Administrative Invalidity in the Western Tradition: Anglo-American, European, and Latin American Approaches

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Gabriel Bocksang Hola*

Introduction

The comparative analysis of administrative invalidity provides a remarkable example about the complexities of legal relationships in the Western tradition. Whenever a quick overview is performed over different national positions on this problem, a feeling and a reasoning turning around legal nominalism might seem appealing, as in the case of the French inexistence juridique, erroneously understood in our days as a recent concept, different from other types of invalidity; and other cases might be evoked.

Nonetheless, a closer inspection shows that the complete panorama of administrative invalidity in the Western tradition derives from a very limited number of essential concepts, treated with legal plasticity and a good deal of political realism by all legal systems involved. For the purposes of this paper, invalidity will be understood as the belonging of a rule to a certain normative system. These lines intend to expose briefly how these relationships were formed and how common characters of invalidity can still be perceived, in the times of counterpoint between national law and globalization, as a method of protection and promotion of the Rule of Law, so relevant for contemporary Administration (Bell 2006: 1271-2).

1. The conceptual roots of administrative invalidity

1.1. The origins in Roman law

The research for a systematic treatment of invalidity in Roman law would be a vain effort, as the abstract concept of actus juridicus is a modern creation. Nevertheless, in a topical, non systematic way, the main elements of our present theory of invalidity can be found among Roman sources (Guzmán Brito 1996: 730).

The fundamental species of invalidity recognized by Roman law was the one establishing that a certain act or contract did not exist, or that no act was performed in law, through formulae like nullum actum est or nullius momenti est, even if other words could designate this same mechanism (Kaser 1980: 60). In fact, nullus, derived from the construction non ullus, means nothingness, the proper sense of nullity or voidness.

If the act or contract existed, although no voidness could be logically applied, praetorian law established the possibility of quashing it ex post through mechanisms as restitutio in integrum or denegatio actionis (Biondi 1965: 218). These multiple concepts represented manifestations of a second type of invalidity, a layer superposed to the more radical voidness. In modern law, but not in Roman law, these situations would be integrated under a common concept called voidability.

These two provinces of invalidity were received in public law as well as in private law. It is clear that a decision by a Roman public authority could either be considered (a) valid, (b) null or (c) valid until another act retired the former one (Mommsen 1871: 442).

* Professor of Law, Pontificia Universidad Católica de Chile.
An eventual third realm, the acts described as *inutiles*, did not establish a new type of invalidity, but rather described situations of the two aforementioned hypotheses, or even cases of simple inefficacity, unrelated to invalidity, such as a clause repeating the content of a previous one; in this case, the act was not invalid, but simply inapt for modifying legal reality (Samper Polo 2003: 398).

1.2. The developments of Medieval and Modern law

There is no doubt that both types of invalidity survived the fall of the Western Roman Empire. They can be found in crucial civil medieval legislation as the *Lex romana Visigoborum* (506) and the *Siete Partidas* (1265); and Justinian’s *Corpus Iuris Civilis* had a strong influence in canon law, which also received these two legal concepts in texts such as the *Decretales* (1234) and the *Liber Sextus* (1298). In Medieval Law, nevertheless, the conceptual axis of invalidity began to move from voidness to voidability, which was particularly visible in procedure law (Bocksang Hola 2013 b).

Albeit the main frame of these legal mechanisms was preserved during Modern law, they were sometimes heavily influenced by political and legal circumstances. In continental law, the case of French law was particularly dramatic, as it tried – not successfully altogether – to tear apart its connections with the classical tradition through two main distortions.

The first one was the introduction of the *lettres de rescission* as a requisite for considering void acts – not all, but many – as void. Such a document could be understandable for annihilating a voidable act, but illogical on voidness, as the act was already and *ipsa iure* non-existent. This was a product of the rise of the royal power, which assumed as part of its new prerogatives a strict control on determination of what was legal and what was not.

This situation led to confusion among the categories of voidness and voidability. Even if great jurists as Domat, d’Argentré and Legrand recognized and promoted the classical dichotomy, at the end of the 17th century there was no clarity on the boundaries of both categories and many practitioners were not able to handle them correctly. It seems that d’Aguesseau was the first to suggest, in 1697, a new criterion for classifying invalidity: the *locus standi*. If it was granted to all interested parties, it would be a *nullité absolue* [absolute voidness]; if only to specific parties, determined by the law, it would be a *nullité relative* [relative voidness]. However, this “voidness” proposed by d’Aguesseau had a neutral meaning of “invalidity”: it could mean *real voidness*, or just *voidability*, depending on the case. Thus, at least four main conceptual combinations were possible from then on: absolute voidness, relative voidness, absolute voidability and relative voidability.

This subjective element of the *locus standi* as the base for classification introduced a second distortion in the theory of invalidity. Through the 18th century, the word *nullité* (technically and etymologically “voidness”) became commonly applied to voidability, the other member of the duality, while, simultaneously, the substantial axis of invalidity continued to move towards voidability. As a result, the *Code civil des français* received the word “nullité” in its new meaning of voidability (article 1304). Nevertheless, jurists were aware that the old “nullité”, in the original sense of voidness, was implicitly received in the Code: it was clear in the *travaux préparatoires* and in the first commentators of this legal corpus, as Delvincourt or Merlin de Douai.

Words, nonetheless, are essential for thinking; and French jurists noticed the inconveniences derived from this ambiguous duplicity of the term “voidness”. As the word *nullité* seemed to be definitely relocated towards voidability, it was just a matter of time that someone proposed a new word for naming voidness *stricto sensu*. In 1839, Aubry and Rau
introduced the word *inexistence* for civil law, asserting that “l’acte nul diffère essentiellement de l’acte inexistant”, this last category designating the old voidness which had lost its word. Although weakened, the duality had survived through the coupling *inexistence-nullité*. However, this linguistic innovation sadly led to a degradation of conceptual clarity, as some important French authors decided to sustain a trichotomy composed by *inexistence* and two kinds of *nullités* in their “new” meaning of voidability (v. gr., Planiol 1908: 127), attacked by other authors as soon as it was proposed, because of its lack of logical consistency. It is hardly surprising that when French Administrative law tried to configure a theory of invalidity at the end of the 19th century and the beginning of the 20th (Laferrière 1887: 468-471, Alcindor 1912), it was heavily influenced by the explanations and even the contradictions derived from the works of the modern Civil lawyers (Plessix 2003: 443-460). And, as well, the words used to name both categories in French law were influential in other countries.

English Administrative law seemed to be well attached to a sort of Roman dichotomic terminology until relatively recently. While *ultra vires* action was considered to be void and null, an *intra vires* error of law on the face of the record produced a voidable act which could be quashed by tribunals. But voidability – at least as a word, not as a real concept, as we shall see – disappeared when its premises did, as the House of Lords declared that all error of law would be *ultra vires* and consequently the decision affected would be void, not voidable (Wade and Forsyth 2009: 255).

Other countries, like Germany, Italy and Portugal are still very linked to their Roman roots. German law still confronts *Nichtigkeit*, nothingness, as in paragraph 125 of the BGB, and *Aufschubarkeit*, the possibility to destroy an existing act, as in paragraph 119 of the BGB. Italian Civil law proposes the duality between *nullità* and *annullabilità*, corresponding literally to the English voidness and voidability. And Portugal, in the recent *Código do Procedimento administrativo*, confronts *nulidade* and *anulabilidade* of administrative acts.

The emergence of constitutionalism and the strengthening of the idea of normative hierarchy have sometimes promoted the analysis of the theory of invalidity in the Western tradition. This has happened since the 18th century; in the United States, Alexander Hamilton (Federalist, n. 78) declared that “there is no position which depends on clearer principles, than every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void”. Furthermore, there are cases of constitutional reception of invalidity, as Argentina and Chile.

### 2. The essential types of administrative invalidity

#### 2.1. Voidness as an actual invalidity

If invalidity is defined as *the belonging of a rule to a certain normative system*, its strongest possible manifestation is the actual exclusion of that rule from the normative universe. That means that the rule is at best apparently, but not really, a rule in Law. As such, it operates *ipso iure* – it is Law itself that prevents its integration to a normative system.

This character is sometimes explicitly recognized by legislation. This is the sense of c. 149, paragraph 3, of the *Codex Iuris Canonici*, when it prescribes that “provision of an office made as a result of simony is invalid by the law itself”. While the English official translation is technically ambiguous, the Latin one is as clear as it could be for pointing out a true voidness: “provisio officii simoniace facta *ipso iure irrita est’.*

Voidness operates *ab initio*. This means that the supposed act was never formed in law, so it was null since the very moment in which the actor (in Administrative law, generally a
public body) intended to form it. This is not incompatible with the possibility of declaring voidness through a judicial decision – or even an administrative one. Such a declaration will just solve a potentially controversial legal situation, and – in general – will not impede the execution or application of the unlawful act. Some authors and jurists explain this possibility through a presumption, the presumption of validity (e.g., in England, Beatson, Elliott, Matthews 2011: 85-90; in Italy, Romano 1937: 265; in Chile, Silva Cimma 1995: 124). But we adhere to the position that no presumption is needed (in Spain, González Navarro 1997: 445), as the mere executive force of Administrative action is sufficient to explain how an Administrative decision can be unilaterally applied. In whatever way, it is clear that the ab initio character of voidness is not challenged in theory or in practice.

Voidness, in its technical sense, is characterized by imprescriptibility. Being a procedural feature, this aspect will be developed below, in the pertinent section.

Is a ius resistendi – a right to resist – granted against void acts? It is true that “a general principle of legal relativity” can be acknowledged, by which, among other consequences, people tend to treat administrative acts as valid, independently of their real belonging to the normative system (Wade 1967-8: 512). The possibility of resistance is a very delicate question and solutions vary. In France, for example, a civil servant can legitimately resist if the order given by his superior is “manifestly illegal” (Code Pénal, article 122-4), and the Conseil d’État has sporadically protected resistance performed by individuals (since the 19th century: Drillet de Lannigou, 1863, Rec. p. 470). In Canon Law, it is expressly ordered that “the executor of an administrative act to whom is entrusted merely the task of execution cannot refuse the execution of this act unless it clearly appears that the act itself is null” (Codex Iuris Canonici, c. 41). In Italy, it has been understood that, while active resistance should never be accepted, passive resistance would be possible in the case of voidness (Zanobini 1958: 299); and in Germany, it is considered that a void act can be ignored by all persons and authorities (Singh 2001: 82).

2.2. Voidability as a potential invalidity

In voidable acts, the exclusion from the normative system is not actual, but potential. Therefore, an existing act in law holds the seeds of its own annihilation if it contains the defects that the law enunciates as essential to its perfection but not to its characterization as an act in law. The idea behind the acceptance of voidability in Administrative Law – vis-à-vis voidness – is a high (or higher) degree of tolerance to what infringes public order.

As a potential invalidity, voidability presents as its main features that the action to quash the act should expire in a certain time (e.g., Portugal APA, article 163 paragraph 3), and that the voidable act can be “healed” through ratification by the Administration (e.g., Argentine APA, article 19). These characters share two tacit assumptions: on the one hand, that the normative system has not been per se affected from the violation performed by the public bodies; and on the other hand, the recognition that someone could consider this transgression as relevant and therefore should be entitled to request the destruction of the act.

The fact that voidability is just a potential invalidity has sometimes led to qualify a voidable act as a valid act. An example of such a perspective is given by Mexican law. Article 7 of the Federal APA prescribes that an act declared voidable “will be seen as valid” (“se considerará válido”). This solution is technically dubious: normally, the declaration associated with a voidable act should be an annulment by which the previously existing act will be destroyed. Mexican Law, on the other hand, seems to sacrifice legality by transforming this declaration in a sort of an automatic and implicit ratification of the irregular act, which, once “declared voidable”, will benefit from a treatment alike the one applicable on a valid act.
3. The systems of administrative invalidity

3.1. Monistic systems

Monism, considered as the existence of a single type of invalidity in a normative complex, does exist in its two variants: monistic voidness and monistic voidability.

In the Western tradition, perhaps the most evident case of monism based on voidness is the Chilean one. Since 1833 a constitutional rule has established voidness as the only applicable species of invalidity in Administrative law (Soto Kloss 2012: 508-510, Bockseang Hola 2015: 589-599; among judicial decisions, e. g., Ex municipales de Vallenar, 1851; Pérsico Paris, 1997), a principle received – in an almost literal transcription – through article 7 of the Constitution of 1980: “No authority, person or group of persons may assume, even on the pretext of extraordinary circumstances, other authority or rights than those conferred expressly upon them by the Constitution or by law. Any act transgressing this article is null and void [es nulo] and shall give rise to the responsibilities and sanctions indicated by law”. But it must be said that, in the province of private law, the Chilean position is dualistic, according to the Civil Code of 1857 (cfr. articles 10, 1683 and 1684).

Spain establishes one area of disguised monism centered on voidness. Even if a dualism is stated as a central point of its Administrative law, article 47 paragraph 2 of the APA (2015) establishes voidness as the only possible invalidity applicable on disposiciones administrativas (i. e., administrative acts of general effects) transgressing the Constitution, the laws, or higher ranked disposiciones administrativas; invading Legislative prerogatives, or applying retroactivity of sanctions or restrictions to fundamental rights. This means that, in Spain, two invalidity systems can be found in Administrative law, depending on their scope: on administrative acts with general effects, a monism founded on voidness, nulidad de pleno derecho; on administrative acts having individual or specific effects, the dualism voidness-voidability. Portugal has recently followed a similar rule with the invalidade (article 144 of their Código), where regulamentos can be quashed “at any time” (“a todo o tempo”).

Monism based upon voidability as the only species of invalidity can also be found in Western law. In Ecuador, for example, article 65 paragraph 2 of the Ley de la Jurisdicción Contencioso-Administrativa states that actions leading to “objective” trials, i. e., intending to quash an administrative acts, should be introduced in a maximum delay of 3 years, with some exceptional cases extending it to a limit of 5 years. In Costa Rica, the Ley General de la Administración Pública distinguishes nulidad absoluta from nulidad relativa (article 165); both are subject to prescription, generally in one year (article 175; articles 39 and 40 of the Código Procesal Contencioso-Administrativo), although a sort of residue of real voidness subsists in article 34 number 2, which establishes an imprescriptible Administrative review leading to protection of public property (dominio público).

3.2. Strong dualistic systems

Some administrative régimes operate with a clear distinction between the two types of invalidity. Germany provides an excellent example of this situation, considering that “illegal [administrative] acts are either void or voidable” (Singh 2001: 82), mirroring the duality established through the BGB for Civil law. In Spain, besides the special case of disposiciones administrativas, as stated above, the invalidity of administrative acts follows a traditional dualism formed by voidness (nulidad de pleno derecho) and voidability (anulabilidad); a structure followed by
the new Portuguese _Código do Procedimento Administrativo_ of 2015 (_nullidade-anulabilidade_). And the French analysis of invalidity in administrative law opposes the cases corresponding to _excès de pouvoir_, configured as a typical voidability, to the ones in which the act is _null et de null effet ou nul et non avenu_ and, as such, showing the main characters of a voidness _stricto sensu_ through the ‘modern’ denomination of _inexistence juridique_.

Naturally, the problem in dualistic systems is to find a mechanism allowing to distinguish when each type of invalidity shall be applicable. French doctrine has been puzzled by confronting the theory of the evidence of the defect (v. gr., de Soto 1941: 63) to the theory of the gravity (Auby 1951: 332). In Germany, these two criteria were combined in the APA of 1976, as article 44 paragraph 1 put the boundary between voidness and voidability in the confluence of a grave error and evidence. Then, paragraph 2 exemplifies some specific cases of void acts (v. gr., acts against morality, acts not showing the issuing authority), while paragraph 3 mentions some cases of vices which are not sufficient for declaring the act as void. A similar path is followed by Spanish law: article 47 of the new APA (2015) establishes six categories of vices producing voidness, while article 48 describes the main cases of voidability, understanding, at any rate, that other statutes can propose supplementary cases of invalidity in any of its forms. A similar catalogue appears in Portuguese law (_Código_, article 161).

The case of the United States seems to be a remarkable one: a _tacit strong dualism_. Without adhering to strict terminologies, it seems to admit that voidability is the rule applicable in Federal law (and thus being internally _monist_), while State law is called to respond to a sort of duality voidness-voidability, for the reasons explained below in the section about prescription.

The extension of each type of invalidity depends on the specific country, although it seems irrefutable that dualistic systems seem inclined to prefer voidability as their principal choice for invalidity. And the position of voidness, playing a secondary role, can considerably fluctuate. Spain and Germany do stress its role much more than in France, where, nowadays, the importance of _inexistence juridique_ is more dogmatic than practical.

### 3.3. Weak dualistic systems

In other cases, the distinction between voidness and voidability exists as such in Law, but its consequences are far behind the ontological approach promoted by Roman law and its modern followers. The most evident case of this perspective can be found in Italian law. Historically attached to the distinction of the duality _nullità-annullabilità_, it was not surprising that Administrative law received it explicitly in 2005, through a modification of the _legge_ 241/1990. While the new article 21- _septies_ ruled the case of voidness, 21- _octies_ did the same on voidability. However, the enactment in 2010 of the _Codice del processo amministrativo_ introduced a new rule (article 31 paragraph 4) applicable to all voidness actions: a time limit of 180 days.

Thus, before plaintiffs, voidness became a case of _qualified voidability_, because instead of being imprescriptible as a traditional voidness in Italy, the voidness action was granted only a slightly longer delay than the one applicable on voidability, which is 60 days (article 29). Nonetheless, some characteristics of real voidness still subsist in Italian Administrative law: the judge, or persons _as defendants_ can “always” (_sempre_) raise the question of nullity. But, as a whole, the decision introduced in Italy does not seem logical. It would be better if they returned to a strong dualism, reducing the risks an artificial trichotomy _inesistenza-nullità-annullabilità_ that seems, when proposed (as in Ponte 2015: 34-48 for _inesistenza_), to repeat the errors of early twentieth century French doctrine (Bocksang Hola 2013 a: 164-166).

Another type of weak dualism is the one existing in Argentina. Voidness, as an imprescriptible invalidity, once integrated the Argentine administrative régime. However,
nullidad was technically – not literally – transformed into a case of anulabilidad whenever a citizen intends to quash an administrative act; as a consequence, doctrine has tried to reinsert a wider scope of voidness by invoking the French terminology of inexistencia (Gordillo 2011: XI, 22-30). But, in fact, the traditional meaning of nullidad as a case of voidness stricto sensu subsists when Administration itself pretends to declare nullity, and, most remarkably, in the cases established by article 36 of the Argentine Constitution: acts against “institutional order” and the “democratic system” are “insanablemente nulos”; they cannot be “healed” through the passing of time. Even if article 14 of the APA, which establishes cases of “nullidad absoluta e insanable”, is subject to prescription, this case of “insanable” invalidity cannot hermeneutically used to interpret of a higher-ranked norm such as article 36 of the Constitution (Dromi 2000: 278). This last norm, as a consequence, helps in installing a dualistic system in Argentina, weak as it might be.

3.4. Flexible dualistic systems

English Administrative law provides another case of dualism: a one less concerned by ontology and more procedure-focused. It is true that the formal distinction of the classical dichotomy has been historically received in this country, but categories are confounded to the point of asserting that “theoretically void administrative acts are functionally voidable” (Wade and Forsyth 2009: 251). This would lead, a priori, to consider the English régime as the one of a monism structured – in reality, not in theory – on the sole principle of voidability. Nevertheless, things seem to be more subtle than that. English administrative jurists themselves remain attached to characterizing this invalidity as voidness, with important consequences: stressing the role of jurisdiction, regulating collateral challenge, and excluding ouster clauses (Beatson, Elliott, Matthews 2011: 109). And, at the same time, time limits related to the action can fluctuate, so that the nature of invalidity “is relative, depending upon the court’s willingness to grant relief in any particular situation” (Wade and Forsyth 2009: 253). This power granted to the courts seems to open the gates for multiple solutions, ranging from a very short-termed voidability to an imprescriptible voidness, and their boundaries seem subject to flexible alterations, depending on circumstances; even if, in daily practice, voidability seems to be the rule and voidness – stricto sensu – an exceptional possibility.

In Latin America, Colombia gives another example of a flexible dualism. Although its APA/Judicial Review act (ley 1347/2011) uses a single terminology, nullidad, it concretes itself under the two forms of voidness and voidability. Voidness appears in article 135, where an action against an unconstitutional general decree can be introduced “at any time” (en cualquier tiempo); and in article 137, ruling the cases of nullidad against “general acts” and some individual acts. Article 164 number 1 states that this action, just as the one in article 135, is imprescriptible, through the same expression en cualquier tiempo, and eventually extending its scope to other cases, such as acts concerning inalienable public property. And voidability applies whenever nullidad intends to be mixed with a protection of a subjective right, named by this statute restablecimiento del derecho (article 138); this action, according to article 164 number 2, must be introduced in four months, generally since notification or publication of the measure. Exceptional rules about prescription do exist, however, in this statute and in other ones. The most peculiar feature of this structure is that the nature of the action does not depend on substantial matters, but on the fact that judicial review of a void act can have nullity as its only object, or nullity associated to a certain subjective protection other than legality. In the first case, the action will be normally imprescriptible; in the second, a short time limit will exist.
4. The functions of administrative invalidity

4.1. The protection of legality

The idea of invalidity is intuitively related to the fact that a normative complex intends to be protected by its application. This is an unquestioned idea; but the way this protection operates depends on the specific type of invalidity. Voidness, operating ab initio, impedes per se the integration of the norm to the system, although a sort of indirect link with it could be conceived whenever some effects of the void act are recognized by the law. Voidability operates differently: a norm belonging to the normative system can be excluded from it, generally aper iudiciis. However simple it may seem, the protection of legality involves quite complicated features.

A first issue refers to the matter of partial invalidity, a concept related to the fact that an act can simultaneously contain legal and illegal articles or clauses. In these cases the principle utile per inutile non vitiatur takes place: valid articles or clauses are not rendered invalid because of the coexistence of invalid ones. Therefore, acts are considered to belong to the respective normative system, excluding the illegal articles or clauses; with the exception of the case when the group is seen as a non-detachable whole. This consideration sustains rules as article 53 paragraph 2 of the Chilean APA, regulating invalidación, the declaration of voidness by administration itself: “partial invalidation will not affect clauses independent from the invalidated part”. The same applies to the Spanish APA, when its article 49 paragraph 2 prescribes that “voidness or voidability in part of the administrative act will not involve the one of the parts of the same act independent of the former, unless the defective part would be so important that the administrative act would not have been issued without it”. Other examples can be found in Argentina (APA, article 16), and Germany (APA, article 44 paragraph 4).

Another nuance concerning legality itself appears from conversion. This institution consists of taking all legitimate elements of an invalid act in order to form a valid kind of act. It exists in some countries, like Germany (APA, article 47), Argentina (APA, article 20), Spain (APA, article 50) and Honduras (APA, article 127).

The extent of the protection of legality extends to what is called domino effect in English, or nullité par ricochet in French: the consequential voidness of an act because another one preceding it had been declared invalid. This situation is sometimes explicitly received by national legislation, as article 13 paragraph 1 of the Peruvian APA. Although it seems dangerous, it is not a real threat to the stability of a legal order, if the two layers of law (lex) and right (ius) are well differentiated. In fact, there is often no problem in declaring an act as void, or annulling it, and at the same time allowing some – or even all – of its effects to survive.

Some national legislators have introduced a principle of conservation. The meaning of each case of reception is not always the same, even if they turn around the idea of considering some acts as valid even if, in application of general rules, they should be considered as invalid. In some cases, conservation describes an attenuation of invalidity in the horizontal relationship of an invalid act with others. For example, article 51 of the Spanish APA expresses that “the public body declaring voidness or voiding acts will always dispose the conservation of those acts and proceedings whose content would have remained the same if no breach had been committed”. But in other cases, this word is applied in a focal way on the examined act itself, whenever the application of any type of invalidity is discarded on the grounds that the defect is negligible. Such is the case of article 14 of the Peruvian APA, which keeps nevertheless administrative responsibility as a possible consequence to the infraction.
The importance of the protection of legality is not restricted to the act or rule examined. It must be seen as an *exemplary mechanism*, for administrative activity is intrinsically associated with a massive production of rules, each one of these – and most of all the most highly ranked – being able to serve as models for the production of other ones. The exclusion, *ipsa iure* or *ope iudicis*, of an unlawful act, is an excellent mechanism for impeding the replication of illegality. As a matter of fact, this consideration, founded in public order, should grant voidness in Public Law a more ample role than the one it plays in Private Law. In the latter, the nature of private interests justifies a clear preference of voidability over voidness; in the former, voidness could play a stronger role, which could reach the category of priority in certain countries, or even exclusivity, as it happens in some monistic systems.

4.2. The protection of rights

Even if described as normatively centered, all theories about invalidity are, in fact, conceived in the ultimate scope of providing a protection of rights; otherwise they would become a mere exercise on technical speculation. This protection can be conceived in two complementary spheres.

On the one hand, there is an area of protection of the rights preexisting to the irregular administrative act. Retroactivity or retrospectivity, often associated with invalidity, does exist in order to keep certain – or even all – legal situations as untouched as possible by the transgression to legality.

But, on the other hand, legal systems cannot deny the fact that an enforced void or voidable act often did, in fact, interfere with legal reality, often being coercively applied by public bodies and sometimes having an appearance of conformity to legitimate rules. People and civil servants will normally be expected to trust the legality of administrative decisions, and this trust could produce effects in law. That is what, in English law, has been described as an “apparent paradox”: the fact that some effects can appear from an invalid act, because “the rule of law may actually require that the law courts should give legal effect to a decision that was not legally valid” (Endicott 2015: 403).

This is no real paradox. It is a natural consequence of separating two areas that might – and should – be related to each other, but are not a single unit: the *act*, for one part, and the *effects of the act*, for another. A valid act will usually produce effects, but not always. Correlatively, an invalid act will have an *inclusion* not to produce effects, but there will be the possibility that some of its consequences should be protected for the sake of Law itself. But the question about which effects should be protected is a complex one to answer.

There are cases when it will be considered that no effects will survive whatsoever, even if a person did trust in complete *bona fide* that the act belonged to the normative system. For instance, public property, whenever it is considered as inalienable, will not be acquired at any time even if an administrative orders its transference, because it is considered a *res extra commercium*, unsuitable *ex ipso natura rei* for any such operation. Such an act will be usually considered void and no effects will appear from it. Until relatively recently, French language used to invoke for such cases the formula “*nul et de nul effet*”: the act was void and producing no effects at all. In this hypothesis, there is an absolute protection of the rights that existed before the invalid act was emitted. A written disposition impeding the production of all effects appears from c. 199 of the *Codex Iuris Canonici*, when establishing that “rights and obligations which are of the divine natural or positive law” are not subject to any prescription.

But, in other situations, corresponding to either concepts of voidness or voidability, the invalid act will be able to produce effects. Therefore, a protection of legal relationships
established from or since the administrative act was issued will be granted, if the conditions required by Law are satisfied. Consequences can vary. In Portugal, while article 162 paragraph 1 of the Código presents voidness as totally ineffective (“a void act does not produce any effects in law, with no regards to its [eventual] declaration of nullity”), paragraph 3 moderates the consequences, as voidness “does not harm the possibility of attribution of effects in law to de facto situations resulting from void acts”. And, from the point of view of voidable acts, the same Código, article 163, prescribes that voidable acts “produce effects in law, which can be retroactively destroyed”, a solution that might be shared by many, if not all, systems including voidability. The Mexican Ley Federal del Procedimiento Administrativo, where both nulidad and anulabilidad are technically cases of voidability – a stronger and a weaker one –, follows a different pattern, associating nulidad with retroactivity (article 6) and anulabilidad with an implicit exclusion of retroactivity through the “healing” (saneamiento) of the act (article 7).

5. Challenging administrative invalidity

5.1. Exhaustion

The requirement of exhaustion of Administrative remedies before requiring courts about the invalidity of an administrative act is not essential to all Western tradition, but it appears in some important legal systems of different branches. For example, the United States of America, where it was a judicial creation (Werhan 2008: 305); Ecuador, as, following article 31 of the Ley de la Jurisdicción Contencioso-Administrativa, documents justifying exhaustion are necessary to all lawsuits; and Argentina, where the APA establishes for several cases the agotamiento de la instancia administrativa or reclamo administrativo previo – articles 23, 24, 30 and 31 – as a condition to accede to judicial review.

Costa Rica establishes a case of general indirect exhaustion. Article 31 paragraph of the Código Procesal Contencioso Administrativo prescribes exhaustion as optional, excepting two cases established by articles 173 and 182 of the Constitution: judicial review of municipal agreements (acuerdos municipales) and of certain administrative contracts. However, whenever the plaintiff directly chooses judicial review, the judge will convey this matter to the public body and grant him 8 days to “confirm, modify, annul, revoke or cease” the measure.

Other countries discard exhaustion as a requisite for quashing an act before a tribunal. In France, the rule of the recours préalable – preliminary administrative review – has no great repercussions in this field, as there should already be a document available for review. In Italy, no general requirement of exhaustion exists in matters of invalidity (Casetta 2015: 812, Sandulli 2015: 675); and the Chilean APA establishes a complete freedom for choosing at first place an administrative or judicial review (article 54).

5.2. Prescription

Perhaps the most crucial procedural difference between the Anglo-American branch of Western tradition and its continental-Latin American counterparts is the influence exerted by the substantial type of invalidity over the time limits within which an administrative act can be quashed.

Both continental European and Latin American administrative régimes – and, historically, the latter following the former – build their view on prescription over an essentialist approach. On the one hand, voidness, conceived as a non-act, could never prescribe, because the passing of time could not purify as an act something that has not reached that state. It is a
rule coming from Roman law: *quod initio vitiosum est, non potest tractu temporis convalescere* (D. 50.17.29). Therefore, the action would remain forever available to interested parties. Nowadays, such is the position of the German *Nichtigkeit*, the French *inexistence juridique*, the Chilean *nullidad de derecho pública*, the Portuguese *nulidade*: their action is imprescriptible. And, on the other hand, prescription is the rule applied over actions concerning voidability, such as in the Portuguese *anulabilidade* or, normally, the Argentine *nullidad*: but the influence on this matter of rules like *quae temporalia sunt ad agendum perpetua sunt ad excipiendum* should not be overlooked.

It is true that, in these countries, terminologies can vary. But in most of them – if not all of them – from a certain conceptual essence – whichever might be its denomination – derives the imprescriptibility or prescription of the action; and in this last case, a concretely applicable time limit.

English law does not follow the path of essentialism. Its approach could be characterized as *functionalistic* as legal reality tends to be configured from functions pursued in judicial review. The problem of how – or if – prescription operates is not forcibly derived from a previous conceptual category, but can be prudentially arranged by the courts within the limits established by the law.

In English law, “if the correct person successfully challenges the administrative act in the correct proceedings, within the time limits, and there are no bars to relief then the act is retrospectively void” (Craig 2012). Abstractly, this seems to remark two different aspects: (1) voidness is not *per se* associated with an imprescriptible action; and (2) nothing impedes *per se* the establishment of an imprescriptible action, if procedural rules would make that choice for a certain situation. These features seem to be confirmed by legislation. A tendency towards typical patterns of voidability appears from part 54 rule 5 of the *Civil Procedure Rules*, expressing that “the claim form must be filed promptly; and in any event not later than 3 months after the grounds to make the claim first arose”: prescription, a typical feature of voidability, is established as a general rule for this ‘voidness’. But it seems that imprescriptibility should not be *a priori* discarded in English Law, for part 3 rule 1 of the same legal *corpus* gives the court a power to “extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)”; and this provision not only could, but has, been used to extend the abovementioned time limit (Wade and Forsyth 2009: 562). If grounds for imprescriptibility could be sustained in a certain hypothesis, England would be receiving voidness in terms exactly as, or very close to, the one developed in the essentialist group.

The case of the United States seems to promote functionalism in a different way. The lack of specific terminology is moderated through an implicit recognition of the essential concepts applicable to invalidity. Complexities of this administrative régime exceed any characterization formulated in these lines, but it can be said that both prescription and imprescriptibility are possible in this country, not primarily through judicial action as in England, but with a strong influence of statutes. Prescription – and therefore voidability – seems to be the rule in Federal Law, because if the lawsuit is addressed against the United States, it “shall be barred unless the complaint is filed within six years after the right of action first accrues” (United States Code, paragraph 2401). But state law seems to be less time-limit inclined than state law (Levin: 2219). Within this layer, according to section 503 of the 2010 Model State Administrative Procedure Act, a time limit – therefore assuming voidability – is only introduced in what concerns procedural or formal defects: “Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time”.
5.3. Standing

In several countries, an interest is needed for quashing an invalid act, most naturally in the case of voidability, and even in the case of voidness stricto sensu, as it happens in France, Italy, Spain and Chile (Boeksaang Hola 2013 a: 600-601). The most recent legislation confirms this trend, as the Portuguese Código of 2015, where, according to article 162, nulidade can be brought before courts by “any interested party” (cualquier interesado). The Anglo-American branch of Western tradition seems to concur with this perspective. Whereas section 702 of the United States’ APA remarks that entitlement to judicial review is granted to “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute”, in English law, the Superior Courts Act, section 31-3, provide that “the Court shall not grant leave [to apply] unless it considers that the applicant has a sufficient interest in the matter to which the application relates”.

5.4. Onus probandi

Some authors approving the existence of a presumption of legality identify it as a key aspect in the regulation of the burden of proof. “It is therefore for the party seeking to challenge the administrative action to adduce evidence which calls into question its legality” (Beatson, Elliott, Matthews 2011: 90). As a consequence, it could be assumed that the presumption of legality is a specific attribute of administrative acts; and legislative manifestations of this assumption can be found in some countries, such as Spain: “the acts of public administrations ruled by Administrative law will be presumed valid and will produce their effects since the date of their emission (APA, article 39).

Nevertheless, it must be considered that challenging any species of norms would follow the same principle. Would anyone deduce that wills, private law contracts, legal statutes or judicial decisions should be presumed invalid until they are declared valid by a tribunal? Then it means that, if the presumption of validity should be promoted as a reality in law, it would not be an exclusive attribute of administrative decisions, but of any kind of act in law, in the sense of the Italian negozio giuridico, the German Rechtsgeschäft, or, in Latin, actus iuridicus.

As such, the challenge of an administrative act would rather simply follow a general procedural principle: onus probandi incumbit actori – the burden of proof is on charge of the plaintiff –, understanding at the same time that, out of different reasons, shifts in this burden are very frequent in Administrative law. Moreover, Administration should have a primary burden in some areas, such in administrative sanctions, where the fact of imposing this burden on the plaintiff would often, if not always, presuppose a certain degree of infringement of the principle of innocence.

Conclusion

A comparative view of Administrative invalidity in the Western tradition shows that all of its branches (1) receive the notion itself, (2) develop one or both of its possibilities, and (3) take into consideration the functions pursued by it. This can be explained by two main reasons: firstly, a common background heavily influenced by Roman law, and secondly, an implicit recognition of an ontological approach towards the concept of an administrative act.

Nonetheless, differences can be found among branches. Continental European and Latin American law tend to emphasize a categorial view, where the treatment of invalidity
depends on relatively well-framed specific concepts, even if some countries, like Colombia, can have a propensity to adhere to functional mechanisms. On the contrary, Anglo-American law seems to be more functional, as rigid denominations tend to be absent from discussion and different solutions are more freely researched through statutes or judicial decisions, even if United States’ law in some regards does implicitly approach a categorial perspective. As expressed, branches cannot be understood as monolithically or impermeably categorial or functional views. Rather they show certain technical inclinations.

Differences can also be found at the national level. Terminologies, structures, requirements and judicial review do vary, sometimes relevantly. Concrete choices and solutions could be criticized; but, in most cases, this diversity shows how even the most elementary notions of the theory of norms need to absorb legal tradition and social realities for becoming active elements of the Rule of Law.

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