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Legal Sciences

ASPECTS OF THE THEORY OF NON-EXISTENT ADMINISTRATIVE ACTS

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ABSTRACT
THE ADMINISTRATIVE LEGAL DOCTRINE HAS DRAWN UP THREE MAIN THESES ON THE NULLITY OF ADMINISTRATIVE ACTS. THESE ARE: THE THESIS OF UNIQUE THEORY OF NULLITY IN ADMINISTRATIVE ACTS, THE BIPARTITE THESIS OF ABSOLUTE NULLITY AND RELATIVE NULLITY, AND THE TRIPARTITE THESIS OF ABSOLUTE NULLITY, ANNULABILITY AND NONEXISTENCE. OF THESE THREE, THE MAJORITY ACCEPTED THEORY BY THE LEGAL LITERATURE WAS THE TRIPARTITE THESIS WHICH ALSO SETTLED DOWN THE NONEXISTENCE OF ADMINISTRATIVE ACTS. THIS STUDY PRESENTS ASPECTS OF THE LEGAL NATURE OF NONEXISTENT ADMINISTRATIVE PROVISIONS, EXAMPLES OF SUCH LEGAL ACTS, AS WELL AS CONSIDERATIONS ON COMPARATIVE LAW.

KEYWORDS: NONEXISTENCE, ADMINISTRATIVE ACTS, NULLITY, FRENCH LAW

INTRODUCTION

The theory of nonexistence of administrative acts appeared in Romanian law during the interwar period, a period that established the tripartite theory of nullities according to which administrative acts may be nonexistent, null and void or voidable. Nonexistent acts "*lack the factual elements inherent to their nature or object, without which they cannot be logically conceived*"[2].

During this period, Professor Paul Negulescu was the most important proponent of this approach. According to him, in the administrative law there are nonexistent acts, "*which do not require any findings"*[3], and null and void acts, *"which have a legal appearance, but do have an original flaw so deep, and therefore their nullity may be pronounced whenever the existence of this flaw is discovered, as this flaw cannot be covered by the passage of time*"[4].

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[2] Tudor Drăganu, "*Actele de drept administrativ",* (București: Științifică, 1959): 150
[3] Paul Negulescu, "*Tratat de drept administrativ. Principii generale"*, ediția a IV-a, vol. I, (București: Institutul de Arte Grafice "E. Marvan" 1934): 425
[4] Paul Negulescu, "*Tratat de drept administrativ. Principii generale"...,* 425

As an example of nonexistent administrative act, the professor took into consideration the decree signed by the successor to the throne before taking the oath, which according to the Constitution of the time, conferred them the exercise of royal powers. Also, if a royal decree was signed only by the king and was not countersigned by the minister, it was considered nonexistent because "*Art. 87 of the Constitution states that such an act has no power*"[5]. The same happened also with a decision of a minister that regulated certain matters for which a royal decree was necessary. The nonexistent administrative act did not produce any legal effect and the person aggrieved by such an act could "*rely on this nonexistence in any era, for such irregularity is neither prescribed nor ratified*"[6]. Nonexistence could be raised either by way of an action or a plea in objection. Since such acts did not produce any legal effect, it was not necessary for the court to declare their nonexistence.

COMPARATIVE LAW

In France, the nonexistence of administrative act is recognized at both doctrinal and jurisprudential level. Nonexistence is set out from nullity and implies that the administrative act be impacted by more severe flaws compared to nullity. Furthermore, it is operated the distinction between materially non-existent acts and legally non-existent acts. The usefulness of establishing nonexistence is that any public authority may note it, at any time, in order to "*correct procedural rules that seem too stringent when applied to acts whose irregularity is flagrant*"[7]. As regards the establishment of the nonexistence of administrative act at jurisprudential level, prof. Paul Negulescu notes in his work some examples of decisions by French authorities. Thus, by decision of May 13, 1881 (Brissy-Recueil 1881, p. 493), the State Council of France ruled that cumulative and previous failure to fulfil the conditions necessary for an administrative act to be valid, results in the nonexistence thereof. In this case, the decree signed by the President of the Republic only and not countersigned by the minister, by which the reintegration of a person into the Legion of Honour personnel was declined was nonexistent even if the respective minister stated later he agreed with the presidential decision. The Council's argument was that through the communication of the vitiated administrative act, it has become final and no further ratification could cover such flaw. Also, by decisions of February 21, 1890, Mimieux, Rec. p. 201, and from January 10, 1908, Legouez, Rec., p. 9 respectively, the State Council noted that the decision to refuse retirement signed by an official lacking competence could not be appealed because such decision was nonexistent and had no value[8].

LEGAL NATURE

Regarding the legal nature of nonexistent acts, three dimensions of their legal status have been set in the legal literature. First, it has been shown that the presumption of legality operates no more as the violation of law is so obvious "*that a person of average intelligence cannot admit them, even for one moment, their legally binding nature*"[9]. According to the presumption of

[5] Paul Negulescu, "*Tratat de drept administrativ. Principii generale"...,* 430
[6] Paul Negulescu, "*Tratat de drept administrativ. Principii generale"...,* 430
[7] See Ana Rozalia Lazăr, "*Considerații privind nulitatea și inexistența actului administrativ"*, *Revista de drept public* 1 (2002): 28
[8] See Paul Negulescu, "*Tratat de drept administrativ. Principii generale"...,* 430-432
[9] Tudor Drăganu, "Nulitățile actelor administrative individuale", *Studia Napocenaia*, seria Drept, vol. I (1981): 64

legality, an act emanating from a public administration body is considered legal until proven otherwise. In the case of a nonexistent administrative act, the presumption of legality is removed because "*we are in the presence of an act which is not only in contradiction with law, but lacks an actual essential element which, according to its nature, may come into being*"[10]. The limits of presumption of legality must be specifically established for each case and not in the abstract. The legal literature has shown that the nonexistent act does not create, modify or extinguish legal relations according to the will of the author of the act, but has the ability to produce legal effects of a legal material fact[11].

Secondly, the rightful subject, the recipient of the administrative nonexistent act, has the right to refuse fulfilment of obligations under such act by invoking the nonexistence thereof before any public authority. If the act was enforced and reinstatement of previous situation is wanted, based on the principle that no one can do justice to themselves, the person concerned would have to go to court[12].

The third legal nature of nonexistent acts arises from the right of the recipients thereof to refuse their execution/enforcement. Correlative to this law, public administration bodies have the obligation to not enforce such acts by default. Therefore, the act is not enforceable anymore and the coercive force of the state cannot be imposed any longer under *executio ex officio* principle. Thus, in the event the nonexistent act is enforced, it is a "*way of fact (and not of law), which entails public administration accountability, and of its officials respectively for the damages caused*"[13]. In this respect, if the administrative act was previously executed, "*a legal action is, however, possible against the public official whose personal liability (civil or criminal) is engaged in the execution of such an act, because his correct attitude should have been passive resistance to the act*"[14]. In this case, the recipient of the act has the right to appeal the administrative court at any time, even if the act falls within the category of exceptions provided for by Law no. 554/2004 on administrative procedure, published in the Official Gazette of Romania, Part I, no. 1154 of December 7, 2004, as amended and supplemented. So, if the plea of illegality is raised before any court of law, the same may note the nonexistence of the act and proceed to its removal from the proceedings when settling the plea.

In French doctrine, it has been also admitted that nonexistent acts may be revoked at any time by public administration bodies. Unlike these, the null/void acts may be withdrawn only until expiry of the appeal.

JUDICIAL PRACTICE

In the socialist legal practice, the distinction between null acts and nonexistent ones enrooted based on the courts' lack of jurisdiction to decide the nullity of administrative acts. Since the courts had no power to declare administrative acts void, they would have reached a situation where they would have had to make a ruling considering that certain acts were valid, although they were issued in violation of administrative competence. In this respect it is reminded the Civil Decision no. 5/1959 in case no. 9399/1958 by which the Cluj Regional Court decided that the

[10] Tudor Drăganu, "*Actele de drept administrativ"...,* 152
[11] See Ioan Santai, "*Drept administrativ și știința administrației*", vol. II, (Cluj-Napoca: Risoprint, 2003): 148
[12] See Constantin Rarincescu, "*Contenciosul administrativ român*", ediția a II-a, (București: Alcalay & Co, 1936): 341
[13] Antonie Iorgovan, "*Tratat de drept administrativ*", vol. II, (București: All Beck, 2008): 78
[14] See Ana Rozalia Lazăr, "*Considerații privind nulitatea și inexistența actului administrativ"...*, 36

notice authorizing the partition of a land issued by the department of architecture and systematization of a people's council executive committee, cannot constitute the basis of a partition without the consent of all co-owners. Thus, this is a notice and not an authorization issued in compliance with legal provisions[15].

It has been shown in the legal literature that the minutes made by a financial controller after this capacity of them terminated is a nonexistent administrative act because in his case the presumption of legality does not operate for a second. There are also considered to be nonexistent, the acts issued under repealed laws or those of a local council that settled a civil litigation under the jurisdiction of courts[16].

In support of the nonexistence of administrative acts, in the socialist literature was stated that the courts were required to verify the existence of legal rules before applying them. The existence of the law involves its publication and its lack of repeal, that is the efficiency of the law. This verification should be done under an official edition of law. Therefore, if the courts have the right and obligation to verify the existence of public administration regulations, there is no impediment for them to study the existence of individual administrative acts[17].

In recent judicial practice it has been considered that a payment commitment not signed by the person intended to make the pay is a nonexistent administrative act which cannot be cancelled by the administrative court "*as this would amount to the implicit and indirect validation of nonexistent administrative acts of the same kind, which, however, were not appealed in administrative courts*"[18].

REGULATION OF NON - EXISTENCE AT CONSTITUTIONAL LEVEL

Currently, the nonexistence of public administration regulations is established at constitutional level. According to Art. 100 (1) of the Romanian Constitution, republished, the failure to publish Presidential decrees in the Official Gazette of Romania entails their nonexistence. Also Art. 108 (4) of the Romanian Constitution, republished, requires publication in the Official Gazette of Government judgments and orders, subject to their nonexistence. There is an exception to this rule where the decisions are of military nature and are communicated only to the interested institutions. Thus, it may be concluded that publication is a condition of validity of the act, the same becoming valid only after its publication even if it was legally adopted, and nonexistence is the penalty for the failure to fulfil the mandatory publication obligation[19]. Regarding the validity of emergency ordinances to be approved by the Parliament, its convocation is mandatory and the "*failure to fulfil this constitutional provision is punishable by considering the emergency ordinance in question nonexistent*"[20].

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[15] See Tudor Drăganu, "*Actele de drept administrativ"...,* 154

[16] See Tudor Drăganu, "*Actele de drept administrativ"...,* 153 și Antonie IORGOVAN, "*Tratat de drept administrativ*"..., 78

[17] See Tudor Drăganu, "*Actele de drept administrativ"...,* 155-156

[18] See *Decizia nr. 710 din 10 iunie 2000* a Curții de Apel Cluj, *Buletinul jurisprudenței*: 470

[19] See Antonie Iorgovan, Mihai Constantinescu, "*Constituția României – comentată și adnotată"*, (București: Regia Autonomă Monitorul Oficial, 1992): 241.

[20] Ramona Delia Popescu, Andrei Gheorghe, "*Producerea efectelor juridice ale actelor normative", Revista Transilvană de Ştiinţe Administrative* 2 (2012): 129

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As regards the nonexistence of laws, there were some in the literature who thought that one can speak of such an institution under the following conditions: "*from the data published in the Official Gazette of Romania it does not appear that that act would be a law (does not bear such name); from the data published in the Official Gazette of Romania it does not appear that the law has been passed by both Houses of Parliament; in the Official Gazette of Romania the decree of promulgation of such law issued by the President of Romania is not published and the law is not published in the Official Gazette of Romania (since the official publication is the only evidence of the existence of law, and it cannot enter into force since it was not published)*"[21]. It has also been noted that the failure to indicate that the law was passed by both Houses of Parliament, subject to the publication in the Official Gazette of Romania of both the law and the decree of promulgation, does not attract the absence of the law because "*to the ordinary individual, the presumption of legality is working*"[22]. Since the constitutional provisions do not expressly govern the unconstitutionality of laws and their nonexistence, it remains only theory.

CONCLUSION

In conclusion, unlike civil law, in administrative law the theory of nonexistence of legal acts is mostly admitted. The nonexistent administrative act does not enjoy a presumption of legality, its recipient may refuse enforcement and public authorities are obliged to refrain from enforcement upon them. With regard to the normative administrative acts, the Romanian Constitution, republished, stipulates that failure to publish decrees of the President of Romania, decisions and Government orders in the Official Gazette of Romania, entails the nonexistence thereof. It is noted that the nonexistence of certain normative administrative acts is of constitutional level.

[21] See Ana Rozalia Lazăr, "*Considerații privind nulitatea și inexistența actului administrativ"...*, 31
[22] See Ana Rozalia Lazăr, "*Considerații privind nulitatea și inexistența actului administrativ"...*, 31

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