VOIDNESS – SANCTION OF THE ADMINISTRATIVE ACT

Emanoil POPESCU, University Lecturer, PhD
Ecological University of Bucharest

Abstract: *The voidness concept is necessary in order to separate the illegal administrative acts of the administration (that may be attacked in court according to the rules of the administrative contentious matters) from illicit facts (because a void act put into forced by by the administration is equivalent to an illicit fact), when the contentious rules present in the matter of the acts are not applicable anymore. For that, we should approach the problem of the notion of voidness, of the void act, the forms of the administrative act voidness (voidness of fact and legal voidness), the hypostases of juridical voidness caused by the lack of an existential validity element, the consequences of the administrative act voidness, and also the vices of the act that bring the sanction of its voidness.*

Key words: *voidness, voidness of fact, juridical voidness, void act, tetra-dimensional competence.*

1. Doctrinaire Notions

• *Voidness* is the sanction applying to the acts that, lacking the elements of fact inherent to their nature or object, do not have even the shadow of a legality appearance, so that they cannot be considered juridical acts, but at most material juridical facts [1]; *voidness* is the sanction occurring when an administrative act is touched by a crass illegality, so that any person, even a person having an average intelligence (as the late professor Tudor Drăganu was saying) may accomplish this. It is a sanction of a constitutional rank, art. 100 and art. 108 stipulated that the non-publishing in the Official Gazette of a decision or ordinance of the Government or of a decree of the President brings its voidness. In case of void acts, the legality presumption does not apply anymore [2].

• *The void act* is an act whose non-value does not need to be officially found or pronounced so that it can be treated as invalid immediately and with no term [3]; the void act does not enjoy the legality presumption specific to administrative acts [4].

• *Essentially,* voidness is the sanction applying those administrative acts affected by an illegality vice so serious that it does not enjoy, not even for a moment, the legality presumption featuring any juridical act, being at the same time a status (of non-value) of a certain act, a status with no vigour, with no juridical force, with no existential element of the act and it should not be found according to a prior procedure.

• *Largely*, voidness also includes the status of abrogated act and the one of shaky act because they lack an essential element: either even the will expression of the administration, retracted by a contrary act, or the legal object, cause, etc.

• *In a limited sense*, voidness as a sanction applies to the acts emitted by disrespecting certain validity conditions that are so important that they become "existential" for the respective act, so that the void has never had *"(...) any existence of fact and any legal one"* [5], preventing the birth of the legal effects, having its cause in the disrespecting, *ab initio*, of the essential conditions of validity of the administrative act.

2. Types of Voidness of the Administrative Act

Real voidness – a sanction applying to an expression of will of the administration affected by certain capital vices of illegality [6] – has two types: voidness of fact and legal voidness.

1) Voidness of fact of a juridical act means that a certain will has never been expressed, in any type.

2) Legal voidness supposes the existence of fact of a will, on which the Law, considering certain capital vices affecting it, does not acknowledge its existence (so, no juridical effect, no moment).

At the same time, we should distinguish between the statuses (hypostases) of the administrative act before its validity, the one after expiring the validity (namely *ante-existent voidness and post-existent voidness)* [7].

3. Hypostases of the legal voidness caused by the lack of an existential element of validity

Regarding this problem, the doctrine underlines three hypostases:

a) the one when a will expression has not produced any juridical effect *yet*, namely a status of temporary non-value of an act to which it is to acknowledge a juridical existence (for example, a presidential decree is signed and it is on its way to the Official Gazette in order to be published);

b) the one when a will expression has not produced, does not produce and will never produce a juridical effect, namely the perpetual status of non-value (for example, establishing crimes by means of a decision of the local council);

c) the one when a will manifestation cannot produce a juridical effect anymore, namely a status of non-value to which we have reduced an administrative act as a result taking it out of its validity (for example, an abrogated, annulled, shaky, revoked administrative act).

4. Consequences of an administrative act voidness

The French doctrine mentions five consequences of the voidness of an administrative act [8]:

1) Nobody is ever forced by the void act and they cannot prevail of it.

2) The void act cannot be validated by any means.

3) The execution of a void act represents a simple way of fact, an illicit juridical fact that would bring the responsibility of the organ applying the act.

4) Against a void act, not only that the annulling procedure is useless, but it is also inconceivable.

5) If the administrative authority acts in justice a particular person, by invoking in his favour a void act, he will protect himself from the principle by means of the exception, because the action way is mostly useless as long as it is about voidness.

Therefore, the *immediate and permanent "non-administrative" acts,* namely the void ones [9] lack an essential element, without which it is inconceivable for the act to happen. *The practical importance* resides, on one hand, in the possibility of any court to find, so not only of the administrative contentious court, and, on the other hand, the possibility of this last court to find the voidness of an administrative act excepted from the judicial control (of a fine of inadmissibility) [10].

5. Vices of act, bringing its voidness

In order to be in the presence of a void act, it should be affected by an illegality vice because of which with the law itself features it as being void, or, *in concreto*, it is only a travesty of act because a person having an average intelligence cannot acknowledge its mandatory feature, not even for a moment [11].

According to the doctrine, all the vices attracting voidness are related to the *disrespecting of the tetra-dimensional competence rules, or to the lack of the conditions of type and procedure.*

• Mainly, the *disrespecting of any dimension of the competence* may bring voidness, if the appearance is the one of illegal flagrant act.

The tetra-dimensionality of the competence supposes the existentiality of the competence: material, territorial, temporal, personal.

We are in the situation of:

- disrespecting the *material competence* when, for example, a prefect declares the siege situation;
- disrespecting *the territorial competence* when, for example, an agent of the Gorj County Police Inspectorate, Gorj Road Police Services, applies a contravention sanction in Craiova;
- disrespecting the *temporal competence* when, for example, a mayor emits a disposition the day after his successor had been validated in function and after he had been sworn in and, by means of the secretary's complicity, he ante-dated it;
- disrespecting the *personal competence*, when, for example a military authority gives instruction orders to some civil persons.

• *The lack of the conditions of type and procedure* brings the sanction of voidness, specifying that this is not usually definitive: as soon as this element is achieved, the respective act achieves its existence.

- The principle formalism imposes *the written form* for the existence of the act but there are also permissive exceptions such as: the verbal administrative act, the tacit administrative act, the administrative act emitted by gestures or by signalling.
- The *unsigned* act cannot be an administrative act yet because the signature differentiates a present will from a simple future project of the administration.
- The law sometimes stipulates expressly the voidness sanction in case of *non-publishing* [art. 100 paragraph (1) and art. 108 paragraph (4) of the Constitution, for example, in case of the presidential decrees and of the governmental decisions].
- Accidentally, there could be other vitiated of type or of procedure that could bring the act voidness. For example, a protocol of contravention sanctioning missing the name, surname, address and identifying data of the offender's identity card can only be void because we cannot determine in any way who was the one sanctioned by it.

6. Conclusion

We join the opinion [12] according to which voidness can be checked by any court, anytime, and the particular persons has the right to oppose to the power in execution of a certain act even before a court pronounces regarding the voidness: an act with no appearance of legality cannot be considered as a state act, not even for a moment.

References

[1] T. Drăganu, *Administrative Law Acts,* Scientific Press, Bucharest, 1959, op. cit., p. 151.

[2] V. Vedinaș, T.N.Godeanu, E. Constantinescu, *Public Law Dictionary, Constitutional Law and Administrative Law,* C.H. Beck Press, Bucharest, 2010.

[3] Ch. Eisenmann, *Cours de droit administratifs, tome II.* L.G.D.J., Paris, 1983, p.76.

[4] R.N. Petrescu, *Administrative Law,* Hamangiu Press, Bucharest, 2009, op. cit., p. 346; A. Iorgovan, *Administrative Law Treaty, vol. II, the 4th edition,* All Beck Press, Bucharest, 2005, op. cit., p. 327.

[5] T. Drăganu, *Acts ... , op. cit., p. 152.*

[6] O. Podaru, *Administrative Law, vol. I, Administrative Act, (1) References for a Different Theory,* Hamangiu Press, Bucharest, 2010, op. cit., p. 395.

[7] O. Podaru, *Administrative Law… ,* op. cit., p. 395 and foll.
[8] Ch. Eisenmann, *Cours … ,* op. cit., p. 76 – 80.
[9] Ch. Eisenmann, *Cours … ,* op. cit., p. 82.
[10] A. Iorgovan, *Treaty… ,* op. cit., p. 327; R.N. Petrescu, *Administrative Law… ,* op. cit., p. 346.
[11] T. Dogaru, *Nullities of the Individual Administrative Acts*, Studia Napocensia, Law Series, vol. I, Academy Press, Bucharest, 1981, op. cit., p. 64.
[12] O. Podaru, *Administrative Law… ,* op. cit., p. 399.