Theoretical and Practical Aspects Regarding the Unlawfulness Plea of the Administrative Acts in the Municipal Law and Community Law

Doina Udrescu
„Dunărea de Jos" University of Galati

Abstract: With respect to the Administrative Law no. 554/2004, as amended by Law no. 262/2007, the legal establishment of the unlawfulness plea renders the specialized administrative courts the full jurisdiction on the control of the administrative act legality. The unlawfulness plea is generally applied and it can be invoked in any civil, criminal or commercial case is the exclusive task of the administrative court.

Key words: administrative act, unlawfulness plea, annulment actions, administrative, legitimate rights, legitimate interest.

The unlawfulness plea represents a means of defence whereby, during a pending case for other grounds than the invalidity of the administrative act, one of the parties, threatened with the application of such an illegal act, defences itself by invoking this fault and requests that the act should not be considered when settling the case.

The unlawfulness plea is regulated by the provisions of art. 4. of the Law no. 554/2004. According to the latest amendments made by Law no. 262 from July 19 2007 art. 4 paragraph 1 of the law states that ***the legality of an unilateral administrative act of individual nature, irrespective of the issuance date of the same, may be investigated at any time during a case, by plea, ex officio or at the request of the concerned party.***

Administrative acts in relation to which the plea can be invoked

According to the current regulation, at present the *administrative acts of individual nature exclusively* can be subject to the control of the administrative court. In case of administrative acts of normative nature, the will of the legislator was that the same could not make the scope of the unlawfulness plea. The solution adopted by the legislator is intended to result in the settlement with celerity of the causes and within a reasonable time, thus being in agreement with the provisions of art. 6 CEDO. Moreover, the solution is also justified based on the provisions of art.11 paragraph 4 of the Law 554/2004 based on which the administrative acts of normative nature deemed unlawful can be objected at any time. Previous to this amendment, the legal practise was not unitary, several courts considering that the unlawfulness plea can also be invoked in case of normative acts, other courts only in case of administrative acts of individual nature. The High Court of Justice and Cassation by decision no. 554/2006, in order to unify the non-unitary practise, stated that the unlawfulness plea invoked with respect to an unilateral administrative act of normative nature is acceptable since the legislator does not make any distinction between the individual and the normative administrative acts.

We estimate that the unlawfulness plea can only be invoked with respect to the *acts that can also make the scope of an annulment action* before the administrative courts. Consequently, the two dismissals provided by art. 126 paragraph 6 thesis 1 of the Constitution, the administrative acts issued in the relations with the Parliament and the administrative acts of military rule represent dismissals for the unlawfulness plea as well. Thus, we consider that the statement of certain theoreticians based on which the existence of the dismissals does not represent an impediment for the invocation of the unlawfulness plea cannot be accepted, since it is not an act annulment but a means of defence to make the act non-operating in a certain case and with respect to a certain party. For the support of the first viewpoint we share, the principle of establishment symmetry exists as well, according to which for identical cases identical solutions are applied (idem ratio, idem jus), principle resulting in the conclusion that it is unacceptable that the administrative courts could not give a decision by a direct action on the legality of an administrative act included in the dismissals but could do the same by a plea. Therefore, the contrary

solution would result in the violation of the Constitution and embezzlement of the scope this plea was regulated for.

The unlawfulness plea regulated by the provisions of art. 4 of the Law no. 554/2004 may only aims at the legality of an administrative act only able to cause legal effects alone *not* at the acts by which the authorities of the public administration performs *administrative operations*. In this respect, the Law no. 554/2004 covers undoubtful regulations, providing under art. 18 paragraph 2 that the competent court to judge the unlawfulness of an administrative act may also decide on the legality of the administrative acts or operations the issuance of the act subject to judgement was based on. (decision 548/2006 of the High Court of Cassation and Justice (ÎCCJ)).

According to the civil law non-retroactivity principle, provided by art. 1 of civil code and art. 15 of the Constitution and the basic administrative principle, based on which the legality of an administrative act is checked and assessed in relation to the legal provisions in force on the adoption or issuance date of the respective administrative act, in the judiciary practise it was established that the special procedure regarding the settlement of the **unlawfulness plea** of an administrative act, as regulated by the provisions of art 4 of the Law no. 554/2004 is *only* applicable *to the administrative acts that were adopted or issued as the case may be, after the enforcement of this law*. The systematic and teleological interpretation of art. 4 of the Law no. 554/2004 results in the conclusion that the unlawfulness plea is unacceptable, with respect to the individual administrative acts that were adopted or issued, as the case may, before the enforcement of this law, since the acceptance of the contrary thesis could entail the violation of the stability and security principle of the legal relations. (decision 1304/2006 of the High Court of Cassation and Justice) .

Thus, it was determined that, *in case of administrative acts previous to the effective date of this law, the unlawfulness plea is settled by the court shown under art. 17 of the Civil Procedure Code with the settlement of the main claim, the unlawfulness plea being an incidental claim.*

After the judicial practise established in this respect the new amendments of the Law no. 554/2004, derogatory norms from the mentioned principles were introduced. Thus, according to art. II of Law no. 262 from July 19, 2007, published in the Official Journal no. 510 from July 30, 2007, the causes under judgement by the courts on the effective date of the Law no. 554/2004 will be further judged as per the applicable law at the court notification time. The provisions related to the unlawfulness plea and the process guarantees provided by the Law no. 554/2004, as subsequently amended, are also applied to the causes under judgement by the courts at the effective date of the law herein. **The unlawfulness plea can also be invoked for the unilateral administrative acts issued prior to the effective date of the** Law no. 554/2004**, in its initial form and the unlawfulness cases will be analysed by reference to the legal provisions in force at the issuance date of the administrative act.**

Moreover, art. III of the same normative act provides that the court decisions given based on the Law no. 554/2004, that are final and irrevocable without the settlement on the merits of the unlawfulness plea that was rejected as unacceptable, may be the scope of a *revision claim* that can be submitted within 3 months from the effective date of the law herein.

Consequently, according to the new legislative amendments, the ***administrative court is the only one qualified to appreciate with respect to the legality of an administrative act irrespective of the issuance date of the same.***

Unlawfulness plea taking conditions

The invocation of the unlawfulness plea is subject to the fulfilment of two conditions: the objected act should be issued for the application of the act whose unlawfulness is invoked, and an agreement between the unlawful provisions from the basic act and the objected act should exist as well.

A first prior, compulsory condition for the invocation of the **unlawfulness plea** is that the act that is the scope of the merits of the cause should be issued for the application of the administrative act whose unlawfulness is invoked by plea. secondly, as per the provisions of art 4 of the Law no. 554/2004 the legality of an unilateral administrative act can be investigated by plea only provided that the *settlement of the litigation on the merits depends* on this administrative act. Therefore, a relation should exist between

the merits of the case and the unlawfulness plea for the legal investment of the competent court for the settlement of the unlawfulness plea, otherwise the sentenced decision being given by exceeding the regulation limits of the court control of the administrative acts by plea provided by art. 4 of the Law no. 554/2004.

Consequently, the invocation of the unlawfulness plea for an administrative act the claims of its plaintiff are not based on or, as the case may be, the ones of the defendant in case of counter claim, will entitle the court before which the plea is raised to reject it as unacceptable.

The *court invested with the merits of the litigation only* decides on the existence of the dependence relation between the merits of the litigation ad the administrative act subject to the legality control in the procedure provided by art. 4 of the Law no. 554/2004, not the administrative court notified with the settlement of the unlawfulness plea (in this respect see the decision no. 3350/2007 of the High Court of Cassation and Justice).

In case of unlawfulness plea, the one invoking it should show the unlawfulness reasons of the administrative act deemed susceptible to affect the settlement of the merits of the cause subject to judgement for the court to be able to check whether a sufficient legal relation exists between the merits of the cause and the administrative act to require the censorship of the legality of the act in the procedure of accessory nature provided by art. 4 of the Law no. 554/2004. The statement of the provisions of art. 4 only does not represent a reason for the unlawfulness plea since it does not cover issues in fact and law that could determine the application of this text of law.

Procedural aspects on the settlement of the plea

With respect to the settlement procedure of the plea, the court before which the same was invoked, after finding that the settlement of the litigation on the merits depends on the administrative act, notifies, by grounded conclusion, the competent administrative court and suspends the cause. The notification conclusion of the administrative court is not subject to any appeal and the conclusion by which the notification claim is rejected can be attacked with the merits.

Consequently, according to art. 299 paragraph (1) corroborated with art. 282 civil procedure code, the appeal stated against the conclusion by which the court before which the unlawfulness plea was invoked is unacceptable, finding that the settlement of the litigation on the merits does not depend on the administrative act, has rejected the notification claim of the competent administrative court (decision no. 3350/2007 of the High Court of Cassation and Justice).

The administrative court notified with the settlement of the plea decides, following the emergency procedure, in public meeting, by summoning the parties and the **issuer**. **In case the unlawfulness plea aims at a unilateral administrative act issued prior to the enforcement of this law, the unlawfulness causes will be analysed by reference to the legal provisions in force at the issuance date of the administrative act.**

The provisions of art. 164 from the civil procedure code are not accomplished in case of two files whose scope is the unlawfulness plea, respectively the annulment action of the same provisions covered by a unilateral administrative act if the scope, the parties and the legal grounds of the two causes are different (decision no. 4795/2005).

In case the unlawfulness plea is invoked before the administrative and fiscal court competent to settle the action on the merits, the suspension of the judgement is not requested until the settlement of the plea. ***In this case, the court qualified to settle the plea is the administrative and fiscal court itself. The unlawfulness plea will be settled with the merits by the same decision (decision no. 961/2006.***

In compliance with the provisions of art 4 of the Law no. 554/2004, the legality of a unilateral administrative act can be investigated any time during the entire judicial process and can be raised by either party of the case or by the court ex officio.

The settlement of the unlawfulness plea is performed in the presence of the act subject to the legality control, since, in the absence of the administrative act that is the scope of the plea, an analysis of the legality of its provisions is not possible, as the exercising of the judicial control on the solution given by

the first instance is not possible as well. (decision no. 4264/2005 of the High Court of Cassation and Justice).

When settling the unlawfulness plea, the court should check whether the administrative act cumulatively meets the following legality requirements:

- The act should be adopted or issued by the authority materially and territorially competent and within the limits of its competence;
- The content of the administrative cat should be in agreement with the content of the law based on which it is issued and the normative acts with higher legal power;
- The act should be consistent with the scope of the law it applies;
- The act should be adopted or issued in the specific form of the administrative acts and in compliance with the procedure and the legislative norms provided by law;
- The act should be up to date and opportune. .

The High Court of Cassation and Justice appreciated that the court cannot decide on certain unlawfulness grounds related to the form conditions of the administrative act, since the same, by their nature, may not have an effect on the solution of the civil law litigation (decision no. 461/2006 of the High Court of Cassation and Justice).

The solution of the administrative court is subject to the appeal that is stated within **5 days** from communication and judged in emergency and with priority.

As a public order plea, the unlawfulness plea can be also invoked for the first time in the appeal.

Unlawfulness plea effects

The unlawfulness plea is acceptable irrespective if the act under discussion can also be directly objected or not, since the law does not make this distinction and consequently, the acceptance of the plea does not result in the annulment of the administrative act but the finding of its unlawfulness and its removal from the cause only.

In case the administrative court has found the unlawfulness of the act, the court before which the plea was raised will settle the cause without considering the act whose unlawfulness was found. Consequently, for the court settling the merits of the cause, the arguments of the administrative court that has settled the unlawfulness plea have authority of res iudicata.

In case of the unlawfulness plea, the court does not decide upon the cancellation of the administrative act but it may find its unlawfulness and the issuing authority of the same, starting from the declaration of the unlawfulness, may proceed with the revocation of the respective act. Thus, the raising of a plea and its acceptance by the administrative court is intended to generate a judiciary precedent and with the generation of a plea acceptance practise the case can be reached when the respective administrative act falls into abeyance.

Since the unlawfulness plea is only a means of defence in the case where it was invoked, the acceptance of the plea causes effects between the parties of that litigation only (inter partes litigantes).

Decisions given by the High Court of Cassation and Justice in the settlement of the unlawfulness plea

The unlawfulness plea of the provisions of art.27 paragraph 3 from G.D. no. 890/2005. The High Court of Cassation and Justice rejected the appeal and maintained the solution of the first instance for the acceptance of the plea, stating that, by setting up a term of 10 days for the objection of the act, term running from the posting at the head office of the local council for the persons with the residence in the same locality, a restriction of the objection right related to the decisions of the local commission is made, affecting the essence itself of this right. The communication principle of the individual administrative acts directly to their consignees, as provided by law, should be also fully observed by the regulation under discussion, not only based on the hierarchy principle of the normative acts but also for the observance of the claiming right and free access to justice as a whole, since an uncertain communication with respect to its date and place will affect the exercising of the above-mentioned rights. (decision 1850/2008).

The unlawfulness plea of item 3, Chapter A, Annex 11 to the Methodological Norms, approved by the Government Decision no. 816/1995. The High Court of Cassation and Justice has rejected the appeal and maintained the solution of the first instance for the rejection of the plea as unacceptable. It was mainly stated that, in this cause, the provisions of art.4 paragraph (1) of the Law no. 554/2006, as amended by Law no. 262/2007, are not applicable, the objected act not being individual but normative and for its annulment the plaintiff may appeal to the annulment action provided by art.11 paragraph 2 item 4 of the Law no. 554/2004. According to these last legal provisions, "the ordinances or the provisions from the same deemed non-constitutional, as well as the administrative acts of normative nature deemed illegal, can be objected any time" (decision no. 2787/08.07.2008).

The unlawfulness plea of the provisions of art.5 paragraph 1 from the Instructions no.1008/220 dated 20.05.2003 issued by the National Agency for Labour Employment and the National Authority for Persons with Disabilities. The High Court of Cassation and Justice has rejected the appeal and maintained the solution of the first instance for the acceptance of the plea. It was stated that by the objected administrative act the economic agent should make evidence of the claim regarding the distribution of persons with disabilities by the written answer of the National Agency for Labour Employment, obligation not stated in the content of the Government Emergency Ordinance no.102/1999, normative act for whose application the instructions were issued. The provision in these instructions of several norms that are not included in the normative act for the execution of which the same were issued was deemed unlawful, on the grounds that the constitutional principle of the law supremacy and the provisions of art. 4 paragraph 3 of the Law no. 24/2004 are violated, based on which the normative acts issued for the application of the laws, the ordinances and the Government decisions, are issued within the limits and according to the norms imposing them. (Decision 1903/14.05.2008)

The unlawfulness plea of the provisions of art. 2 from the Methodological Norms for the application of the Government Emergency Ordinance no. 148/2005, approved by Government Decision no. 1825/2005. The High Court of Cassation and Justice has rejected the appeal and maintained the solution of the first instance for the acceptance of the plea. It was stated that the granting of the monthly allowance provided by the normative act under discussion was related, based on art. 6 of the Government Emergency Ordinance no.148/2005, to the number of born children not the number of births, case when the provisions of art. 2 from the methodological norms are illegal. Defining birth as giving birth to one or several alive children, art.2 from the Government Decision no. 1825/2005 unlawfully supplements the normative act of higher power for the application of which it was adopted and breaches the principle of equal treatment between the children resulted from a simple or multiple pregnancy. (Decision 1947/04.04.2007).

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