



Where do the Limits of the Discretionary Power of the President of Romania in Regard to the Withdrawal of Decorations end?

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Abstract: In the context of debates that occurred in the public spaces in regard to the decision of the President of Romania to withdraw decorations awarded to public persons, this study intends to perform an analysis in regard to the limits of the discretionary power of the head of state in this case. Without involving the political component of this case, our research shall be limited to the applicable legal framework (insofar there is any), the attributions of the Chancellery of Orders, the conditions of awarding and withdrawing decorations, inclusively the necessity of motivating decrees as an essential condition for the validity of the administrative deed. The study concurrently also refers to a comparative analysis between similar situations of withdrawing decorations.

Keywords: discretionary power; decree; withdrawal; motivation; Chancellery of Orders

1. Applicable Legal Framework

In accordance with the provisions of art. 94 lit.a) from the Constitution of Romania² “*The President of Romania also fulfils the following attributions: a) awards decorations and honourable titles*”. Concurrently, art. 100 provides that “*(1) In exerting his attributions, the President of Romania issues decrees, which are published in the Official Gazette of Romania. The non-publication results in the non-existence of the decree. (2) Decrees issued by the President of Romania in exerting his attributions provided in article 91 para. (1) and (2), art. 92 para. (2) and (3), art. 93 para. (1) and art. 94 lit. a), b) and d) are countersigned by the Prime-Minister.*”

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² Republished in the Official Gazette of Romania, Part I, no. 767/31 October 2013.

From the corroboration of the said legal texts, it results that the awarding of decorations is performed by presidential decree, being countersigned by the Prime-Minister of Romania and published in the Official Gazette for validity purposes.

The national system of decorations is regulated by Law no. 29/2000¹. From among the decorations provided by the said legislative act, we shall mention only a few for exemplification purposes, having regard to the fact that there are no differences in regard to the awarding procedure. Law no. 29/2000 provides a number of 47 decorations as orders, crosses and medals, being divided on national decorations and decoration on activity fields, which in their turn are for time of peace or time of war. Each of these decorations has the own legislative act regulating the legal regime thereof, being accompanied by a regulation on the description and award of the concerned distinction.

In regard to national decorations, such are regulated by three legislative acts: Emergency Ordinance of the Government no. 11/1998², for the restatement of the National Order “Steaua României” (Star of Romania), Emergency Ordinance of the Government no. 104/2000³ on the reinstatement of the National Order and Medal for Merit, Emergency Ordinance of the Government no. 105/2000⁴ on the reinstatement of the National Order, Cross and Medal “Serviciul Credincios” (Faithful Service).

In regard to decorations on domains of activity, we mention as an example Law no. 9/2003⁵ on the Sports Merit Order and the Sport Merit Medal and Law no. 459/2003⁶ on the Order of Military Virtue and the Medal of Military Virtue.

It is worth mentioning that all these legislative acts include also a Regulation in the content of which are described the regulated distinctions and the award procedure.

In regard to the withdrawal procedure, we shall distinguish in the content of Chapter III between the two cases expressly provided by art. 51 from Law no. 29/2000 “*conviction by non-appealable court decision to a freedom-depriving punishment*” and “*for dishonouring deeds, other than such provided at lit. a), inflicting moral prejudices to the members of the order*”. If in regard to the latter,

¹ On the national decoration system, republished in the Official Gazette of Romania, Part I, no. 118/18 February 2014.

² Published in the Official Gazette of Romania, Part I, no. 271/14 June 1999.

³ Published in the Official Gazette of Romania, Part I, no. 320/10 July 2000.

⁴ Published in the Official Gazette of Romania, Part I, no. 319/10 July 2000.

⁵ Published in the Official Gazette of Romania, Part I, no. 74/5 February 2003.

⁶ Published in the Official Gazette of Romania, Part I, no. 563/31 July 2003.

the lawmaker was prodigal in regulating the withdrawal procedure¹, it is interesting to withdraw the decoration in case of conviction to a privative punishment by non-appealable court decision, a situation in which the law is silent.

2. Chancellery of Orders

In accordance with the provisions of art. 60 from Law no. 29/2000 “*The assignment of decorations is entrusted to the Chancellery of Orders, which shall operate as a department within the Presidential Administration*”

The Chancellery of Orders is the structure within the Presidential Administration mainly liable to fulfil the constitutional attribution of the President of Romania to award decorations and titles (art. 94 from the Constitution of Romania, republished). The establishment and duties of the Chancellery of Orders are established by Law no. 29/2000. The Chancellery of Orders has mainly the part of ensuring the application of the legal provisions regarding the awarding of decorations to individuals (Romanian and foreign citizens) or legal entities and this is performed by a varied range of activities, from drafting budgetary projections to cover the necessary decorations, subjecting for the approval of the President of Romania the annual rate of decorations on types, grades or classes. The Chancellery of Orders is concurrently managing the database comprising the decorated persons, collaborates with the Councils of Honour of each order, in view of carrying out their activity and has relations with other institutions or with varied categories of petitioners in regard to its domain of activity. It should be also mentioned that under bilateral contracts at the level of chiefs of state, involving exchanges of decorations, the Chancellery of Orders ensures the necessary expertise, setting at the disposal of the President of Romania – but also to other interested institutions – documentations regarding Romanian and foreign decorations. The same Chancellery of Orders manages the evidence of Decrees issued by the President of Romania, as well as the remittal thereof to the rightful institutions.²

¹ In accordance with art. 52 from Law no. 29/2000, “*For the judgement of dishonourable deeds inflicting moral prejudices upon the members of the order, other than such provided in art. 51 lit. a), a council of honour is set up for each order*”. Furthermore, the operation of each council of honour is regulated by a separate legislative act.

² <https://canord.presidency.ro/>.

The provisions of art. 5 from Law no. 29/2000 are worth mentioning, as according to them “*The nominal proposals to award decorations are endorsed by the Chancellery of Orders*”. We can only suppose that the “endorsement” activity refers to the legality, not to the assessment of the suitability of awarding a certain decoration. Furthermore we can notice that the lawmaker provided this prior procedure only on awarding, not also on withdrawing the decoration, but we shall resume these issues in the following chapter.

It results from the above that such structure within the Presidential Administration has mainly an administrative part, whereas the decision of awarding or withdrawing a decoration exclusively pertains to the President of Romania.

3. The Awarding vs. Withdrawing of Decorations

In accordance with the provisions of art. 4 from Law no. 29/2000:

*“(1) Decorations **are awarded** by the President of Romania, **by decree, based on the individual decoration proposals**;*

(2) Decoration proposals are made by:

a) the president of the Senate or the president of the Deputy Chambers, for the President of Romania, the Prime-Minister, senators and deputies;

b) the Prime-Minister, for the members of the Government;

c) ministers and heads of autonomous central institutions and organizations, for persons from their domain of activity.

(3) The President of Romania may award decorations also out of the own initiative, to an extent of 1% from the total number established by law for each grade or class of each decoration, except grades of High Officer, Great Cross and Collar;

(4) For Romanian citizens, the decorations take place once a year, on the National Day of Romania;

(5) In special cases, decorations may be awarded also throughout the calendar year.”

Also, in accordance with art. 5 from the same legislative act, “*Nominal proposals for the award of decorations are endorsed by the Chancellery of Orders, which is set up within the Presidential Administration.*”

In regard to the procedure of awarding decorations, such is taken over in the legislative acts related to each of them¹. It can be thus noticed that the procedure of awarding decorations follows the same course in case of all decorations, the final act rendering to the holder the rights and obligations related to the awarded distinction is the Presidential Decree, an administrative of individual nature that has to fulfil all validity terms of administrative deeds. Also, in order to be effective according to the provisions of art. 100 para. (1) from the Constitution of Romania, the Decree should be published in the Official Gazette of Romania.

The situation is of interest only when dealing with the withdrawal of a decoration. Art. 51 from Law no. 29/2000 provides two cases in which the capacity rendered by a distinction “*can be*” lost: “*conviction by non-appealable court decision to a freedom-depriving punishment*” and “*for dishonouring deeds, other than such provided at lit. a), inflicting moral prejudices to the members of the order*”². In regard to the case provided by art. 51 lit. b) from Law no. 29/2000, the lawmaker expressly regulated in art. 52 from the same legislative act that “*For the judgement of dishonourable deeds inflicting moral prejudices upon the members of the order, other than such provided in art. 51 lit. a), a council of honour is set up for each order*”, implementing thus the procedure regarding both the appointment of the council and the method of performing the research of each potential case that would fall under the incidence of this legal text.

It can be noticed from the said legal provisions that art. 51 provides a *possibility*, not an obligation to withdraw the decoration of a person.

On the other hand, in case of “*dishonouring deeds inflicting moral prejudices to the members of the order*” the lawmaker established the *judgment* competence thereof as the task of a council of honour, by observing the right to defence of the concerned person. For such purpose, art. 54 para. (2) provides that “*Persons subject to judgement are invited to participate in the judgement of the Council of Honour*”.

Unlike this situation, in regard to the withdrawal of the decoration for “*conviction by non-appealable court decision to a freedom-depriving punishment*”, the law is silent. Thus, we are in the situation in which the President of Romania is the **only**

¹ As an example, we mention the provisions of art. 5 from the Emergency Ordinance of the Government no. 11/1998; the provisions of art. 4 and 5 from Law no. 9/2003, but also Appendix no. 1 to this legislative act; the provisions of art. 1 and 2 from Appendix no. 1 to Emergency Ordinance of the Government no. 105/2000.

² Art. 51 lit. b) from Law no. 29/2000.

one who *”can”* decide to withdraw a decoration at any time, in any way and from any person. Having regard to the fact that the legal text does not provide any condition in regard to the possibility of the President to withdraw a decoration awarded to a person

For comparison purposes, it is also worth mentioning that in regard to foreign citizens, their decoration may be withdrawing *”in case of committing deeds incompatible to the capacity of a person to whom was awarded a distinction of Romania”*¹ it is mentioned that *”The withdrawal of decorations is performed by decree, on the proposal of the Chancellery of Orders, based on the notification of the Ministry of Foreign Affairs”*². Two essential issues result from these provisions:

Firstly, the law conditions the withdrawal of the decoration based on two issues: *”the committal of an incompatible deed”* and the notification of the Ministry of Foreign Affairs.

Last but not least, we notice also an extraordinary situation provided by law, the one according to which *”Decorations awarded for deeds fulfilled in the service of national defence in time of war shall be withdrawn only in case of a conviction for treason in time of war”*³. From here it results that in this case, the lawmaker conditions the withdrawal of the decoration – in a fair way, we might say – exclusively from the existence of a conviction for treason in time of war.

In other words, the decoration may be withdrawn **only** for the committal of one single deed in the domain in which the (military) distinction was awarded – treason in time of war.

4. The Comparative Analysis of Cases of Withdrawing Decorations

This chapter refers to the case provided by art. 51 lit. a) from Law no. 29/2000, i.e. the capacity rendered by a distinction *”can be”* lost in case of a *”conviction by non-appealable court decision to a freedom-depriving punishment”*. We believe that this case is worth analyzing, considering that the law leaves a large margin of discretion to the President of Romania for the withdrawal of a decoration, as no condition or the procedure to be followed in this case is provided.

¹ Art. 57 para. (1) from Law no. 29/2000.

² Art. 51 para. (2) from Law no. 29/2000.

³ Art. 55 from Law no. 29/2000.

We shall analyze in a first stage, in comparison, the situation of a decree of awarding the decoration and obviously the correlative decrees by which was withdrawn the concerned distinction, showing examples of such cases.

Thus, a first example is such of Decree no. 960/28 November 2002¹, in the preamble of which, after mentioning the legal grounds, we find the *motivation* of issuing the administrative deed, i.e. “*for the entire activity subject to the purpose of furthering and developing Romania, for the competence and abnegation proven in the government deed*”. On the other hand, we have Decree no. 1059/11 December 2019² by which was withdrawn the concerned decoration. Further to analyzing this latter administrative deed issued by the President of Romania, we can notice that there is no *motivation* and only the legal grounds are indicated. The situation was identical for all 15 decrees of withdrawing certain decorations issued on 11 December 2019 and published in the same Official Gazette from the same date³. Attempting to avoid any discussion of political nuance (a reason due to which we have neither mentioned the name of the concerned persons), in reality the *motivation* of such presidential decrees was communicated by the mass-media and it comprised the “*existence of non-appealable criminal convictions*”.

Starting from this situation, the following questions occur:

- Supposing that the motivation of withdrawing the decorations was the existence of non-appealable conviction decisions, why are these issues not provided in the content of the deeds?
- In the absence of mentioning any *de facto* element underpinning the issuance of the decrees, can we talk about the lack of motivating administrative deeds?
- Further to accepting the verbal *motivation* performed by the issuer of the decrees, the obvious question arises: why have the decorations not been withdrawn at the time when the concerned convictions became non-appealable, but more than 7, 8 years as of that time? Has the President exceeded the limits of the assessment right by issuing these administrative deeds under such conditions?
- If the withdrawal reason invoked in the public space was the existence of criminal conviction decisions, should this hypothesis have not resulted to the

¹ In regard to awarding the National Order Star of Romania in a grade of Great Cross, published in the Official Gazette of Romania no. 865/29 November 2002.

² Published in the Official Gazette of Romania, no. 998/11 December 2019.

³ *Idem*.

withdrawal of the decorations the beneficiaries of which are undergoing such a situation? Otherwise, could we talk about discrimination?

We shall obviously not analyze the theme we proposed to ourselves by relating to the declarations from the public space, but we shall limit ourselves to the research in the exclusive view of administrative law.

The motivation of the decrees we referred to or, better said, the absence thereof, represents the first essential issue to which we shall further refer. Presidential Decrees are by their nature administrative deeds of individual nature, as such establish rights and/or obligations incumbent on a person or a group of non-determined persons and they produce *erga omnes* effects.

As provided in the doctrine, “*the introduction of the mandatory nature of motivating administrative deeds, which is already comprised in the theses of the future administrative procedure code, shall reduce the risk that the administration would take arbitrary, abusive decisions and finally it shall improve the activity of the administration.*” (Vedinaş, 2017, p. 341).

The utility of motivating decisions resides in informing about the reasons, meaning it explains the decisions in the content of the administrative deed (not by public declarations). Motivation concurrently enables an efficient control of the supervisor upon the content of the decision, as well as a rigorous jurisdictional control of the contentious administrative courts (Oroveanu, 1998, p. 134). Besides, the practice of the High Court¹ is constant in regard to the **necessity of the *de facto* and *de jure* motivation**, to a sufficient extent and able to allow the unrestricted exertion of the legal control of the court of laws, noting that “*the discretionary power rendered to an authority cannot be considered in a constitutional state as an absolute limitless power, as the exertion of the right of assessment by infringing the fundamental rights and freedoms of citizens provided by the Constitution or the law is an **excess of power** in the context in which the Constitution of Romania provides in art. 31 para. 2 the obligation of public authorities to ensure the correct informing of the*

¹ Decision of the High Court of Cassation and Justice no. 1580/11.04.2008; In a different case, the ARAD Tribunal noted by Civil Judgement no. 6185/ 29 October 2013 that “*In the absence of an explicit motivation of the administrative deed, the possibility of attacking in court the concerned deed is illusory, as long as the judge cannot speculate upon the reasons that determined the administrative authority take a certain measure and the absence of any motivation favours the issuance of abusive administrative deeds, insofar the absence of the motivation deprives of efficacy the legal control of administrative deeds and hence the motivation is a general obligation applicable to any administrative deed, representing a condition of external legality of the deed, which is the subject matter of an in concreto assessment*”;

citizen about the public affairs, but also about the issues of personal interest. Hence, any decision able to produce effects in regard to the fundamental rights and freedoms should be motivated not only in view of the competence to issue that deed, but also in view of the possibility of the person and society to assess the legality of the measure, i.e. the observance of the boundaries between discretionary power and arbitrary nature. Accepting the thesis according to which the authority needs not motivate the decisions is equivalent to depriving of content the essence of democracy and of the rule of law based on the principle of legality”.

From the brief analysis of the decrees that we referred to above, it obviously results that such motivation is actually completely missing, as their issuer limited himself to itemize the legal grounds based on which such were issued. In this view, we believe that a first reason of illegality of the administrative deeds issued in this manner is set up.

A second issue is the question whether in this case we can talk about an *excess of power* of the President when issuing the concerned deeds. Starting from a definition given by the Law on the administrative contentious no. 554/2004¹ defining “excess of power” as the *exertion of the assessment right of public authorities by infringing the limits of the competences provided by law or by infringing the rights and freedoms of citizens*², we intend to find out whether the President of Romania exceeded or not the limits of its assessment right.

As it results from the first part of the definition of *excess of power*, it represents the “*exertion of the assessment right of public authorities*” by **exceeding certain limits of competence** (which are obviously such provided by legislative acts) or by infringing the rights and freedoms of citizens (as the ones recognized by the Constitution).³ As found in the analyses of the concerned decrees, it is obvious that such were issued by observing the provisions from Law no. 29/2000, i.e. this legislative act renders to the President of Romania the attribution of issuing decrease, among them also such of withdrawing decorations.

Nevertheless, we believe that we deal with an excess of power first of all due to the actual missing motivation of the discussed decrees. On the other side, the criminal convictions referred to in the declarations from the public space were ruled more than 5 years ago. Therefore, in our view, another vulnerability of the concerned

¹ Published in the Official Gazette of Romania, Part I, no. 1154 from 07 December 2004;

² Art. 2 lit. n) from Law no. 554/2004;

³ Constitution of Romania, republished in 2003, chapter II, Fundamental Rights and Freedoms

administrative deeds occurs, in the context in which, although the law does not provide a term in which the decoration should be withdrawn from finally convicted persons to a freedom-depriving punishment, such should be anyway performed within a reasonable term.

We believe that the third vulnerability would be the fact that the President of Romania applied a different legal treatment to persons undergoing the same situation – of having a non-appealable criminal conviction to a freedom-depriving punishment¹. Can we not talk about discrimination in this situation? Direct discrimination occurs when a person is treated in a less favourable manner than a person that was, is or could be in a comparable situation and the difference in treatment is based on any discrimination criterion provided by the applicable law². This type of discrimination can result from the provisions of the law, of other legal acts or from the real conduct towards the concerned social group³.

Finally, it should be noticed that in time there have also been other situations of withdrawing decorations, some decrees being signed by the same person, as such discussed here.

We mention here Decree no. 459/9 May 2013⁴, issued at a distance of 17 days (!!!) as of ruling a non-appealable conviction decision, as it results from the motivation from the content of the deed, i.e. “*having regard to Criminal Decision no. 86 from 22 April 2013 of the High Court of Cassation and Justice.*” On the other side, we notice that in previous cases, the (current) President of Romania issued decrees of withdrawing decorations relatively recently after the conviction decision became non-appealable, such deeds being motivated at that time not only *de jure*, but also *de facto* with the express mentioning of the court decision⁵.

Thus, we can only wonder why such decrees were motivated and issued within a relatively short term as of the time the criminal conviction decision of the concerned persons became non-appealable, whereas in the notorious situation

¹ The case of Mr. Gheorghe Popescu is notorious, who was decorated by Decree no. 400/18 March 2000; subsequently, on 4 March 2014, he was convicted by the Court of Appeal Bucharest in a non-appealable manner to a freedom-depriving punishment with execution, of 3 years and 1 month, a punishment that he also executed;

² <https://cncd.ro/formele-discriminarii>;

³ Mihaela Ajder, Veaceslav Bălan. *What is direct discrimination?* The Centre for Information in the domain of Human Rights;

⁴ Published in the Official Gazette of Romania no. 260/9 May 2013;

⁵ Decrees no. 404 and 405 from 25 April 2017, published in the Official Gazette of Romania no. 294 from 26 April 2017; such were issued at less than one year as of the date when the conviction decisions became non-appealable;

crated in the waves of decrees for the withdrawal of certain decorations published in the Official Gazette no. 998 from 11 December 2019, the situation was a completely different one?

5. Conclusion

In regard to all issues analyzed in this study, we believe that we face an excess of the limits of the assessment right from the President of Romania in at least 2 perspectives:

- The absence of motivation of the administrative acts in their content;
- The lengthy duration elapsing as of the time when the criminal conviction decisions remained non-appealable;
- The differentiated treatment granted to the issuer of the decrees versus the existence of the same causes of withdrawing decorations in case of different persons.

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