PRACTICAL CONSIDERATIONS ON THE ADMISSIBILITY OF THE PLEA OF ILLEGALITY IN ADMINISTRATIVE LITIGATION

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Motto
Law is not a science of restrictions, but of opportunities ...

Abstract
The plea of illegality allows the control of the legality and validity of individual administrative acts, without any time limit. At least, the literal and grammatical interpretation of article 4 of the Law on Administrative Litigation leads to such a conclusion. Unfortunately, the case law "has created" several limitations on the use of this judicial review tool, and most of them do not have a solid legal basis. The protection of the res judicata principle, but also other situations that would circumvent the legal regime of the action for annulment, as well as the broad category of fiscal-administrative acts were considered grounds for the inadmissibility of the plea of illegality, administrative acts outside its scope respectively. What is worse is the fact that the limitations in question may constitute restrictions on the right of access to justice, more precisely to the procedural route of the plea of illegality. The study aims to analyze the legal basis of the cases of inadmissibility of the plea of illegality, created by case law and their compliance with the will of the legislature. The author's goal is to produce a paradigm shift with regard to this legal institution and to increase its degree of effectiveness. The research conducted is descriptive and explanatory, underpinned by relevant case law and doctrine.

Keywords*: plea of illegality, administrative acts, judicial review of administrative acts, inadmissibility, imprescriptibility, res judicata.*

JEL Classification**:** K23, K41

1. Introduction

The plea of illegality allows the control of the legality and validity of the individual administrative acts without any time limit. At least, the literal and grammatical interpretation of article 4 of the Law on Administrative Litigation leads to such a conclusion. Unfortunately, the case law "has created" several limitations on the use of this judicial review tool, and most of them do not have a solid legal basis. The protection of the res judicata authority, but also other situations that would circumvent the legal regime of the action for annulment, as well as the broad category of fiscal-administrative acts were considered grounds for the inadmissibility of the plea of illegality, administrative acts outside its scope respectively.

The study below aims to analyze the legal basis of the cases of inadmissibility of the plea of illegality, created by case law and their compliance with the will of the legislature. The author's purpose is to produce a paradigm shift in this legal institution and to increase its degree of effectiveness, in a context where case law and doctrine tend to limit the use of the plea of illegality.

In the first section, we will analyze the legal regime of the plea of illegality from a theoretical point of view, as it results from article 4 of the Law on Administrative Litigation (hereinafter LAL) and the relevant doctrine (*section 1*). In the next section, we will address the three main limitations on the use of this procedural tool, as they result from the case law: res judicata, fiscal-administrative acts and the circumvention of the rules on the action for annulment (*section 2*). We will note the justifications of these limitations and their validity, related both to the text of the law and the finality of the plea of illegality, as well as to the particular legal arguments.

We consider that any limitation on the plea of illegality must be *expressly provided by law* (precisely because it is a limitation on access to justice), and not inferred by interpretation or by using principles that can be overcome in the current legal context, such as the "electa una via" principle. The plea of illegality is a procedural right that persons have in order to raise the illegality and/or

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invalidity of administrative acts, and the principle of the stability of legal relations cannot imply the maintenance of an illegal administrative act. In a state governed by the rule of law, such an act cannot lie at the basis of a judgment.

Of the cases of inadmissibility of the plea of illegality created by case law, the only cases which can be rigorously justified are those relating to the authority of res judicata and the silence of the administration. In the case of res judicata, the inadmissibility of the plea of illegality must be analyzed on a case-by-case basis, as not all judgments enjoy this authority or the grounds of illegality/invalidity raised are not the same.

2. The plea of illegality in administrative litigation – a theoretical approach

Definition and role fulfilled. The plea of illegality is part of the procedural tools which allow the judicial review of administrative acts[2]. Its existence and its imprescriptible character serve the principle of the legality of administrative acts. We consider that, despite its name, this is not an exception in the procedural sense[3], but a *ground for action*, if it is raised by the claimant, or a *defence on the merits*, in case it is raised by the defendant.

The object of the plea of illegality. The plea can be raised with respect to any *individual administrative act*, regardless of the date of issuance, as well as in any case, regardless of its nature (civil, criminal, labour law, etc.). The object may be a *repealed* or *revoked* administrative act, because during the period in which it was in force, the act produced legal effects, and if these were illegal, they were also potentially harmful.

The *normative* administrative acts cannot be the object of the plea of illegality, given that the action for their annulment is imprescriptible. Administrative acts which cannot be the object of a control of legality in an action for annulment cannot be the object of a plea of illegality. These are the administrative acts of public authorities concerning relations with Parliament, military command acts and administrative acts for the amendment or abolition of which, by organic law, another judicial procedure is provided for.

The *acts preceding* the issuance of an administrative act cannot be the object of the plea of illegality either, because they cannot be controlled by way of an action for annulment separately, but only together with the administrative act whose issuance they underlay. The doctrine and case law[4] have excluded *assimilated administrative acts, jurisdictional administrative acts, fiscal-administrative acts*, as well as *bilateral* or *multilateral* administrative acts[5] from the field of the plea of illegality.

Admissibility conditions. The plea is admissible if it concerns an individual administrative act, on which depends the decision to be pronounced on the merits of the dispute in which the plea was raised. The second condition of admissibility which must be examined in the context of raising the plea of illegality concerns the role which the administrative act challenged by the plea may play in *deciding on the merits* of the dispute. Therefore, the plea will not be admissible if the individual administrative act is relevant only in relation to the decisions on pleas[6] or issues which do not pertain to the merits of the dispute. The failure to comply with these conditions of admissibility leads to the rejection of the plea of illegality as *inadmissible.*

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[2] On the features of the exception of illegality see Cătălin-Silviu Săraru, *Contenciosul administrativ român*, Ed. C.H. Beck, Bucharest, 2019, p. 379-397; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 553-558.

[3] An opinion was expressed in the doctrine, according to which the plea of illegality is "an exception of public order, and from a procedural point of view, it is a substantive exception" (Eugenia Marin, *Legea contenciosului administrativ nr. 554/2004, Comentariu pe articole*, Ed. Hamangiu, Bucharest, 2020, p. 95). For a history of this legal institution, see the same paper, p. 91 et seq.

[4] Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată,* 4th edition, revised and added, Ed. Universul Juridic, Bucharest, 2018, p. 174; Eugenia Marin, *op. cit.*, pp. 96, 98, 100; as well as the references to the case law of the High Court of Cassation and Justice by the author.

[5] In its current form (introduced by point 1 of art. 54 of Law 76/2012 for the implementation of Law 134/2010 on the Code of Civil Procedure), art. 4 of Law 554/2004 mentions individual administrative acts. In the previous form of the law, unilateral individual administrative acts were expressly mentioned as the object of the exception.

[6] To the extent that the pleas are combined with the administration of evidence or the merits, the condition of admissibility is met.

Differences in relation to the action for the annulment of the administrative act. The control carried out through it has been called *indirect* in the doctrine. In our opinion, this name is not exactly inspired, because through the plea of illegality, the courts perform a real control of legality and opportunity of the administrative act. The nature and the rules to which the courts refer by deciding on the plea are identical to those specific to the action for the annulment of the administrative act. The name "indirect control" is intended more to draw attention to the consequences of the admission of the plea, as opposed to those resulting from the admission of an action for the annulment of the act, but *the judicial review carried out is the same.*

An action for the annulment of an administrative act, if it is admissible, definitively removes that act and its effects from the system of positive law. By admitting the plea, the challenged administrative act becomes *unenforceable* against the party who raised the plea of illegality, "so that the act in question, although valid, once declared illegal, remains inoperative in that dispute"[7]. The effects produced remain *inter partes*. The court will decide the case without taking into account that act, but it continues to produce the effects of an administrative act outside the procedural framework in which the plea was raised. Subsequent administrative acts issued on the basis of the individual administrative act deemed to be illegal may be later challenged in the action for annulment.

Rules of procedure. Given its role of guaranteeing the legality of administrative acts and the importance of the principle of the legality of administrative acts, the plea of illegality can be raised at any moment both as a time limit and as a procedural stage. The parties, the ex officio court or the prosecutor participating in the court hearing may invoke art. 4 of the Law on Administrative Litigation (hereinafter referred to as LAL) in the first instance, in the appeals of reformation, as well as in those of retraction. At the same time, the plea can be raised in any type of case and regardless of its object, and the decision is the responsibility of the court before which it was raised, regardless of the specialization of this court.

In deciding on the plea, it is appropriate for the court to call into question the participation of the authority issuing the individual administrative act, if it is not already a party to the proceedings. The presence of the issuer of the act in the proceedings will allow it to show the justification, legality and validity of the act. In all cases, however, it is necessary for the court to issue an address in order to communicate the administrative file which was the basis for issuing the challenged act.

The court will decide on the plea of illegality either by an interlocutory judgment, which can be challenged at the same time as the merits of the case, or by a decision on the merits. A different situation occurs when the plea is raised for the first time in the second appeal. If the plea of illegality is raised directly in the second appeal, which is admissible, the appellate court may rule on the plea of illegality by issuing an interlocutory judgment, which is not subject to any appeal or by a decision on the appeal, as established by the supreme court, without this solution violating the right to a fair trial"[8]. Indeed, the previously adopted solution is legal, but a solution more in line with the right to a fair trial would be cassation with a reference to a retrial by the first instance court. We propose this solution so that the parties have the possibility of both a substantive judicial review and a legality review specific to the second appeal, including the plea of illegality. This is all the more so as, in the matter of administrative litigation, the Romanian legislature provided for a single devolutive procedural way, the first appeal being excluded.

3. The plea of illegality in administrative litigation - restrictions brought by case law

Res judicata authority. It has been established in the case law that the examination of the legality of the administrative act directly, excludes the judicial review by the indirect means of the plea of illegality, at the request of the same person, for considerations related to the res judicata authority. "The Court concludes that it is not permissible to challenge at the same time, by the same party, the legality of an administrative act both by a direct action for annulment and by the incidental

[7] Eugenia Marin, *op. cit.*, p. 95.
[8] Eugenia Marin, *op. cit.*, p. 108.

way of the plea of illegality, showing that this is the constant interpretation of the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section, as examples mentioning here the decisions no. 1626/2015, no. 935/2008 or decision no. 333/2009. In other words, in the sense of art. 4 of Law no. 554/2004, the appellant-claimant could no longer invoke by way of exception the declaration of the illegality of the administrative acts, for which he had already chosen the means of challenging them in the main proceedings, the injury being known to him from the moment they were communicated to him and being materialized in the formulated claims. (...) The same interpretation is found in the practice of the constitutional litigation court, the Constitutional Court pointing out in the recitals of Decision no. 404/2008 that the provisions of art. 4 of Law 554/2004, criticized, are in compliance with the provisions of art. 126(6) of the Fundamental Law, which guarantee the control of administrative acts by way of administrative litigation, because through the plea of illegality this is done in concreto, by extending the possibilities of control over acts whose *legality has not been challenged in the main proceedings"*[9].

We consider that this limitation on the use of the plea of illegality is justified, as long as the reasons for the annulment of the administrative act are the same. If the grounds of illegality and/or invalidity raised in the plea of illegality are different from those set out in the action for annulment, no infringement of res judicata may be held.

Secondly, in so far as the action for annulment has not been decided on the merits, the plea of illegality of the same administrative act is admissible, since we are not in the presence of the res judicata authority. Judgments which are given as a result of the admission of a procedural exception or which, for whatever reason, do not resolve the merits of the case, do not have res judicata authority. In this context, we do not think that the reason for which the case has not been decided on the merits, and whether that reason is attributable to the party subsequently raising the plea of illegality, may be relevant.

The courts have also considered that the principle *electa una via non datur recursus al alteram*, opposes the raising of the plea of illegality, subsequent to the filing of the action for the annulment of the individual administrative act. "Although the plea of illegality is a means of defence, since the allegedly injured person has chosen for the first time the action for annulment based on the provisions of art. 1 of Law 554/2004, the principle of law 'electa una via (...)' also becomes incidental, and according to it, once the procedural route has been chosen, the party cannot return to it, so that the examination of the administrative act by the direct way of the action for annulment also excludes the possibility of judicial review by the indirect way of the plea of illegality, at the request of the same interested person. In other words, it is not allowed to have two trials on the same object, namely the administrative act at issue"[10].

In our opinion, it is relevant that the principle "electa una via (...)" is a creation of the Roman legal system, profoundly different from the contemporary legal system. Thus, when we use the instruments of Roman law, we must be careful not to apply them to the legal system that created them, but to a much more complex and dynamic legal system. Today's society is different from Roman society, and law reflects the specifics of society from a certain historical stage. *Any restriction on the plea of illegality must be expressly provided by law (precisely because it is a restriction) and not inferred by interpretation or by using principles that can be overcome in the current legal context.*

Fiscal-administrative acts. The doctrine and case law have established that fiscal-administrative acts cannot be the object of the plea of illegality, "precisely because it was considered that the Fiscal Procedure Code provides for a judicial procedure that cannot be avoided by raising the plea of illegality"[11]. Another part of the doctrine has noted that the exclusion of fiscal-administrative acts from the scope of the plea of illegality, has no support at the level of written law, and the interpretation which imposed this direction is subject to criticism.

Indeed, fiscal-administrative acts are not excluded by the legislature from the scope of the plea of illegality. They do not belong to the categories of administrative acts in respect of which the

[9] Craiova Court of Appeal, Decision no. 122/14 January 2022, final.
[10] Ibid.
[11] Eugenia Marin, *op. cit.*, p. 100.

Constitution and the Law on Administrative Litigation, prevent judicial review[12], nor do they have the characteristics of assimilated, jurisdictional, bi or multilateral administrative acts. The only argument is related to the preliminary procedure specific to the fiscal-administrative litigation and the interest of not circumventing it, given that the plea of illegality is not preceded by the preliminary procedure.

The preliminary procedure in the fiscal-administrative litigation remains an administrative procedure, which has no judicial character. The authority deciding on the contestation is administrative, not judicial. The legal regime of the contestation is regulated by the Fiscal Procedure Code, and not by the Law on Administrative Litigation. The contestation is similar to the prior complaint provided by the LAL[13] and is a component of the tax legal relations regarding the administration of tax claims due to the consolidated general budget. "The fiscal administrative stage and the judicial stage really reflect the Kelsian pyramid, because one continues the other and they are cumulative, but they benefit from different regulations: the first in the FPC, the second in the LAL"[14].

Although the regulation contained in art. 281(2) FPC seems to introduce the binding nature of the administrative contestation, in the sense of the possibility – even of the court, ex officio - of invoking its absence, we argue that it is correct to observe this effect only in the case of an action for annulment in the general regulatory framework[15]. Pursuant to art. 281(2) FPC, "the decisions on the contestations together with the fiscal administrative acts to which they refer may be challenged by the contester or by the persons introduced in the procedure for deciding on the contestation, at the competent administrative litigation court, as provided by law". *The absence of the decision on the administrative contestation only creates the impossibility of directly challenging the fiscal-administrative acts in litigation*[16]. But this situation does not contradict the legal regime of the plea of illegality, since the effect pursued by raising the plea is not the annulment of the act, as in the case of an action for annulment. The aim is only the unenforceability of the act in a specific case, not its annulment with *erga omnes* effects.

3.1. Circumventing the legal regime of the action for annulment

An opinion has also been expressed in the doctrine, namely that the plea of illegality would be inadmissible, if the party raising it was aware of the existence of the act and did not understand to challenge it by a direct action, because otherwise this would have circumvented the legal regime of the action for the annulment of administrative acts[17]. As an argument, it was indicated that the plea of illegality was a subsidiary defence in relation to the direct action and could only be used if the injured party became aware of the damage caused by the issuance of the administrative act, for reasons not attributable, after the expiry of the time limits for bringing the direct action.

"In case of challenge of an individual administrative act by a plea of illegality by its beneficiaries on the ground that the recognition of a legitimate right or interest was denied through this administrative act, it is clear that, after declaring the illegality of this act by the plea of illegality, the court deciding on the merits of the dispute, by removing the act found illegal from the ruling, shall

[12] The administrative acts of public authorities relating to their relations with Parliament, military acts of command and administrative acts for the amendment or abolition of which another judicial procedure, by organic law, is provided for.

[13] The differences are given by the time limit within which it can be introduced (art. 270 par. 1 FPC), the possibility of suspending the procedure for deciding on the contestation by the fiscal-administrative body (art. 277 FPC) and the ways in which it can be decided (art. 279 FPC).

[14] Livia Maria Moldovan, *Despre admisibilitatea excepției de nelegalitate a actelor administrative fiscale*, the article is available at: https://www.juridice.ro/678898/despre-admisibilitatea-exceptiei-de-nelegalitate-a-actelor-administrative-fiscale.html, last accessed 10.04.2022.

[15] Ibid.

[16] An opinion has also been expressed that "the failure to carry out the preliminary procedure and to file the contestation represents the same ground of inadmissibility of the action before the court, it can be invoked only under art. 193(2) FPC" (Livia Maria Moldovan, Cosmin Flavius Costaș, *Lipsa formulării contestației ca excepție relativă în contenciosul fiscal și posibilitatea invocării unor motive noi în fața instanței, raportat la cele susținute prin contestație – se aplică în materie fiscală art. 8 alin. (1) teza finală din Legea nr. 554/2004, introdusă prin Legea 212/2018?*, the article is available at: https://www.ceeol.com/search/article-detail?id=824100, last accessed 3. 04. 2022).

[17] Eugenia Marin, *op. cit.*, p. 108.

recognize the legitimate right or interest of the beneficiary of the individual administrative act, if the claim is well-founded in all respects, from the time of delivering the judgment. It thus results that in this situation the finding of the illegality of the individual administrative act by a plea of illegality produces the same legal effects as in the case of the annulment of the act by a direct action, since, in this hypothesis, as there are no other legal subjects to whom the individual administrative act is addressed, the finding that the act is illegal no longer has the consequence of producing legal effects towards other legal subjects and, as such, there is no longer any reason for this administrative act to be in force.

Considering these aspects, as well as the fact that art. 11 of Law 554/2004, in order to protect the principle of the security of legal relations, imposes clear time limits for exercising direct action for the annulment of individual administrative acts, and the law must be interpreted in the sense of its application and not of its non-application, it is held that the plea of illegality of an individual administrative act is inadmissible if the party raising it was aware of the illegality of the act and did not intend to challenge it by direct action within the time limit and the conditions provided by law, as the plea of illegality is a means of defence subsidiary to the direct action and may be used only if the injured party became aware of the damage caused by the issuance of the administrative act, for reasons not attributable, after the expiry of the time limits for bringing an action for annulment. The administrative act, which is enforceable ex officio, is issued for its immediate application in order to produce the intended effects, which is why, in the spirit of defining the plea of illegality, it can be seen that after a period of one year, that act already produced the desired legal effects. The "anytime" circumstance within art. 4(1) of Law 554/2004 must be interpreted in conjunction with art. 11 of the same normative act in the sense that the legality of individual administrative acts can be verified within the limitation period of one year from the date of its issuance. The acceptance of the contrary thesis is tantamount to covering up the omission and the acceptance of the passive conduct of the legal subject who, although he does not challenge the act of which he is aware within the limitation period, would have at his disposal the incidental route of the plea of illegality, or such an interpretation represents *contradictio in terminis*, since, on the one hand, the law restricts the right to obtain the annulment of the act by establishing a limitation period for a direct action, and, on the other hand, it would allow the litigant not to comply with the same mandatory provision. Thus, the provisions of the Law on Administrative Litigation regarding the bringing of a direct action would be circumvented"[18].

In the above case, the second appeal court held that the plea of illegality was inadmissible on account of the absence of the influence of the contested administrative act on the merits of the case. Regarding the time limit for raising the plea, the Court implicitly refuted the reasoning of the first instance judge: "the plea of illegality is a procedural instrument, a means of defence by which, by way of the incidental control of legal rules, the illegality, not the nullity of the act is found, and the verification of the fulfilment of requirements for the validity of the act is carried out by relating to the legislation existing at the time of its issuance. The incidental declaration of legality, regardless of the date of issuance of the administrative act, is justified by the need to exercise a control of legality without which the solution pronounced by the court risks being based on an act concluded in violation of the law"[19].

But the very essential aspect of preventing the pronouncement of a judgment on the basis of an illegal administrative act has been ignored by the supporters of the restrictions regarding the raising of the plea. "Although the raising of the plea of illegality should not be encouraged in order to replace the missing of procedural time limits, however, as long as this means of accessing the control of legality is provided by law, the right of the litigant to use it must be treated in such a way as it will be 'concrete and effective' rather than 'theoretical and illusory' "[20]. Indeed, the restrictions that have been imposed on the plea of illegality in judicial practice raise issues from the perspective of access to justice.

[18] Olt Tribunal, sentence no. 201/10 March 2021, final by decision no. 2506/12 October 2021 of the Craiova Court of Appeal.
[19] Craiova Court of Appeal, decision no. 2506/12 October 2021.
[20] Livia Moldovan, *op. cit.*

4. Conclusions

We consider that any restriction on the plea of illegality must be *expressly provided by law* (precisely because it is a restriction on access to justice) and not inferred by interpretation or by using principles that can be overcome in the current legal context, such as the "electa una via" principle.

Of the cases of inadmissibility of the plea of illegality presented and analyzed above, the only cases that can be legally and rigorously justified are those related to the authority of res judicata and the silence of the administration. We are not fully convinced that the plea is inadmissible in the case of bilateral or multilateral administrative acts and we see no reason for which the plea could not be raised with regard to an unjustified refusal.

In the case of the res judicata authority, the inadmissibility of the plea of illegality must be examined on a case-by-case basis. The res judicata authority is unquestionably a reason for rejecting the plea of illegality, but not all judgments enjoy this authority. Judgments which are given as a result of the admission of a procedural exception or which, for whatever reason, do not resolve the merits of the case, do not have res judicata authority. Therefore, in so far as the action for annulment *has not been resolved on the merits*, the plea of illegality of the same administrative act is admissible, since we are not in the presence of the res judicata authority. The plea is also admissible if the grounds of illegality and/or invalidity raised within it are different from those pursued in the action for annulment, as no infringement of the res judicata authority will be held.

Secondly, when we analyze the raising of the *plea of illegality regarding a fiscal-administrative act*, we must keep in mind that these acts are not excluded by the legislature from the scope of the plea of illegality, they do not fall within the categories of administrative acts which are exempt from judicial review and do not constitute assimilated, judicial, bi or multilateral administrative acts. The only argument concerning the inadmissibility of the plea in their case relates to the procedure prior to the referral to court. However, this is an administrative procedure, not a judicial one, and its mandatory character can be retained only in the case of the action for the annulment of the act, not in the case of the plea of illegality.

Finally, we consider that the relationship between the action for annulment in the general regulatory framework and the plea of illegality cannot be examined in terms of "circumvention". The two procedural ways must be followed carefully so as not to infringe the authority of res judicata, but beyond this, they can be used by litigants according to the text of the law, and the case law should not restrict the use of the plea of illegality[21]. These are procedural rights that individuals have in order to raise the illegality and/or invalidity of administrative acts, and the principle of the stability of legal relations cannot imply the maintenance of an illegal administrative act. In a state governed by the rule of law, such an act cannot be the basis of a judgment.

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[21] Pursuant to art. 53 of the Constitution, "the exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom".