories of acts (which do not include exculpation decrees among them).

Antonie Iorgovan assess in his turn that revoking is "a principle of the legal regime of administrative acts"[4]. The author recognises that this principle is not endorsed by a text with legal value and suggests it should be included in a future Code of administrative procedure. Antonie Iorgovan expresses six exceptions from the principle of revoking administrative acts, among which are the "materially accomplished" acts. The author does not employ as examples the exculpation decrees, but rather the authorisations. Thus, issuing an authorisation for construction is meant to give the beneficiary the possibility to undertake certain material operations. Once the construction of the building is completed, revoking the administrative act possesses no interest and cannot lead to any legal effect[5], and the situation at hand (the existence of a building) cannot be undone by revoking the act.

The thoroughest explanation in the literature concerning the revoking of administrative acts can be found in Tudor Drăganu, *Actele de drept administrativ*[6]. It is not the purpose of this article to settle the dispute present in Romanian administrative Law linked to the usage of the most appropriate terminology and to the choice of the category of either administrative acts or acts of administrative Law. In any case, it must be mentioned that the author himself currently uses the existing terminology, i.e. administrative acts[7]. Although the quoted work dates from 1959, Tudor Drăganu's considerations in the matter of revoking administrative acts still hold truth today, without being conditioned by the existing legislation at that time. These acts, according to the author, are revocable; still this principle ceases to be absolute in the case of individual acts (such as the case with exculpation decrees). Tudor Drăganu considers that exceptions to the principle of acts revocability find justification in the fact that "it is necessary to assure certain stability for the citizens"[8]. In other words, revoking of acts is a deflection from the established legal administrative order which, in order not to disturb the stability, is admitted under restrictive conditions. This is why the exceptions from the principle of revoking

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[1] Virginia VERDINAȘ, *op. cit.,* p. 112.

[2] *Ibidem,* p. 115.

[3] *Ibidem,* p. 274.

[4] Antonie IORGOVAN, *op. cit.,* vol. II, p. 81.

[5] *Ibidem,* p. 90.

[6] Editura Științifică, București, 1959.

[7] See Tudor DRĂGANU, "Câteva reflecții pe marginea recentului Proiect de Lege a contenciosului administrativ", in *Revista de drept public*, nr. 3/2004.

[8] IDEM, *Actele de drept administrativ*, cit., p. 202.

administrative acts must be stated in a limitative enumeration and restrictively interpreted, taking into account, we might add, the general principle of law according to which exceptions are meant for a strict interpretation.

When an administrative authority revokes its own act it leads to a breech in legality[1], and the victim "may use all means of attack available to the citizens in our legislation"[2]. Among the exceptions to the principle of revoking administrative acts Tudor Drăganu lists those acts that have been materially accomplished. The author employs the same example as Antonie Iorgovan, the one with construction authorisation, which comes to show the source of inspiration for the latter author (actually, admitted as such).

We consider that Decree no. 1164/2004 issued by the President of Romania falls into the category of administrative acts that have been materially accomplished and which, as a consequence, cannot be revoked. It so happens because, immediately after the publication of the decree in Monitorul Oficial, *most of the persons directly touched by its provisions – the ones being convicted to imprisonment, because among the persons included into the decree were some already released from prison – had been freed, this operation being undoubtedly a material accomplishment of the exculpation decree.* Releasing from prison represents the most important, if not the only one, material accomplishment of exculpation decree issued by the President of Romania. If we are to accept this conclusion, which conforms to the majority of viewpoints expressed in the literature with respect to the admitted exceptions to the principle of revoking administrative acts, *Decree no. 1173/2004 cannot have legal effects, being issued in breach of general admitted principles of law.* What is necessary is that *these principles should be taken into consideration when concluding the draft Code of administrative procedure,* as well as in what concerns a *possible modification of Law no. 546/2002.*

The transgression of principle of law done by issuing Decree no. 1173/2002 had consequences on the present legal order that cannot be properly assessed to their full extent. Thus, 18 out of the 35 exculpated persons have been taken back to prison following the revoking of Decree no. 1164/2004. Another 8 were already free, being released from prison prior to the issuing of the two presidential decrees, which reveals grave material errors within the text of Decree no. 1164/2004. Three of the convicted persons found of the list of exculpation have not been freed due to other material errors within Decree no. 1164/2004 – errors linked to their birth dates or the numbers of their court sentences, contrary to the dispositions of Art. 8, Law no. 546/2002[3]. Unfortunately, this law makes no clarification about the legal consequences of the lack of compulsory elements that should be in the exculpation decree or other material errors that affect these elements. A modification of the Law no. 546/2002 should take into account these aspects and clearly state the consequence/consequences for issuing an exculpation decree that is in breach of legal provisions.

The reading of Decree no. 1164/2004 and of Decree no. 1173/2004, as well as the analysis of the consequences these administrative acts have produced, should encourage the development of two hypotheses:

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[1] Tudor DRĂGANU speaks of a breech of "popular legality", notion that is no longer in use today, explicable in the historical context when the work appeared.

[2] At that moment in time, challenging administrative acts in courts was not admitted by Romanian legislation.

[3] Data available in *Ziua* newspaper, from December 20th 2004.

a) Decree no. 1164/2004, having to withstand grave material errors, can be categorised as a non-existent administrative act. In general, it is being considered that these acts do not enjoy the assumption of legality and do not exist as such. It isn't necessary for these acts to be declared void in order to deprive them of legal effects, but rather this observation can be made by anyone, because of their obvious faults[1]. If we accept this hypothesis then there was no need for revoking the decree in question. Such a hypothesis must take into account Art. 100 from the Constitution according to which the sanction in the case of a decree issued by the President of Romania unpublished in *Monitorul Oficial* is its non-existence. *The Constitution makes no reference that the sanction of non-existence applies only in case of unpublished decrees the possibility exists for this sanction to be used in other cases of comparable gravity*. Not publishing represents only an operation given as *exempli gratia* by the framers of the Constitution.

b) The breaches that affect Decree no. 1164/2004 are not visible enough to justify the sanction of non-existence of that particular act. In this case, Decree no. 1164/2004 may be challenged before an administrative court, with the possibility of being totally or partially annulled, according to Art. 11 from Law no. 29/1990.

Arguments can be developed in favour of each of the two hypotheses and only a court can appreciate the degree of gravity of the material errors that affect Decree no. 1164/2004. There is another hypothesis that deserves a separate discussion. The question is to what extent the acting President of Romania may revoke a decree issued by the previous President. In this respect there can be no clear answer, because there are no explicit provisions that Law no. 546/2002 should include. Until now, there has never been such a situation. In our opinion, *in case a new President takes office, he can only revoke those decrees issued by the former President that have not been materially accomplished*. It is obvious that both *Decree no. 1164/2004, and Decree no. 1173/2004, can be considered without a doubt as acts that have been materially accomplished, which means that the acting President cannot revoke them*. In the case of other decrees which have not been put to use, the solution of revoking even by another person that takes office as President of Romania following the constitutional mandate of the one that issued them cannot be rejected *de plano*, conclusion drawn from the interpretation of the general legal principles.

If we agree with the latter hypothesis Decree no. 1164/2004 may be challenged before an administrative court, according to Law no. 29/1990, by individuals who consider that their rights were damaged by the issuing of this administrative act. This conclusion follows from the interpretation of the above-mentioned law. It is also being illustrated by the literature – specifically by Verginia Verdinaș[2] or Dana Apostol Tofan[3]; indirectly by Tudor Drăganu[4] and Rodica Narcisa Petrescu[5], by not mentioning it in the category of exceptions from the legal control instituted by Law no. 29/1990 or by Antonie Iorgovan, by not including President's decrees in the category of acts that are considered as reasons for action dismissal[6]. The main competence to judge such an action, by which the annulment of the legal

[1] Tudor DRĂGANU, *Actele de drept administrativ*, cit., p. 152.
[2] *Op. cit.*, p. 272.
[3] *Op. cit.*, p. 137.
[4] *Drept constituțional și instituții politice*, cit., pp. 285-286.
[5] *Op. cit.*, pp. 403-404.
[6] Antonie IORGOVAN, *op. cit.*, vol. II, pp. 543-544.

consequences of Decree no. 1164/2004 is requested, falls, according to Law no. 29/1990, onto the Appeal Court of Bucharest[1].

We consider that a possible such action can be introduced following the mentioned rules and not by invoking Law no. 554/2004 on contentious business falling within the competence of the administrative courts[2]. This because the new Law on administrative courts entered into force, according to Art. 31 § 1, in 30 days from the publication date (December 7th 2004) and cannot produce retroactive effects, not being applicable to the two decrees issued by the President of Romania that were being extensively discussed in this article.

It is interesting to notice that, had Law no. 554/2204 been adopted previous to the issuing of the decrees not only the injured parties from its dispositions (those subject to Decree no. 1164/2004) could have challenge it to the administrative court, but any other person who could prove a damage to personal rights or to legitimate interest, because Art. 1 § 2 of the respective law states that "it can address the administrative court also the person suffering an infringement against a personal right or a legitimate interest by an administrative act with individual character, addressed to another legal subject". Taking into account what was mentioned above, Law no. 554/2004 cannot be applied in the case of the two presidential decrees and, as a consequence, *an action challenged before the administrative court by any other person, individual or legal, except those clearly refereed to by Decree no. 1164/2004, can only be dismissed on the grounds of lack of active judicial capacity*.

A final clarification to the above-mentioned conclusion is needed. Although the new Law on contentious business falling within the competence of the administrative courts could have been adopted before the issuing of the two presidential decrees and a possible action before court should have followed its provisions, the solution of challenging by other persons besides the one directly touched by Decree no. 1164/2004, would have been questionable. The reason is that, as revealed by the literature[3], a popular action like the one envisaged by Law no. 554/2004 is contrary to Art. 21§ 1 from the Constitution, which states: "Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests", an opinion we share full-heartedly. Of course, as long as no court ruling observed the unconstitutionality of the respective provisions, any considerations remain strictly theoretical.

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[1] For details concerning the material and territorial competence of courts that adjudicate requests formulated following Law no. 29/1990, see Dacian Cosmin DRAGOȘ, *Procedura contenciosului administrativ*, All-Beck, București, pp. 208-209.

[2] *Monitorul Oficial*, no. 1154 from December 7th 2004.

[3] Tudor DRĂGANU, "Câteva reflecții pe marginea recentului Proiect de Lege…cit.", pp. 57-58.