THE CURRENT FORM OF LAW No. 554/2004 OF THE CONTENTIOUS ADMINISTRATIVE

Elena Mihaela Fodor

"Dimitrie Cantemir" Christian University
Faculty of Law Cluj-Napoca

Abstract. *Since the enforcement date, Law no. 554/2004, regarding the procedure in the administrative litigations, suffered different alterations through normative acts or decisions of the Constitutional Court. The jurisprudence of the courts also removed some of the legal provisions. Due to these alterations, several problems remained uncertain, like the deadline for the prior administrative procedure for a third party injured by an administrative act addressed to another entity, the possibility to examine the legality of an abrogated normative administrative act or the effect of Law no. 76/2012 on the possibility to examine the legality of an individual administrative act issued before the enforcement of Law no. 554/2004. The consequences of alterations introduced by the Law no. 76/2012, as well as decisions of the Constitutional Court, regarding the competence of the courts for direct actions or the illegality plea, and remedies in administrative litigations, is also discussed.*

Key words: *administrative litigations, public law, plea of illegality, remedy.*

Since the changes brought to Law no. 554/2004 by Law no. 262/2007, the law of the contentious administrative suffered other changes, induced by some decisions of the Constitutional Court of Romania, or the enforcement of the new Code of civil procedure (Law no. 134/2010). Some controversial aspects are followed in our work. Since some aspects have already been discussed by other authors[1], we have focused on and developed other issues.

1. THE DEADLINE FOR THE APPEAL OF THE THIRD PARTY INJURED BY AN ADMINISTRATIVE ACT ADDRESSED TO ANOTHER

In case of contesting an administrative act to court, a pre-action procedure is needed. Such a procedure is required not only if the administrative act injures its

[1] L. Ungur, *Implicațiile noului cod de procedură civilă asupra litigiilor de contencios administrativ* [Implications of the New Civil Procedure Code Upon the Administrative Litigations], "Fiat Iustitia", no. 1/2013, p. 70–84.

beneficiary, but in case it injures a third party too. This requirement is mentioned in Law 554/2004, art. 7, par. (3), stating that the third party has to initiate the pre-action procedure, as soon as one becomes aware of the existence of the act, during the time interval of 6 months provided by par. (7) of the same article. Par. (7) of art. 7, states that the time interval of 6 months starts from the day the administrative act was issued. Decision no. 797/2007, of the Constitutional Court of Romania, found that the text of art. (7), par. 7, of the Law 554/2004, is unconstitutional if applied to a third party. The Constitutional Court considered that one has no possibility to know about an administrative act issued to someone else, until one is injured by that act, and that might happen over the time limit of 6 months from the issuing moment. On the other hand, inequity will arise between different persons, depending on how early they have found out about the administrative act that injures their legal right or interest.

Following the interpretative decision no. 797/2007 of the Constitutional Court, two things have to be established: what is the starting moment for the time limit to perform the pre-action procedure, and what is the duration of the time limit.

The first question is easily answered both by par. (3), of art. 7, and the reasoning of the Constitutional Court's decision, indicating the moment the third party acknowledged, in any way, the existence of the damaging administrative act. As for the duration of the time limit, things are not so clear any more. As for the beneficiary of the damaging administrative act the time limit for the pre-action procedure is 30 days, some courts considered that the same duration will have to be considered for the third party, the only difference being that for the beneficiary of the act the time limit will start at the moment the act is served to him, as for the third party the time limit will start the moment he acknowledges its existence. Following this opinion, it may be concluded that the 30 days time interval may be exceeded up to a limit of 6 months, also starting from the moment the third party acknowledged the existence of the damaging administrative act[2]. The third party must prove serious reason for exceeding the time limit, as would the beneficiary of the act (art. 6, par. (7), of the Law no. 554/2004).

Another opinion is that, following the decision no. 797/2007 of the Constitutional Court, for the third party, the time limit to perform the pre-action procedure is 6 months, starting from the moment this party acknowledges, in any way, the existence of the damaging administrative act[3].

[2] Court of Appeal Cluj, dept. of administrative and fiscal contentious, *Decision* no. 347/2010 – http://www.curteadeapelcluj.ro/Jurisprudenta/sectia comerciala/Comercial trim. I 2010.pdf (26.01.2014).

[3] G. Bogasiu, *Legea contenciosului administrativ comentată şi adnotată cu legislaţie, jurisprudenţă şi doctrină* [The Law of the Administrative Courts Commented and Annotated with Legislation, Case Law and Legal Doctrine], Bucureşti, Universul Juridic, 2008, p. 155 (apud. M. Tăbârcă, *Aspecte privitoare la procedura prealabilă reglementată de Legea nr. 554/2004 a contenciosului administrative* [Aspects Relating to the Prior Procedure Regulated by Law no. 554/2004 on Administrative Courts], „Revista Transilvană de Ştiinţe Administrative", vol. (23), no. 1/2009, p. 89–96).

We entirely agree with the latter opinion. First of all, the law definitely intended to establish a broader time limit for the injured third party. That is because a third party is not served with the individual administrative act, and for this reason has to do more steps in order not only to be sure that the damaging act exists, but also to establish its full content, and determine if it is in accordance with the law or not. Furthermore, from the reasoning of the decision no. 797/2007 of the Constitutional Court, it is clear that the starting moment of the time-limit was considered unconstitutional, not its duration. Dispositions of par. (3), of art. 7, were not found as being unconstitutional, and these dispositions clearly mention a time limit of 6 months for the injured third party.

The Constitutional Court mentioned, in the reasoning of decision no. 797/2007, that it is for the legislator to step in and make corrections to art. 7, par. (7), of Law no. 554/2004, the same way it did in the case of art. 11, par. (1), of the same law. In that case, Law no. 262/2007 changed the starting point of the time limit to address to court, from the moment the administrative act was issued to the moment it was served to its beneficiary. It was thought that a different period of time may flow for serving different particular individual administrative acts, so the real period of time for introducing the pre-action procedure will be different, creating an inequity among the injured parties. Unfortunately the legislator did not make any corrections, allowing an interpretation of the law unfavourable to the injured third party, contrary to the aim of the law.

2. THE CONSEQUENCES FOR LACK OF PRE-ACTION PROCEDURE, WHEN IT IS NECESSARY

According to art. 193, par. (1), of the new Civil procedure code (Law no. 134/2010), a legal action may be submitted to court only after performing the pre-action procedure, if a law specifically requires that. The proof of the pre-action procedure has to be attached to the legal action. The lack of fulfilment of the pre-action procedure may only be invoked by the defendant, within its response to the legal action, under the penalty of losing the right to plead it later.

In case of the administrative procedure, it means that, although Law no. 554/2004 defines the pre-action procedure as compulsory, the court may not examine *ex officio* if the requirement of the law is fulfilled, and may not dismiss the legal action for lack of pre-action procedure, if the defendant public authority does not plead the failure. In our opinion such an interpretation does not comply with the specificity of public law. Within public law, the administrative authority is not the equal of the private person. The administrative authority, bearing the public power, always has the upper hand. This is why the administrative acts are presumed to be true and legal and may be directly enforced on private persons. This is the reason why, for example, the administrative act is not automatically suspended when contested by the injured party, and the petition of the plaintiff for the suspension of

the administrative act is heard in the presence of the defendant. Administration does not need the court support in order to enforce its decisions. Within private law, as litigant parties are on equal positions before the court, it is admissible for the defendant to renounce the benefit of a legal disposition and accept the trial, even if the necessary pre-action procedure has not been fulfilled by the plaintiff. Such an outcome would be unconceivable in case of a litigation governed by public law rules, as the administrative authority should not be permitted to renounce the benefits of the law, as these benefits aim to protect a public interest.

Art. 28, par. (1), of the Law no. 554/2004, provides that the dispositions of this law are supplemented with the ones of the civil procedure code, if the latter do not contravene to the specifics of public law. For reasons mentioned above, we think that in this case the provisions of art. 193, par. (1), of the new Civil procedure code (Law 134/2010) are not in accordance with the specifics of public law. Thus, the court should be obliged to establish *ex officio* if the pre-action procedure was legally fulfilled and dismiss the claim if the plaintiff has failed to comply.

3. FAILURE TO COMPLY WITH THE TIME LIMIT FOR SUBMITTING THE LEGAL ACTION

According to art. 11, par. (1), of the Law no. 554/2004, the time limit for submitting the legal action is 6 months, starting at different moments, according to the particular situation of the plaintiff. Exceeding the time limit will result in the impossibility to address the court. According to par. (2) of art. 11, the limitation of 6 months may be exceeded for good reason, but not for longer than one year from the date the administrative act was issued. The one year time limit may not be exceeded for any reason.

Defining the 6 months period as a prescription time limit was correct under the Decree-Law no. 167/1958, regulating the limitation period for addressing the courts. According to this act, the court was obliged to establish *ex officio* if the legal action was brought before the court within the limitation period and dismiss the legal action if the limitation period was exceeded.

The rules of the new Civil Code (Law no. 287/2009) have replaced the Decree-Law no. 167/1958. According to art. 2512 of the New Civil Code, the court may not examine the compliance with the time limit *ex officio*. The defendant may claim the dismissal of the legal action on the grounds that the prescription time limit was exceeded, only with the response to the legal action or, at the latest, at the first day of trial.

Dispositions of art. 2512 of the New Civil Code do not comply with the specifics of public law, for the reasons presented above, in the case of the time limit for the pre-trial action. Furthermore, they contravene to the imperative dispositions of art. 11, par. (2), allowing the trial of a legal claim that has exceeded the one year time limit.

We believe that, considering the abrogation of the Decree-Law no. 167/1958, in litigations governed by public law rules, the time limitations should be considered as compulsory procedure rules (*termene procedurale*) that may not be exceeded. *De lege ferenda*, adequate changes should be made in art. 11, and art. 6, of the Law no. 554/2004.

Such changes were already made in other matters regulated by public law. Law no. 76/2012, for enforcing the new Civil Code, has modified art. 34, par. (1), of the Government Ordinance no. 2/2001 regulating the general legal frame of contraventions. Now, this legal text shows that the court is competent to solve the legal action after it establishes that it was submitted to court within the legal time limit.

4. **REMEDY**

Before the enforcement of the new Civil procedure code (Law no. 134/2010), in the Romanian legal system there were two remedy possibilities. The first remedy, the appeal (*apelul*) gave the chance to a second instance, superior to the first one, to determine the lawfulness of the decision delivered by the first court and the merits of the case. The second remedy, the appeal on points of law (*recursul*) gave the chance to a third instance (superior to the second one) to determine only the lawfulness of the decision delivered by the second court (the court that judged the appeal). For some legal actions, according to the dispositions of the Civil procedure code entered into force in 1865, only the appeal on points of law was allowed. Law no. 554/2004 provided, for legal claims of contentious administrative, only the remedy of an appeal on points of law (*recurs*).

According to art. 304^1, of the same Civil procedure code, in cases where the appeal (*apel*) was not possible, the court was not limited to lawfulness issues, but could also review the merits of the case. In this way, a double judgement on both merits and points of law was always possible, two levels of jurisdiction being given for every case.

According to the new Civil procedure code (Law no. 134/2010), all legal actions have the remedy of appeal and only in specific situations, defined by art. 483, the plaintiff has the possibility to use the appeal on points of law. So, again, a double judgement on both merits and points of law is possible. However, according to art. 54, point 4, of Law no. 76/2012, regarding the enforcement of the new Civil procedure code (Law no. 134/2010), for the contentious administrative litigations, the appeal on points of law (*recursul*) is the only remedy. These dispositions strike out the possibility for remedy on merits grounds, of the decision delivered by the first instance court, in contentious administrative cases.

It should be noticed that in contraventional law, before the enforcement of the new Civil procedure code (Law no. 134/2010), the remedy was the appeal on points of law (*recurs*), governed by the rule established by art. 304^1 of the Civil procedure code entered into force in 1865. At the time of the enforcement of the new Civil procedure code (Law no. 134/2010), the Goverment Ordinance no.

2/2001 was modified by art. 41, point 4, of the Law no. 76/2012, regarding the enforcement of the new Civil procedure code. The remedy of appeal on points of law (*recursul*) was replaced with the appeal (*apelul*). In doing this, the legislator considered the fact that a contraventional sanction may be regarded as a "criminal charge" as it is defined by the European Court of Human Rights. In the case *Ioan Pop v. Romania (2011)*, the European Court For Human Rights considered that a contraventional sanction of suspending the driving licence and fine, can be regarded as a "criminal charge". As, according to the interpretation given by the European Court for Human Rights to art. 2, par. (1), of the 7th Protocole to the European Convention for Human Rights, a remedy considering both merits and points of law is compulsory in case of a criminal charge (two levels of jurisdiction), it was considered necessary to change the remedy from appeal on points of law (*recurs*) to appeal (*apel*). This change was consistent with decision no. 500/2012 of the Constitutional Court of Romania. When the Constitutional Court examined dispositions of art. 118, par. (3^1), of the Emergency Government Ordinance no. 195/2002 (stating that in the case of a complaint against a contraventional report regarding traffic rules violation, there is no remedy against the decision of the first court), it mentioned art. 2 par. (1) of the 7th Protocole and the fact that a contraventional sanction can be regarded as a criminal charge. Decision no. 500/2012 established that the lack of a second judgement, on both merits and law, was unconstitutional.

But contraventional sanctions are not the only ones that can match the seriousness of a criminal charge. In the jurisprudence of the European Court for Human Rights it was established that certain situations in connection with taxes and fiscal obligations can fit the autonomous notion of criminal charge[4]. As administrative acts concerning taxes and fiscal obligations fall into the competence of the contentious administrative courts, a remedy that will only refer to the lawfulness of the first court decision, and not the merits of the case, may lead to a breach of art. 2 par. (1) of the 7th Protocole to the European Convention for Human Rights.

Even if there is no case of a criminal charge, in our opinion, it is a mistake to leave no possibility for a remedy on merits against a decision of the first instance, especially in situations governed by public law. It is true that considering the necessity of the pre-action procedure, one may say that the judgement of the first instance is already a remedy based on merits against the refusal of the administrative authority to withdraw the damaging act. But it should be considered that the pre-action procedure is not solved by a "court" in the sense of art. 6 of the European Convention for Human Rights, and in such a procedure the rules of the fair trial do not exist. As the administration is free to enforce its decisions upon private persons, the lack of a remedy based both on merits and points of law strikes the balance offered by the initial conditions of the Law no. 554/2004 that ensured the right to a full jurisdiction remedy.

[4] *Bendenoun v. France* (1992), *Dorota Szott – Medynska and others v. Poland* (2003).

Regarding the competence for judging the appeal on points of law, according to art. 10, par. (2), from Law no. 554/2004, it belongs to a Court of Appeal (*Curte de Apel*) if the contested decision was delivered by a Tribunal (*Tribunal*), and to the High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*) if the contested decision was delivered by a Court of Appeal. Special laws may contain derogatory dispositions. The dispositions of art. 10, par. (2), of Law no. 554/2004, are consistent with the ones in the new Civil procedure code (Law no. 134/2010). Art. 483, par. (3), states that all appeals on points of law are in the competence of the High Court of Cassation and Justice, but par. (4) of the same article shows that in the case of situations regulated by special laws, the competence belongs to the court that is superior to the one that delivered the contested decision. Art. 2, par. (2), of the new Civil procedure code also states that the provisions of the Law no. 134/2010 do not apply against the provisions of special laws[5].

Another difference from the general dispositions of the new Civil procedure code (Law no. 134/2010) is the solution that may be given when the appeal on points of law is judged by the High Court of Cassation and Justice. According to art. 497, of the new Civil procedure code (Law no. 134/2010), if the High Court of Cassation and Justice is quashing the contested decision, it refers the trial back to the same court that has delivered it. Dispositions of art. 20, par. (3), of the Law no. 554/2004, state that in all situations, in case the contested decision is quashed, the court judging the appeal on points of law will settle the dispute as a first instance court. So, there will be no difference, in respect to the court that judges the appeal on points of law, on the solutions that might be given.

In settling the case as a first instance court, the superior court has to judge upon both merits and law. According to the decision no. 14/2013 of the High Court of Cassation and Justice, delivered in solving an appeal on points of law with compulsory solution (*recurs în interesul legii*), every time that a court is admitting an appeal on points of law with the consequence of settling the case as a first instance court, it may allow all sorts of legal evidence and has to judge both on merits and law. Decision no. 14/2013 was given with respect to the old Civil procedure code (entered into force in 1865), but its reasoning may be applied to art. 20, par. (3), of the Law no. 554/2004. Moreover, according to art. 501, par. (2), of the new Civil procedure code (Law no. 134/2010), in case the appeal on points of law is admitted and the court retains the case for settling it, all sorts of legal evidence are allowed.

[5] Other authors considered that, according to the new Civil procedure code (Law no. 134/2010), the competent court to judge the appeal on points of law, in contentious administrative, is always the High Court of Cassation and Justice. The analysis was based only on the Law. no. 134/2010, without taking into consideration art. 10 of the Law no. 554/2004. A. Tabacu, *Procedura contenciosului administrativ şi noul Cod de procedură civilă* [Administrative Contentious Procedure and the New Code of Civil Procedure], "Revista Transilvană de Ştiințe Administrative", vol. (29), no. 2/2011, p. 199–210.

All the legal dispositions mentioned above, together with the findings of the compulsory decision no. 14/2013, do not change the fact that, in order to reach the stage of admitting an appeal on points of law, only reasons regarding the lawfulness of the contested decisions may be claimed. Only after admitting that the contested decision is wrong for reasons regarding the law, the superior court may admit new evidence and analyse the case on merits and law. This situation softens the consequences of the lack of appeal (*apel*), but does not equal the possibilities of an appeal, where the parties may claim that the first court failed to see the merits of the case. For this reason, in our opinion, the contentious administrative cases do not have the benefit of two levels of jurisdiction.

According to art. 493, of the Civil procedure code (Law. 134/2010), all the appeals on points of law in the competence of the High Court of Cassation and Justice are submitted to a filtering procedure, performed in chambers by a filtering panel of judges. There is no mention about derogatory situations. If the appeal on points of law is manifestly ill founded, it may be rejected by the filtering panel. The filtering procedure is not applicable at the Courts of Appeal. This way, there is an unjustified difference between the procedure in judging the appeal on points of law before the Courts of Appeal and the High Court of Cassation and Justice. The possibility for a second judgement is drastically narrowed for the appeals on points of law against the decisions delivered by a Court of Appeal. The specificity of the relation between the administration exercising the public power and the private person trying to defend against an abusive conduct of the administration, make the dispositions regarding the filtering procedure inapplicable in contentious administrative cases, according to art. 28 of the Law no. 554/2004.

5. **PUBLICITY OF THE TRIAL**

According to art. 17, par. (1), cases of contentious administrative are heard in public sessions. These dispositions should be seen as derogating from the ones of the new Civil procedure code (Law no. 134/2010) stating, in art. 240, that the first instance civil cases are heard in chambers, if there are no other special provisions. Considering that if the appeal on points of law is to be judged by the High Court of Cassation and Justice, applying the filtering procedure, if the dispositions of art. 240 from the Civil procedure code would apply to the contentious administrative cases, there might not be any public hearing in solving the appeal on points of law.

6. **EXTRAORDINARY REMEDY**

In our opinion, both exceptional remedies provided by the new Civil procedure code (revision and appeal for annulment) may be used in contentious administrative cases.

Art. 21, par. (1), of the Law no. 554/2004, as modified by Law. no. 262/2007, provided that in contentious administrative cases all extraordinary remedies mentioned by the civil procedure code may be used. Regarding the revision of the case (*revizuirea*), par. (2), of art. 21 mentioned that, besides the possible reasons for revision mentioned in the civil procedure code, an extra reason may be used in contentious administrative cases: violation of the priority of European law. By decision no. 1609/2010 of the Constitutional Court, the middle part of par. (2), of art. 21, was found to be unconstitutional. The text referred to by the decision of the Constitutional Court regulated some aspects of the procedure in case the special reason for revision was used. In the same decision, the Constitutional Court found that the special reason for revision is valuable, as it is in accordance with art. 148, par. (2), of the Constitution, underlining the priority of European legislation to the national one. Unfortunately, the Parliament misinterpreted the decision of the Constitutional Court and, by Law no. 299/2011 abrogated the whole par. (2), of the art. 21 of Law no. 554/2004. Later on, Law no. 76/2012 for enforcing the New Civil Code has abrogated par. (1), of art. 21, from Law no. 554/2004, probably in the consideration of Law no. 299/2011.

After the enforcing of Law no. 76/2012, a new decision of the Constitutional Court was delivered, no. 1039/2012. The Constitutional Court decided that Law no. 299/2011 was unconstitutional. It was shown that the Parliament misinterpreted the decision no. 1069/2010, and that the first and last part of the par. (2) of art. 21 from Law no. 554/2004 ensure the enforcement of the European law. Limiting the possibilities for such protection of the European law by abrogating the whole art. 21 was found unconstitutional.

In the actual form, art. 21 of Law no. 554/2004 only refer to the existence of a special reason for revising a court decision, in the contentious administrative cases. That gives reason to the idea that the revision may be regarded as a possible remedy in this field. Dispositions of articles 509–513 of the Civil procedure code (Law no. 134/2010) will apply. If revision may be used, there is no reason to consider that the other exceptional remedy, the appeal for annulment (*contestaţia în anulare*), may not be used in contentious administrative cases, according to articles 503–508.

7. **THE PLEA OF ILLEGALITY**

The plea of illegality was consecrated in the Romanian jurisprudence in the interwar period. It came from the French law, where, in case the injured party has missed the deadline to contest directly an administrative act, it could discuss its legality when contesting the subsequent act, issued in application of the former one[6]. Romanian jurisprudence did not discuss about the nature of the administrative

[6] E. M. Fodor, *The Nullity of the Administrative Acts in Romanian Law,* "Caietul ştiinţific", no. 5, 2012, The Institute for Administrative Sciences of the Republic of Moldova, p. 435–441.

act – individual or normative – whose legality might be verified by means of the plea. If French law considered that the illegality plea could be used mostly for the normative acts[7], the Romanian jurisprudence considered a larger area of application, including normative or administrative acts that could not be contested directly[8]. After 1990, jurisprudence recognised the plea of illegality as a defence for the party that was threatened by an administrative act used by its opponent. The court judging the litigation where the administrative act was invoked was also competent to solve the plea of illegality[9].

Law no. 554/2004 brought the plea of illegality from jurisprudence to a legislative consecration in article 4. The intention was to make sure that such a plea would be solved by the court. Due to the diversification of law branches and legislation, followed by the organisation of specialised panel of judges, the law gave the competence of solving the plea of illegality to the contentious administrative courts, no matter the nature of the case where the plea was raised. Once the plea was raised, the litigation stopped until the contentious administrative courts solved the plea of illegality and continued after.

Art. 4 of Law no. 554/2004 raised some disputes between the High Court of Cassation and Justice on one side, and the Parliament and the Constitutional Court on the other side.

First of all, the High Court of Cassation and Justice considered that, after the enforcing of Law no. 554/2004, the plea of illegality could be applied only to administrative acts that entered into force after this law. All pleas regarding previous acts should be dismissed as inadmissible. As the legislator knew that the purpose of mentioning the plea in Law no. 554/2004 was to consolidate what the jurisprudence has already created, the text of art. 4 was modified by the Parliament[10], mentioning that the plea of illegality may be raised for any administrative act, regardless the date it entered into force.

At the same time, another change was made in the same article. Jurisprudence proved that if the plea was used in case of normative administrative acts, different solutions were given by different courts in respect of the same administrative normative act, producing an inequity amongst injured parties. So, the law was changed, art. 4 mentioning that the plea could be used only in the case of individual administrative acts.

The High Court of Cassation and Justice disregarded the alterations of art. 4, giving a personal interpretation to its text, that still allowed the plea of illegality for normative administrative acts.

[7] P. Foillard, *Droit administratif*, Paris, Paradigme, 2005, p. 339.

[8] D. Apostol Tofan, *Unele consideraţii privind excepţia de nelegalitate* [Some Considerations on the Plea of Illegality], „Revista de drept public", no. 4/2007, p.25.

[9] A. Trăilescu, *Excepţia de ilegalitate în contextul legislaţiei actuale* [The Plea of Illegality in the Context of Current Legislation], 1998, „Dreptul", no. 4/1998, p. 21.

[10] The change was made by the Law no. 262/2007.

In respect with the age of the administrative act, it considered that the possibility of solving a plea of illegality for the administrative acts that entered into force before the Law no. 554/2004 was violating the principle of stability of legal relations, consecrated by the European Court for Human Rights, and the principle of nonretroactivity of the law. The High Court of Cassation and Justice even raised a plea of unconstitutionality of the text. But the Constitutional Court decided[11] that the text offering the possibility for the plea to be solved in case of administrative acts that entered into force before the Law no. 554/2004 was in agreement not only with the Constitution of Romania, but with the European Convention of Human Rights too. It also decided that such a plea may be raised at any time the interested party was injured, as it had no reason to contest the administrative act before. Besides the arguments of the Constitutional Court, we have expressed the idea that, as the aim of Law no. 554/2004 was to bring into the law a creation of the jurisprudence, there was no reason to narrow the application of this creation. The plea of illegality was already constantly applied before the enforcing of Law no. 554/2004, even in the interwar period, for any administrative act regardless the issuing date, so there would not be a case of retroactivity of law[12]. Regardless the decision of the Constitutional Court, the High Court of Cassation and Justice chose to set aside the dispositions that she considered were not in agreement with the Convention.

Law no. 76/2012 for enforcing the new Civil procedure code has once again modified the text of art. 4 of Law no. 554/2004. Once again, the Parliament upheld the provision that permitted the plea to be used in case of the administrative acts that entered into force at any time, even before Law no. 554/2004. The new text explicitly forbids the use of the plea for illegality in case of normative administrative acts. But the new text renounces the competence of the contentious courts for solving the plea. Now, the court where the plea was raised is competent to solve it and then solve the whole claim. At this moment, the legal text is in accordance with the jurisprudence formed before the enforcing of Law no. 554/2004, when the date of issuing the administrative act in question was not an issue. What will be the opinion of the High Court of Cassation and Justice now? Would it still consider that the plea is to be used only for administrative acts entered into force before Law no. 554/2004, or only for the administrative acts entered into force before Law no. 76/2012?

We maintain our point of view that we are in a case of legalising a creation of the jurisprudence, so that the use of the plea of illegality for administrative acts issued before the enforcing of the Law no. 554/2004 is not a case of retroactivity of the law.

We do not consider that taking away the competence of solving the plea from the contentious administrative courts was a good idea. Romanian legislation still

[11] Decision no. 425/2008 of the Constitutional Court of Romania.
[12] E. M. Fodor, *op. cit*.

does not contain regulations regarding the legality of the administrative act, the jurisprudence being the sole creator of rules in this field. At the same time, the real life situations are more and more complex and a vast jurisprudence regarding the legality of the administrative acts is created. It will be difficult for other courts, especially the lower first instance courts (*judecătorii*), specialised in civil or criminal litigations, to follow the developments in administrative law, so the righteousness of the solutions given to the pleas of illegality may suffer.

Removing the possibility to use the plea of illegality against a normative act has, without doubt, great merits. But there is one situation that remained without a solution. Jurisprudence of the High Court of Cassation and Justice concluded[13], before the changes introduced by Law no. 76/2012, that the plea of illegality may be raised against an administrative normative act that was abrogated at the time the plea was presented before the court. The reason was that many administrative individual acts were issued based on the normative administrative act in question. By the time such an individual act was contested before the court, and the plea of illegality against the normative administrative act was raised by the injured party in the defence strategy, it was possible that the normative administrative act was abrogated. The abrogation act is not giving any reason concerning the legality of the abrogated act. In such a situation, refusing to analyse the legality of the abrogated normative administrative act for the time it was into force will leave no possibility for the injured party to defend ones rights.

In the current form of art. 4 of Law no. 554/2004, there is no possibility left for raising the plea of illegality against a normative administrative act. For situations described before, a direct action for the annulment of the illegal normative act, source of an individual administrative act, will not be possible, because an abrogated act cannot be annulled. *De lege ferenda*, we suggest an exception to the rule established by par. (4) of art. 4 of Law no. 554/2004 in case of an abrogated normative act.

[13] Decision no. 3358/2006, of the High Court of Cassation and Justice, dept. of contentious administrative – http://www.scj.ro/SCA%20rezumate%202006/SCA%20r%203358%202006.htm (26.01.2014).