

# THE EXCEPTION OF ILLEGALITY IN CONTENTIOUS-ADMINISTRATIVE

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## Abstract

*By way of exception of illegality the party of a dispute is entitled to invoke the irregularity of an administrative act. Therefore, this study shall present the regulation of the exception of illegality, respectively the provisions of the Law no. 554/2004 of the contentious-administrative, showing through the doctrine and the jurisprudence the possible weaknesses of the current normative regulations. There will also be discussed case studies from the recent practice of the High Court of Cassation and Justice concerning the exception of illegality. Last but not least, our conclusions will focus on the highlighting of several critical observations on the current state of the subject proposed, our approach considering in this purpose the warnings that come from the practice of the courts.*

**Keywords:** *Law no 554/2004, exception of illegality, liability, individual unilateral administrative act, contentious-administrative*

## 1. Introduction

The exception of illegality has also been called in the doctrine ‘the plea of illegality’ and has been known in our legal system prior to the Law no.554/2004<sup>1</sup>, of the contentious-administrative, respectively to the Law no. 1/1967 on the courts judgment on the claims of those whose rights have been prejudiced by illegal administrative acts<sup>2</sup>.

The doctrine defined the exception of illegality as being: “*a means of defence by which during a process for other grounds besides the illegality of the administrative*

*law act*”<sup>3</sup>, one of the parties threatened to be applied such an illegal act, defends oneself by pleading this defect and requires the act not to be taken into account in solving the case”<sup>4</sup>.

Although it was not expressly regulated in the legislation prior to the Law no. 554/2004, the exception of illegality of the normative administrative acts was accepted as a procedural mean of defence that could be submitted before any court, in a traditional way in the Romanian contentious, both by the parties and by the ex officio court and is settled by the competent court to hear the case in

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<sup>1</sup> Law no.554/2004 of the contentious-administrative, published in the Official Gazette no. 1154/2004.

<sup>2</sup> Law 1/1967 on the judgment performed by the court of the complaints of those whose rights were prejudiced by illegal administrative acts, published in the Official Journal no.67/1967

<sup>3</sup> It can be noticed that the author refers to the administrative acts, being well known in the doctrine the theoretical disputes of the two schools of administrative law in our countries on the concepts, namely the School of Bucharest used the concept of administrative act and the School of Cluj which exponent was the professor Tudor Draganu, the concept of administrative law. But essentially the disputes were only theoretical, the concepts being similar.

<sup>4</sup> Tudor Drăganu, *Actele de drept administrativ* (Administrative Law Acts), Ed.Științifică, Bucharest, 1959, p.260. For the same purpose, see și Antonie Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol.II, 4th edition, Ed.All Beck, Bucharest, 2005, p.677, Verginia Vedinaș, *Drept administrativ* (Administrative Law), 3rd edition reviewed and updated, Ed. Universul Juridic, Bucharest, 2009, p.187.

question<sup>5</sup>. Nowadays the exception of illegality is expressly regulated in art. 4 of Law no.554/2004.

### 1. Normative regulation of the exception of illegality

The legislation in the field of the administrative law is distinguished by the lack of administrative coding, which means that from the point of view of the legal procedure, the scope of the legislative acts is restricted to the contentious-administrative and to the Civil Procedure Code.

We shall briefly present below the way the exception of illegality was reflected over several time periods.

a) *Prior to the law no. 554/2004 of the contentious-administrative.*

This exception was not regulated prior to the law no. 554/2004 of the contentious-administrative, neither in Law 1/1967 on the judgment of the courts on the claims of those whose rights were prejudiced by illegal administrative acts and neither in law no. 29/1990<sup>6</sup>. After the enforcement of law no. 1/1967 and especially after the enforcement of law no. 29/1990 when the persons whose rights recognized by law through an authority administrative acts are prejudiced may appeal to the competent court for the repeal of the authority administrative act and the remedy of the case, the exception of illegality can only be submitted for defence, either by statement of defence submitted by the defendant or by response to the statement of defence submitted by the plaintiff<sup>7</sup>.

b) *Law no. 554/2004 of the contentious-administrative*

It is well known that the exception of illegality was regulated for the first time by law no. 554/2004 of the contentious-administrative, consisting of 4 articles and four paragraphs. The law editors are liable for the express insertion of the exception of illegality in the content of the contentious-administrative law.

Therefore, in accordance with art. 4 of the law: par. (1) *The legality of a unilateral administrative act may be at any time investigated during a law suit, by way of exception, ex officio or upon the request of the interested party. In this case, the ascertainment that the administrative acts depend on the settlement of the disputes, the court notifies the contentious-administrative court by explanatory statement, in this way suspending the case.* (2) *The contentious-administrative court rules in public session after the emergency procedure by summoning the parties.* (3) *The decision of the contentious-administrative is subject to appeal, which is stated within 48 hours from the decision and is judged within 3 days from the registration, by summoning the parties.* (4) *If the contentious-administrative court observes the illegality of the act, the court before which the exception was submitted settles the case without considering the act whose illegality was observed.*

However, the Constitutional Court held the provisions of par. (3) as unconstitutional due to the imprecision and ambiguity resulting from the running of the appeal term from the decision or from the notifying of the set short terms, as well as

<sup>5</sup> Gabriela Bogasiu, *Justiția actului administrativ* (Administrative act justice), Ed. Universul Juridic, Bucharest, 2013, p. 264.

<sup>6</sup> Law no.29/1990, published in the Official Gazette no.122/1990 that represented the law of the contentious-administrative until its repeal by law no.554/2004.

<sup>7</sup> Valentin Prisăcaru, *Tratat de drept administrativ român.Parte generală* (Romanian administrative law treaty. General Part) 3rd edition reviewed and supplemented, Ed.Lumina lex, Bucharest, 2002, p. 624 and the following.

in terms of the mean of summoning that is contrary to art. 21 and 24 of the Constitution and to art. 6 of the Convention for the protection of human rights and fundamental freedoms<sup>8</sup>.

c) *Law no. 262/2007*

Law no. 554/2004 of the contentious-administrative was amended and supplemented by Law no. 262/2007<sup>9</sup>. Art. 4 has basically undergone several amendments: on the one hand, the exception of illegality may be submitted only on individual unilateral administrative acts and not on normative acts, on the other hand, the suspension of the case is not disposed any more, the exception of illegality being submitted before the competent contentious-administrative court to settle it. Another amendment refers to the fact that the submitting of the exception may not be reported on the date of issue of the individual act. These amendments represented the scope of an exception of unconstitutionality that was rejected<sup>10</sup>.

On the other hand, the High Court of Cassation and Justice also held that the provisions of law no. 554/2004 of the contentious-administrative, as further amended and supplemented by law no. 262/2007 violate the principle of the legal security and the right to a fair law suit provided for by art. 6 of the ECHR and 47 of the Charter of Fundamental Rights of the European Union to the extent that they allow the censoring of the legality of the individual administrative acts issued prior to the enforcement of the law<sup>11</sup>.

Therefore, by the enforcement of the provisions of art. 20 par. (2) and of art. 148 par. (2) of the Constitution in relation with the ECHR and the Court of Justice from Luxembourg, the enforcement of the provisions of art. 4 of law no. 554/2004 as further amended and supplemented by law no. 262/2007, on the individual administrative act issued prior to the enforcement of this law and which illegality was called by way of exception, was properly removed.

d) *Actual state-Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Civil Procedure Code, as well as the amendment and the supplementing of other normative acts.*

For reasons mainly related to the necessary shortening of the law suits terms, Law no. 76/2012 radically modified the regime of the exception of illegality restoring its settlement by the court vested with the substance of the dispute, before which it was submitted<sup>12</sup>.

Nowadays, the exception of illegality provided for by art. 4 of Law no. 554/2004 par. (1) has a different wording compared to the original one, respectively: „*the legality of an individual administrative act, regardless the date of its issuing, may be at any time investigated during a law suit term, by way of exception, ex officio or at the request of the interested party*”. If in the past the setting of the jurisdiction to settle the exception of illegality in favour of the contentious-administrative court represented the main novelty element of art. 4 entered by Law no. 262/2007, unlike the

<sup>8</sup> The Decision no. 647/2006 of the Constitutional Court of Romania on the exception of illegality of the provisions of par. (3), art.4 of law no. 554/2004, published in the Official Gazette no.921/2006.

<sup>9</sup> Law no. 262/2007 on the amending and supplementing of Law no. 554/2004 of the contentious-administrative, published in the Official Gazette no.510/2007.

<sup>10</sup> The Decision no. 404/2008 of the Constitutional Court of Romania on the exception of illegality of the provisions of art.4 of law no. 554/2004, published in the Official Gazette no.347/2008.

<sup>11</sup> The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no. 4785/2008, <http://www.iccj.ro/cautare.php?id=46601>, accessed on 15.04.2014.

<sup>12</sup> G.Bogasiu, *op.cit.*, p. 265.

previous situation when the court notified by the dispute also settled the exception<sup>13</sup>, in 2013 the novelty element is represented by the fact that any court has the jurisdiction to settle the exception<sup>14</sup>.

Par. (4) also expressly stipulates that the normative administrative act may not be the scope of the exception of illegality, its control being exercised only by the action for annulment, which is indefeasible<sup>15</sup>.

### 3. Jurisprudence

The High Court of Cassation and Justice ruled in its jurisprudence on whether the Regulations of the Romanian Football Federation are administrative acts in terms of art. 2 par. (1) letter c) of the law no. 554/2004 of the contentious-administrative.

Therefore, in one of the cases the High Court of Cassation and Justice held that the provisions of art. 4 par. (1) and (2) of law no. 554/2004 of the contentious-administrative, on the date in force of the calling of the exception of illegality, do not expressly provide that the normative administrative acts, respectively the regulations of the Romanian Football Federation, are excluded from the legality control based on the special procedure of the exception of illegality<sup>16</sup>. As an undeniable fact, the court determines that the Romanian Football Federation is a public authority assimilated in terms of the provisions of art. 2 par. (1) letter b) of law no. 554/2004 of the contentious-administrative, being a legal entity of private law declared public by the special law of the physical education and sport, justified by particularity of the activity performed.

In the same context it is stated that the disputed acts under art. 4 of law no. 554/2004 of the contentious-administrative issued by the Romanian Football Federation assimilated to a public authority share the nature of normative administrative acts, being issued under the actual performance of the provisions of the general law no. 69/2000<sup>17</sup>. The fact that they were issued under and in compliance with the international regulations of FIFA and UEFA for the regulation of a sport activity shall not remove the regulations nature of normative administrative acts. Therefore, the court considers that the regulations rule the sport activity in a similar way to the regulations of the cults, namely in a general and abstract way.

In another case, the High Court of Cassation and Justice had to settle the legal issue on whether the Decision of the General Director of the Prison Administration is a normative act. The exception of illegality in this case was submitted within a pending dispute before the Court of Appeal from Craiova. The court observed that: the normative administrative act may be subject to the legality control in the exception procedure of illegality, by virtue of the principle of law according to which the law is construed in terms of producing legal effects, with no doubt that if the legislator has created a mean of defence on the way of the exception of illegality for the individual authority act, all the more such a mean of defence has to be provided to the subjects of law in connection with the normative acts.

Indeed the legislator in art. 4 par. (1) refers to the analysis of the legality on individual administrative acts which may lead to the conclusion that the possibility of calling

<sup>13</sup> D. Apostol Tofan, *Unele considerații privind excepția de nelegalitate* (Some considerations on the exception of illegality), in RDP no. 4/2007, p. 28.

<sup>14</sup> Elena Emilia Ștefan, *op.cit.*, pp. 85-86.

<sup>15</sup> G. Bogasiu, *op.cit.*, p. 267.

<sup>16</sup> High Court of Cassation and Justice, contentious-administrative and fiscal, decision no. 5465/28 May 2010, unpublished, p.13.

<sup>17</sup> Law no. 69/2000 of physical education and sport, published in the Official Gazette no. 200/2000.

the exception of illegality on the individual administrative act might be limited, but in par. (2) of art. 4 the term unilateral administrative act is used without the distinction between the normative and the individual, being obvious that the legislator's omission on the exception of illegality on the normative acts do not represent the plea of inadmissibility of the exception for these acts. Thus, the court concludes that the normative administrative acts may be subject to the legal control, provided for by art. 4, as further amended, the amendment having the role to include the individual acts in the area of the general acts, and not to exclude the normative acts. Furthermore, the principle of the legislative consistency requires the solution of the admissibility of the exception of illegality both for the individual and for the normative acts, with the purpose of keeping the function for which this means of defence was created. If the legislator intended to provide for the individuals a means of defence by way of exception for the individual acts, based on the judgment of *a fortiori* legal reason, such a means of defence should also be provided to the parties on the normative acts which target audience is general and which effects may occur or may be observed not only immediately after the issuing, but also prior to it.

The High Court of Cassation and Justice also ruled on the acts exempted from the legal control<sup>18</sup>. According to art. 5 par. (2) of law no. 554/2004 the administrative acts for which amendment or dissolution is provided another judicial procedure may not be challenged by way of the contentious-administrative, which leads to the conclusion that the exception of illegality was not regulated by the legislator in order to create a way of avoiding special judicial procedures. In this case the object of the exception is the notice of assessment that represented the

basis of a notification and of an enforceable title; therefore, the taxation decision may be appealed in accordance with art. 205 and the fiscal procedure by way of a fiscal complaint submitted before the fiscal competent body and only the settlement decision of the complaint may be appealed before the contentious-administrative court, according to art. 218 par. (2) of the fiscal procedure code.

In the specialized doctrine, as well as in the jurisdiction of the contentious-administrative and fiscal department of the High Court of Cassation and Justice was observed that from the corroboration of the art. 4 and 5 of law no. 554/2004 results that the administrative acts exempted from the legal control by way of the direct action are also exempted from the legal control by way of the exception of illegality. In other words, the jurisdiction of the contentious-administrative of verifying by way of exception the legality of an administrative act cannot be drawn by invoking the art. 4 of law no. 554/2004 when it comes to an administrative act for which the amending or dissolution requires a special judicial procedure.

## Conclusions

This study was focused on the description of the exception of illegality in the Romanian legal system and took into account a threefold approach: the normative state, the doctrine point of view and the jurisprudence phase. The exception of illegality has received regulation at the normative acts level within the content of law no.554/2004 of the contentious-administrative. Compared to the actual wording of the exception, we consider that problems generated by the fact that at this moment the exception may not be submitted

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<sup>18</sup> High Court of Cassation and Justice, decision no.5925/2013, <http://www.iccj.ro/cautare.php?id=94557>

within any law suit shall not arise in practice, making extremely difficult to solve such a procedural incident due to the particularity of the administrative acts, which are essentially acts of power. Therefore, we consider that only the contentious-administrative judge has the power to

knowingly consider the analysis of the illegality of an administrative act. From this point of view, we consider that the actual wording of the provisions of art. 4 of law no. 554/2004 of the contentious-administrative is unsuccessful.

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