HARMFULNESS IN ECUADORIAN LEGISLATION.

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ABSTRACT

In the legal system of Ecuador, the revocation of favorable administrative acts is established, which has two phases; the first, which is the declaration that the administrative act is harmful, carried out by the public administration, and the second, which refers to the presentation of the action of harmfulness in the District Court of Contentious Administrative Matters, that is, with the application of the legal figure that doctrinally has been called harmfulness. In the present investigation, a doctrinal and normative study is carried out regarding administrative acts which cannot be declared null by the administration, and their revocation must be applied, when they are legitimate acts or acts with valid vices; and the analysis of the application of harmfulness in a casuistry is presented. In the development of the research, the qualitative method is applied because it allows the documentary, doctrinal and normative analysis of the topic raised.

KEYWORDS: *Administrative act, harmfulness, public interest.*

INTRODUCTION

The public administration exercises its powers that are established in the Constitution and the law through administrative acts that are unilateral and that has the presumption of legitimacy and enforceability, when that administrative act has a cause of nullity it can be extinguished, but when it does not have that cause it can be revoked and must resort to harmfulness, legal figure that the public administration has, which has two requirements; the first, that the administrative act to be revoked produces favorable effects to the administered, and the second that the act harms public interests.

It follows that the harmfulness clearly has two moments for after that a favorable administrative act is eliminated from a legal world and thus what is determined by the legal system exclusively the Organic Administrative Code in Chapter I, Section V, refers to the revocation of favorable administrative acts, as prescribed by Art.115: Provenance. In order to propose the action of harm before the District Court of the Contentious Administrative competent, the highest authorities of the respective public administrations, previously must, ex officio or at the request of a party, declare harmful to the public interest the administrative acts that generate rights for the person to whom the administrative act causes individual effects directly, that are legitimate or that contain defects that can be validated. (National Assembly Republic of Ecuador, 2017).

Likewise, the judicial declaration of harmfulness, prior to the revocation, is intended to protect the general interest. It is open to challenge only with regard to the redress mechanisms decided upon therein. .(Asamblea Nacional República del Ecuador, 2017)

The public administration has the power to determine the declaration of harmfulness of the act in administrative headquarters, because it is effectively the one who makes the decision, respecting the principle of motivation. The public interest that damages the administrative act must be demonstrated by the entity in court, and the administration should not use it for any purpose other

than to protect the rule of law, because otherwise the norm would be violated and the powers of the administration would be violated.

Therefore, the present research has the focus on the analysis of harmfulness, specifically determine which are the two parts of this legal figure and establishes the identification of those circumstances that must be taken into account in practice because it analyzes an emblematic case where the action of harmfulness is resorted to. In relation to the methodology, it has a development in a critical approach with doctrinal information from different authors that are of important foundation to the subject raised, as well as it is based in a normative way.

METHODS

The article presented has an investigation that admits the development of an interpretation of a legal matter allowing to build results in the course of the investigation. Qualitative research was applied for the analysis of the information presented, with the support of bibliographic review.

In relation to the design of the research, variables are not manipulated because it is based on legal theory and doctrine, with the analysis of the norms regarding the issue raised. The scope is analytic explanatory because it answers the questions that arise in the development of it.

The structure has an approach to review and documentary analysis in a deductive way, because it develops in a general way to the particular with the understanding of the legal figure of harmfulness.

RESULTS

In Ecuador, the public administration includes the public sector covered by article 225 of the Constitution; agencies and dependencies of the functions of the state, of the decentralized autonomous regime, those created by the Constitution or law, and the legal persons created by the Gads. (Asamblea Nacional Constituyente, 2008)

In this sense, the public administration has administrative actions, among them, it is the administrative act, as an expression of its own will, which produces legal effects, according to Fernandez: the administrative act is a unilateral declaration of will of an organ of public power in the exercise of the administrative function, with direct legal effects with respect to specific individual cases. . Thus, Gordillo mentions that administrative act is a declaration made in the exercise of the administrative function, which produces direct legal effects. .(Fernández, 2016)(Gordillo, 2017)

For its part Cassagne, states that the administrative act is a unilateral declaration issued by the public administration with individual or collective legal effects. (Cassagne, 2018). According to Black-bellied sandgrouse The administrative act is formed when an authority or an individual in the exercise of administrative functions adopts a decision and, with this, promotes a legal situation. and that according to (Ortega, 2018)Mora & Rivera, It refers to the activities or tasks that it can legitimately perform, depending on the nature of the activity, and can only act for the fulfillment of the purposes that motivated its creation. .(Mora & Rivera, 2019)

For Sanchez & Chamba, The Administrative Act as one of the administrative actions is the declaration of the will of the competent body of the Public Administration that creates, modifies or extinguishes a legal situation and that takes effect with respect to a person or group of people or third parties, including other agencies and dependencies of the Administration itself. .(Sánchez & Chamba, 2019)

Termination of administrative acts

Extinguishing an administrative act is related to the elimination of the legal world said act and that it ceases to have legal effects, among others is the revocation that according to Galindo is a decision taken by the administrative authority, by means of which it nullifies a previous act or replaced it with another with a different scope. . (Galindo, 2006)

According to Marcheco, in order to revoke a favorable act, the existence of an atypical administrative process is necessary, where it is the administration itself that challenges its acts, it is based on the idea of the prohibition of modification of its own decisions when these have recognized subjective rights. For (Marcheco, 2018)Jéze lies with the particularity that the process is the responsibility of the administration because it challenges its acts, because the common interest must prevail. .(Pérez, 2020)

Article 103, paragraph 2, of the Organic Administrative Code prescribes revocation as a cause for which the administrative act may be extinguished. The revocation may be given by favorable acts or by unfavorable acts. . (Asamblea Nacional República del Ecuador, 2017)

Harm in favorable administrative acts

According to Moreta The harmfulness is nothing more than the nullification of a legitimate administrative act that granted rights in favor of an administered person. Unlike nullity, the revocation proceeds against acts that are legitimate, or that at most contain defects that can be validated. . For its part (Moreta, 2019)Pérez explains that the harm lies in a legitimate administrative act with the specific characteristic of granting rights to the administered. .(Pérez, 2020)

Then, to revoke a favorable administrative act it is done through the harmfulness which consists of two instances; the first in administrative headquarters where the administration itself must declare the administrative act harmful to the public interest that for Dromi, has no more value than to authorize the admission and processing of the action; and a second instance in court where with the declaration already established, the administration must file an action for harm before the Dispute Tribunal.

In administrative headquarters according to the Organic Administrative Code article 115 prescribes that it is the highest authority of the public administration who must previously, ex officio or at the request of a party, declare harmful to the public interest the administrative acts that generate rights for the person to whom the administrative act causes individual effects directly, that are legitimate or that contain defects that can be validated. .(Asamblea Nacional República del Ecuador, 2017)

In judicial headquarters exclusively the administration goes with the declaration of harmful interest of an act goes to the District Court of the Contentious Administrative for the declaration of harmfulness. According to the Organic Code of Processes in article 306 numeral 4, the administration may file the action of harm within ninety days before the Court of Administrative Litigation. All the requirements for a lawsuit must be met, but in addition to that, "the copy of the resolution, administrative act, contract or provision challenged, with the reason for the date of its notification to the interested party and the detailed relationship of the act or fact challenged" (National Assembly Republic of Ecuador, 2015).

Table 1: Harmfulness

Harmfulness	
Phase 1	**Phase 2**
Administrative headquarters	Judicial Headquarters
The administration itself must declare the administrative act harmful to the public interest	File an action for harm before the Contentious-Administrative Tribunal.
Once the two phases are completed, the favorable administrative act is eliminated from the legal world.	

Source: Jessica Santander 2022

Table 1 shows the two phases of the legal figure of harmfulness and that once each of them is concluded, the administrative act effectively ceases to produce legal effects.

CASE OF JULIAN ASSANGE (ECUADOR) APPLICATION OF HARMFULNESS

Julian Assange is the founder of WikiLeaks, which was in the Ecuadorian embassy in London and in 2017 the Ecuadorian state granted him Ecuadorian nationality through naturalization, but in 2019 the questioning of that nationality begins.

On April 10, 2019, the Ministry of Foreign Affairs and Human Mobility pronounces resolution 0000042, where it declares harmful the administrative act of Resolution No. 0001-MREMHVMH-2017 of December 12, 2017 issued by the Vice Minister of Human Mobility, which provides for granting the naturalization letter in favor of Julián Paul Assange, and resolves: Article One. - To declare harmful the administrative act contained in Resolution No. 0001-MREMHVMH-2017, of December 12, 2017, contains the Naturalization Letter in favor of JULIAN PAUL ASSANGE, for harming the public interest and state power. Article Two. - Immediately suspend the enjoyment of the rights inherent in the quality of Ecuadorian by naturalization of JULIAN PAUL ASSANGE... Article Four. - To order that the General Coordination of Legal Advice of the Ministry of Foreign Affairs and Human Mobility continue the action of Harm before the District Court of the Contentious Administered of Quito. .(Registro Oficial N. 486, 2019)

From the above, it is concluded that Julian Assange automatically loses the rights of nationality and with the declaration of harmfulness issued by the public administration it was enough to suspend rights and extinguish that administrative act from the legal world.

Subsequently, the Minister of Foreign Affairs and Human Mobility filed the lawsuit with the action of harm in the District Court of Administrative Litigation based in the Metropolitan District of Quito, province of Pichincha, and in July 2021 the court accepts the lawsuit and ratifies a) the nullity of Resolution No. 0001-MREMH-VMH of December 12, 2017 issued by the Vice Minister of Human Mobility through which it was granted naturalization in favor of Mr. Julian Paul Assange; and therefore, b) the legality of Resolution No. 0000042 of April 10, 2019, signed by the Minister of Foreign Affairs and Human Mobility, which declared harmful the administrative act contained in Resolution No. 0001-MREMH-VMH. The court accepted the claim whose harmfulness has been declared and ratified in the judgment. The present case is currently before the National Court because the appeal was filed by the defendant and is still pending.

DISCUSSION

The public administration has the power to establish the declaration of harmfulness of the act, in administrative headquarters with the basis that the act harms public interests, but the regulations do not establish any additional requirement or parameter to be considered at that time, because it would effectively be in the judicial process with the action of harm before the District Court of the Contentious Administrative that should verify what the public administration deduces.

From the emblematic case that is exposed that is of the founder of WikiLeaks Julian Assange a question arises from what moment the revocation of a favorable administrative act becomes effective, from the moment that the administration declares the act harmful in administrative headquarters, or at the moment of obtaining a sentence in court?

Because it would be understood that while the judicial process is being substantiated, the administrative act continues to have legal effects, and that the validity of the act is still in force, and only with the sentence in court the act would be revoked. Because what has happened is that only with the declaration of harm in administrative headquarters the administrative act ceased to have legal effects, that is, in the present it does not comply with the doctrinal and normative requirement that requires the legal figure of harmfulness, which is that the two parts that it has must be respected.

CONCLUSIONS

- The harmfulness is contemplated in two parameters, first an administrative process where the administration must declare an act harmful to the public interest, and second a judicial procedure with an action of harm filed in the District Court of Administrative Litigation.
- In the case of Julian Assange, the gap that exists between the two instances of harmfulness is evident, because the declaration of harmfulness can have legal effects, and the obligation to go to the second phase that is the judicial one in the District Court of the Contentious Administrative.

- With the analysis carried out, it is considered necessary to expressly regulate the procedure of harm in the country, in relation to the process in administrative headquarters to the act declaring harmfulness, and the process of those immediate effects when an act is declared harmful in court, because this legal institution does not have a normative development in its entirety.

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