INVOKING THE PLEA OF ILLEGALITY DIRECTLY DURING THE APPEAL. DECISION NO. 36/2016 BY THE HIGH COURT OF CASSATION AND JUSTICE

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Abstract:

This paper aims to analyze the possible problematic situations that may arise as a result of certain orders whose goal is to unify judicial practice and jurisprudence, and those are the orders given by the High Court of Cassation and Justice.

Here we speak of a concrete situation, which has to do with the possibility of invoking, during any kind of litigation, the plea of illegality of an administrative document, a plea that is regulated exclusively by art. 4, Law 554/2004.

Of course, the celerity of the act of justice and the unification of judicial practice are important, but the supreme court has left unanswered a series of questions and issues, which may, in certain situations, lead to the infringement of the material or procedural rights of the participants in the lawsuit.

Keywords: *plea of illegality, contentious administrative matters, procedural law, Law 554/2004, Decision no. 36/2016 HCCJ.*

JEL Classification: [K15, K41].

1. The context for the HCCJ order. The need for the unification of the application of norms. Law 554/2004 and the new Code of Civil Procedure

1.1. General inconsistencies in light of the New Code of Civil Procedure

Contentious administrative matters, regulated mostly by the legal norms provided by Law 554/2004 for contentious administrative matters, a normative text which, essentially and mostly, contains procedural norms, has seen an interesting evolution as a branch of law, in light of the continuous correlations that must be made to the common law implemented in the field, and, respectively, to civil procedure and through the prism of the continuous legal modifications that have punctuated the history of this domain.

Of course, the problematics of these correlations have become even more interesting and debated after the massive alterations in civil procedure

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introduced along with the New Code of Civil Procedure through Law 134/2010, and the appearance of this new fundamental legislation in the civil domain, the doctrine being the first in analyzing these aspects (Ungur, 2012).

The issues became even more complex after Law no. 76 of May 24th, 2012, for the application of Law no. 134/2010 concerning the Code of Civil Procedure, came into force, a law which had the stated purpose of adapting civil procedural legislation such that it is in agreement with the new provisions, although, practically, it made amendments to the new legislation as well.

As a result, multiple disputes which had already been tempered relatively reignited after the new code appeared, others became completely useless, as the regulations clarified most of the problematic points, but, more than anything, new problems and new matters arose that were more or less correlated between the two norms – the Code of Civil Procedure, the general norm (along with the Civil Code) and Law 554/2004, which we can deem, without hesitation, to be the special norm in the field of contentious administrative matters.

1.2. The role played by the HCCJ in regulating possible inconsistencies

Of course, regulating these inconsistencies and unifying the practice of the courts of law, which could lead to a rise in the predictability of the resolutions adopted by the court, is desirable both by the litigating parties and the practitioners of law and theorists.

Besides the literature in the field, an essential role in regulating all inconsistencies is played by the general jurisprudence of the courts of law, especially that of the supreme court, the High Court of Cassation and Justice, which, based on the competence it is awarded by the civil procedural norms, wields the specific attributions and possibilities for rendering the practice uniform and for clarifying certain aspects.

Thus, according to the provisions of art. 97 of the C. Civ. Pr, the Supreme Court presides over "(…) 2. appeals in the interest of the law; 3. requests with a view to pronouncing a preliminary order in regard to resolving certain issues of law (…)."

Where the appeals in the interest of the law had been covered under the previous civil procedural norms, the requests for the pronunciation of a preliminary order in regards to resolving a matter of law were a new addition when the new Cod of Civil Procedure was released, signaling a French influence (Deleanu, 2013).

This is one of the paths that ensure, as much as possible, a unitary judicial procedure, which is more than a pre-judicial procedure, given that it is not mandatory for it to be invoked, but it becomes mandatory for all courts of law, once the supreme court has ruled on the matter (Deleanu, 2013).

Of course, in order to reach the point where such an order is possible, certain conditions, established by art. 519 Civ. Pr. C, must be met. According to this article, "if, during the process, the formation of the High Court of Cassation and Justice, of the court of appeals or of the tribunal, chosen to solve the issue in final analysis, finding that a matter of law, whose clarification is necessary for the resolution of the main issue of the respective matter by the court of first instance, is new and the High Court of Cassation and Justice has not yet ruled on it, nor is it the subject of an appeal in the interest of the law whose resolution is pending, shall be able to request an order from the High Court of Cassation and Justice for the resolution in principle of the matter of law for which it was summoned."

These multiple conditions, which must be taken under consideration, along with the relatively recent regulation of such a procedure, determine that these types of solutions are still nascent. One of the domains in which such a solution given by the Supreme Court exists is the one of contentious administrative matters, respectively in the terms that it is defined according to the provisions of art. 4, Law 554/2004 and the plea of illegality.

2. The plea of illegality

2.1. The regulation and judicial nature of this plea

The plea of illegality is a judicial institution of administrative law which has existed ever since the inter-war period, but was regulated exclusively by the doctrine or by the jurisprudence, and whose normative instatement happened relatively late, along with the entry into force of Law 554/2004 (Tofan, 2007).

The actual legal text, following all of the alterations since the moment the law appeared, reads as follows:

"(1) The legality of an administrative document with an individual effect, regardless of the date it was issued, can be, at any time, investigated during a trial, by way of plea, ex officio or at the request of the interested party.

(2) The court of law of first instance endued with the trial of a litigation process and to whom the plea of illegality was invoked, finding that the administrative individual document relies on the resolution of the litigation in the first instance, is authorized to issue an order in what concerns said plea, either through an interlocutory order at the end of a court session or through the order it shall issue on the case in question. If the court chooses to rule on the plea of illegality through an interlocutory order, this can be disputed along with the results found in the first instance.

(3) In case that it has ascertained the illegality of the administrative document with an individual effect, the court to whom the plea of illegality was invoked shall resolve the case without taking said document into consideration.

(4) Administrative documents with a normative effect cannot be subject

to the plea of illegality. The judicial review of administrative documents with a normative effect can be carried out by the court specialized in contentious administrative matters on the basis of the claim for annulling the document considered by the plaintiff to be illegal, under the conditions stated in this law." (Law 212/2018, altering Law 554/2004, provides no alteration for art. 4.)

The name itself that the lawmaker has chosen to give this judicial institution thus suggests that the legal nature of this plea is that of an institution whose purpose is to defend a party from a non-legal administrative document, invoked indirectly and not through a distinct course of action, the initial regulation being, however, molded after the regulation passed by the lawmaker for the plea of unconstitutionality, which entails the disjunction of the plea from the lawsuit, the creation of a new case file based on it and its resolution by the competent court for the trial of that type of litigation (Tofan, 2009).

The new legislative regulations permit the invocation of plea at any time, with no time limits and no restrictions in what concerns possible statutes of limitation, according to the interpretations from RCC and ECHR (Fodor, 2011). Invoking an plea is possible for any administrative document with an individual effect, except for documents issued before the new law on contentious administrative matters came into force, a questionable interpretation given by HCCJ, which is contrary to the one given by RCC (Fodor, 2017).

2.2. The judicial problem – the possibility of invocation of this plea during the appeal

The judicial matter raised in this article (and the litigation process where this problem occurred) is that of the possibility of invoking this plea of illegality during the stage of appeal of the trial and, especially, the consequences of such an invocation.

In this case, a refusal on the part of the authorities to issue a building permit, where the authority was the mayor (Roş, 2015), was disputed, on the basis of the provisions stipulated in art. 8, Law 554/2004. The plaintiff was denied the civil claim that she sought in the first instance and filed an appeal. During this appeal, the appellant formulated and invoked the plea of illegality of the certificate of urbanism that she was forwarded and through which certain papers were asked of her that conditioned the issuing of the solicited authorization by the authority, without which this issuing would be denied.

It is obvious that invoking this plea was the only solution for the appellant, who had not disputed said certificate of urbanism within the time limit provided to her by the law.

The court suited for the trial of this case assessed that the request could be arraigned to the Supreme Court for regulation through a preliminary order, which would cover any future similar situations.

The question was whether "the dispositions in art. 4, Contentious Administrative Law no. 554/2004, including subsequent amendments and additions, allow the invocation of the plea of illegality to be expressed directly during the appeal or whether they contain a limitation, a restriction in what concerns the time when such a plea of illegality can be invoked?"

As the aforementioned legal conditions were fulfilled (art. 97, art. 519 and the next Civ. Pr. C.), the matter was brought to the attention of the High Court of Cassation and Justice.

2.3. Decision no. 36/2016 of the High Court of Cassation and Justice

The High Court of Cassation and Justice addressed this issue through decision no. 36/2016, published in the Official Gazette, no. 104 of February 7th, 2017, after analyzing all opinions given by the parties, by the national courts, as well as the reporting court.

Of course, the legal matter per se was resolved with this resolution, now mandatory, a resolution which has, however, not addressed all of the issues that may occur in such a situation, the verification being carried out exclusively with a view towards two matters (the problem of trying the first instance during the appeal and the legality of such an analysis in the absence of an appeal).

The solution given by the court found assessing the invocation of this plea to be admissible during an appeal.

2.4. Judicial problems stemming from the decision of HCCJ

Before we commence a punctual discussion regarding the problematic matters that we desire to analyze in this case, we would like to underline the context in which a problem such as this one occurred. Thus, the previous procedural regulations (the previous Code of Civil Procedure) expressly provided for the special trial procedure for such pleas, which was disjoined from the case file of the first instance and sent to a court specialized in contentious administrative matters to be judged, and the latter would analyze the plea invoked within this new case file, with the possibility of disputing the resolution with an appeal.

After the amendments made to the civil procedure through the aforementioned norms, it was established that the plea would be analyzed by the court to which it was invoked, without disjoining the case and creating a new case file for a new trial in a court of first instance.

First of all, the consequence is that, on the basis of this regulation, any court has the capacity to verify the legality of an administrative document, which can be a questionable matter, given that administrative law and contentious administrative law feature a series of special regulations and excel extremely in difficulty in many processes of litigation, which, to a judge at the

beginning of their career (who has no means to preside over contentious administrative matters usually, as the court of common law is the special section of the Tribunal) or a judge who has not specialized in this branch of law will not be quite so easy to preside over.

Secondly, the solution provided by the supreme court, which did not address all possible consequences, is susceptible, however, to the infringement of the provisions in art. 16, 20, 21, 24, 53, 124 and 129 of the Romanian Constitution, as well as to the infringement of the right of the parties to a fair trial, stipulated in art. 6 of the European Convention on Human Rights.

Invoking this plea during the appeal, besides the procedural aspects of the evidentiary hearing, has the significant consequence of rendering impossible for the party disadvantaged by the solution decided upon by the court of justice to challenge said solution, given that we are now in the final level of jurisdiction, meaning that the decision made during the appeal cannot be challenged through any legal course of action, be it even extraordinary.

2.4.1. The inexistence of the appeal

In order to rule on the solution, the Supreme Court relies first on a grammatical analysis of the text, assessing whether the provisions of art. 4, par. 1, Law 554/2004 establish, at least on a theoretical level, the possibility for the invocation of plea at any time during the trial, with reference to the fact that par. 2 of the same article speaks of "the court awarded the first instance of the litigation" and the fact that, according to the provisions stated in art. 20, par. 3, Law 554/2004, the court of appeals has the obligation "to retry the litigation from the first instance." Corroborating these provisions with those of art. 488 of the C. Civ. Pr. and those of art. 389 and 498, par. 1 of the C. Civ. Pr, we can draw the conclusion that the court of appeals, by trying the case in first instance, can analyze the plea of illegality invoked for the first time in this phase of the trial.

However, the provisions of par. 2 of the same article refer to the possibility of challenging the interlocutory order, along with the first instance trial, which means that the lawmaker evidently had a trial phase in mind in which the solution found by the court in what concerns the plea of illegality is susceptible to challenge from any of the interested parties.

Taking into consideration the manner in which the lawmaker has regulated this plea across time, in the sense that it was analyzed by the competent contentious administrative court, thus the tribunal that had competence in trying the case in first instance, it is obvious that the intention of the lawmaker was to allow the invocation of plea exclusively during the trial of first instance.

The possibility of trying this plea exclusively by the civil courts, established through the latest legislative amendments, has the purpose of supporting the celerity of said trial (with no disjunction, trial conducted by the

competent court of justice or appeal), but in no way can it have the intention of depriving the parties of the possibility of challenging the order concerning the plea of illegality, as is applicable to the aforementioned case.

If we look at the interpretation given by the supreme court, however, we see that we are in the situation where, practically, this normative provision that refers to the appeal in the case of such pleas deprives itself of efficiency, without the explanations provided by the supreme court being however satisfying.

More than that, the matter of invoking for the first time certain law aspects that can completely change the procedural framework of the litigation during the appeal when there are provisions in place that expressly forbid it can be called into question.

Going over the interpretation of Law 554/2004 exclusively and the possible infringements of internal civil procedure, we believe that a solution such as allowing the analysis of the plea of illegality during the appeal infringes on the superior provisions of the Constitution and one of the fundamental treaties that are now part of the Romanian judicial system, by which we mean the European Convention on Human Rights.

It is extremely important to note that art. 129 of the Romanian Constitution establishes the fact that the interested parties and the Public Ministry can seek an appeal, under the conditions established by the law. Thus, the Romanian Constitution expressly regulates the inviolability of seeking legal remedy in what concerns the possibility of challenging a judicial order, a regulation that would be eluded by allowing the plea of illegality in the present case.

The interpretation given by the Constitutional Court for the words "under the conditions established by the law" is constant, which means referring to the conditions of procedure and exercise of seeking legal remedy, not its impossibility (Decisions no. 45/2000 and 84/2000).

Having taken these aspects into consideration, we must also mind the jurisprudence of the Constitutional Court, which is already constant, in what concerns this necessity to respect the Constitution, which, from the perspective of the Court, guarantees the double level of jurisdiction in civil matters, a right that would be infringed upon by accepting the possibility of invoking the plea of illegality during the appeal. The relevant logical reasoning and previous jurisprudence are broadly invoked in two essential decisions made by this forum, respectively Decision 500/2012 and 967/2012, its jurisprudence thus now unitary.

An interpretation that contradicts these provisions voids all constitutional and European regulations referring to equality before the law.

Art. 16 of the Constitution establishes the equality of citizens before the law, including equality before the courts of law and the carrying out of litigation, an article that is corroborated with the provisions of art. 124, par. 2 of

the Constitution, which establishes that justice is one, impartial and equal to all. Admission of the possibility of analyzing a plea of illegality during the phase of the appeal where the current court order is being challenged evidently deprives the disadvantaged party of the means through which they may decide to challenge it in such a situation.

These aspects are corroborated with the provisions of art. 24 of the Constitution, which guarantee the right to defense of the parties, a right which has already been established as infringed upon in the situation where one of the parties is deprived of both the first and second instances of court jurisdiction, which, through the plea invoked when aiming to challenge the current court order, the appellant wishes to avoid.

However, according to the provisions in art. 53 of the Romanian Constitution, restriction of the exercise of certain rights or liberties is only possible in situations expressly and limitatively established by the law, only when it is proportional to the situation that has determined it, applied in a non-discriminatory manner, and without prejudice to the existence of the right or liberty. Challenging the standing order is a right which cannot be restricted in a justifiable way either legislatively, or in order to respect procedural rights or, under no circumstance, as a result of the conduct of one of the litigating parties.

Art. 21, par. 3 of the Romanian Constitution clearly establishes that the parties have the right to a fair trial, a right that is, thus, guaranteed constitutionally.

Finally, according to art. 20, par. 2 of the Romanian Constitution, if there are inconsistencies between the pacts and treaties on the fundamental human rights, which Romania has signed, and the internal laws, the international regulations take precedence, except for the case where the Constitution or the internal laws contain more favorable dispositions.

Under these circumstances, even if it is considered that the express provisions of the Constitution are not applicable, art. 6 of the ECHR, regulating the right to a fair trial, would then become applicable. Although no express discussions have been had over the mandatory nature of the double level of civil court jurisdiction, first instance and appeals, one of the meanings conveyed by said article and the jurisprudence related to its application is that of equality of arms during litigation.

However, the court has assessed that the absence of a course challenging the standing order is not a problem, as it has to do with a defense during litigation. When stating its reasons, the supreme court referred to RCC Decision no. 1682 of 2009, which denied the plea of unconstitutionality of invoking the plea of illegality during the appeal stage, but that order was made while the previous legislation was in force, a legislation where this plea was disjoined, had a new case file compiled around it and was tried according to the norms of contentious administrative law by a specialized court, both in first instance and in

the appeal stage, where necessary, thus in a completely different normative context.

We believe that such a solution is, however, extremely facile and incorrect. Beside the proper offence and the infringement upon the procedural rights of the party by not having the solution verified by another court of law, although the court shall not annul the document per se, and the consequence of that is that the court shall not take into account said document during the litigation, the solution has, however, a long-term judicial impact.

And this occurs under the conditions where, evidently, through the prism of the new provisions of civil procedure, based on the interpretation of art. 430 and 461, par. 2 C. Civ. Pr, it becomes clear that through the impossibility of challenging the arguments behind the decision analyzing the legality of the administrative document (under the circumstances where challenging the order after the appeal becomes impossible), situations can be created for invoking res judicata between the same parties, concerning said document, which was never truly annulled, which no court of administrative contentious law has verified and which was analyzed exclusively by the appeals panel, without any subsequent verification from another court of justice.

2.4.2. The capacity of the newly introduced party

Another matter is that of the quality of the litigating parties. Practically, by invoking the illegality of an administrative document, be it even by way of plea, during litigation, it is necessary for the entity who issued said document to exist or appear, an entity that can be, obviously, a completely different party than the litigating ones in that particular case.

Evidently, in this situation, the question is whether said party acts in any capacity within the case and, if the answer is positive, what that capacity is and under what circumstances do they become a party in the case.

Our opinion is that, for multiple reasons that we will detail along the way, it is evident that the entity issuing the document must be or must become a party to said case. Although the court is trying a plea (in the form of a defense), it is beyond any shadow of a doubt that the entity who issued the document has the right or even the obligation to express their point of view in what concerns the issued document and to defend the legality of said document.

The matter of the right to express a point of view on a document issued by said authority should be beyond any sort of debate, given that the court is subjecting the document in question to analysis. In what concerns obligation, this aspect should be just as clear (although the administrative authorities frequently do not consider it so), given that we speak in such situations of judicial reports of administrative law in which the issuing entity is the one deciding, while the beneficiary agrees to the requirements established by the

issuing entity, the latter being vulnerable to considerable damage as a result of a judicial solution in the absence of a procedural position coming from the authority that must explain the decision taken.

Not being a part of the case, however, makes it impossible for the authority to state their point of view, to defend themselves, to make requests for production of evidence or to submit other papers than the ones that the court might ask of them during the evidentiary hearing.

Otherwise, the supreme court has already officially ruled, through decision no. 4867/2011, that summoning the issuing entity and their involvement in the case is mandatory, with their argument based on the need to respect the principle of contradictoriality, of the right to a defense, of the right to a fair trial, and to respect the civil procedural norms (Rîciu, 2012).

The legislation has been amended since, but the legal principles remain the same and, thus, the aspects invoked are still valid.

Thus, the presence of this authority during the litigation process proves stringent and mandatory. The question remaining is the capacity which said authority can be given in case the invocation of plea is made during the appeal.

According to civil procedure, beside the plaintiff and the defendant (in our case, the appellant and respondent), the presence of other parties can also be possible, parties who act in the capacity of intervener (Viorel Mihai Ciobanu, Marian Nicolae etc., 2013).

Of course, first there is voluntary intervention (which can be with a personal interest or to support one of the parties), but, at least from a theoretical standpoint, that cannot be possible in a situation such as this one, as the entity who issued the document does not learn or may not learn about the existence of this plea.

Practically, it is very probable that the court shall solicit (or it should be normal for the court to solicit) the documents required for the issuing of the document whose illegality is invoked. The matter may be questionable, bearing in mind the fact that, procedurally, art. 4, which regulates the plea, makes no reference to these aspects, while the provisions of art. 13, Law 554/2004, both in the previous regulations and the current ones, after the instatement of Law 212/2018, strictly refers to action in an administrative court, not to the situation of plea of illegality.

The party whose interest is maintaining the legality of the document may find themselves in the situation where they do not have the means to defend their point of view, given that the issuing entity is not a party in the case and the case file lacks the documents required for the issuing of said individual administrative document. In reality, without checking them, it is practically impossible to establish the legality or illegality of this document.

If the court does however formulate a request towards the issuing entity to release the documents that were needed for the issuing of the administrative document in question, we must ask ourselves what the next step will be in said litigation.

The issuing authority can write a request of intervention (with a personal interest or to support one of the parties). As the issuing entity of the document, it would be normal for them to have the possibility to defend themselves and the legality of said document, but, according to art. 62, par. 2 of the C. Civ. Pr, "the request can only be made before the court of first instance, before the conclusion of the debates carried out during the trial of first instance," thus, from the very start, in the situation of invocation during the appeal, this sort of possibility does not exist.

The possibility of writing a request for forced intervention on the part of either of the parties ceases to exist as well, because, according to the legal provisions regulating this judicial institution – art. 68, par. 2 of the C. Civ. Pr. – the request "shall be submitted at the very latest until the conclusion of the pre-trials review before the court of first instance," the conclusion of the third-party notice (art. 72 of the C. Civ. Pr. and the next, not admissible during the appeal stage, according to art. 73, par. 2 and 3 of the C. Civ. Pr.) or of the forced involvement ex officio of other persons (art. 78 of the C. Civ. Pr, admissible only before the court of first instance), so an intervention of this sort is excluded during the appeal stage.

The only possibility is to request intervention to support a party found in litigation, which is, however, a matter that depends on the will of the issuing authority. If the authority that has issued the document chooses not to participate in the trial, meaning that they choose not to write a request of intervention, the verification of the document must practically be carried out in their absence as party in the litigation process.

A matter such as this one is, at the very least, problematic, both on an evidentiary level and in what concerns equality of arms, as the beneficiary of the administrative document whose illegality is disputed acts in most situations according to the instructions given to them during the process of fulfilling their request to issue the document by the issuing authority themselves.

It is obvious, thus, that the legal principles and regulations of equality of arms and of the right to a fair trial are infringed upon, given that, for this party, there is suddenly a completely disadvantageous situation which cannot be answered with any procedural means.

We should also not neglect art. 1, index 1 of Law 554/2004 (adjacent to art. 22, par. 3 and art. 78 of C. Civ. Pr.), according to which "when the judicial report submitted to trial requires so, the court of contentious administrative matters shall communicate to the parties the necessity to introduce another

person to the trial, such that they may discuss it. If none of the parties solicits the introduction of the third party and the court believes that the cause cannot be resolved without the participation of the third party, the court shall deny the request without proclamation during the first instance."

The text of the special legislation does not specify the time limit until which the court may decide this, but the common law in the field is and shall remain the Code of Civil Procedure, where we can deduce that we are, in fact, in the situation where the deadline shall always be during the first instance.

Otherwise, a different solution is difficult to understand, given that the active role of the judge and the force that the lawmaker awards their power of assessment is being put into question, "including in what concerns concentrating all efforts to correctly and comprehensively establish the procedural framework," a procedural framework which, evidently, must be correctly established during the first stage of trial, before the court of first instance, according to RCC Decision no. 1567/2010 (Bogasiu, 2015). The solution found by the court is, usually, cassation with a referral for the very reason of setting in order these procedural aspects and of establishing the correct procedural framework (Bogasiu, 2015).

The interpretations found in the literature for these normative provisions all refer to those contained in art. 78 of C. Civ. Pr, which mandatorily entails the existence of litigation in its first stage of trial, of first instance (Bogasiu, 2015).

Practically, the only procedural form through which a third party can be introduced as a party to a trial in the appeal stage is voluntary intervention in order to support an existing party, where they must begin addressing the case in the stage that it is in, as it also depends on the procedural position of the party that it supports, both conferring a completely inferior position, from a procedural point of view, to this type of intervener.

If not and in the hypothesis set forth through the supreme court's solution, if the issuing authority does not write said request of intervention, they cannot be brought into the case in a correct manner, they do not have any capacity, and the party that avails themselves of the supposed illegal administrative document does not have the possibility to defend themselves correctly.

There is no other possibility of extending the procedural framework during the appeal, which can, evidently, lead to grave issues concerning the right to a fair trial.

2.4.3. The problem of evidence

Another matter is that of evidence during this procedural stage, as any other form of evidence except for documents is not admissible in the appeal stage of trial. Of course, after cassation, regardless if the appeals court retains the case or if they refer it back to the previous court, according to Decision no.

14/2013 of the HCCJ, made during the appeal in the interests of the law, other types of evidence can be brought forward, including expert evidence, an aspect supported by some authors with a general application (Tăbârcă, 2014). The proclamation of the decision during the appeal in the interests of the law that we mentioned clearly indicates that this solution exclusively applies to cases started before Law no. 202/2010 came into force, and thus we have here a special hypothesis that cannot be theoretically extended to other iterations of litigation.

Regardless of this aspect, in what concerns invoking the plea of illegality when challenging the standing order during the appeal, this can be done even before the court voids the decision, in which case, from a procedural standpoint, an interesting and complicated situation emerges.

As the decision from the court of first instance has not been analyzed in any way yet, and was thus not voided either, we find ourselves faced with the hypothesis specified in art. 492 of C. Civ. Pr, and, thus, new evidence, other than documents, is not admissible in order to verify the legality of the administrative document.

However, there are frequent situations in what concerns the analysis of the legality of an administrative document in which the introduction of new evidence other than documents (most frequently, assessment from an expert) is necessary.

Consequently, the situation is especially difficult for the court, because, in order to correctly establish whether said document is legal or not, in the event that the gathering of evidence that exceeds the normal framework of the appeal is mandatory, the only possibility it has to find the truth is to refer the case to a first instance trial, which is only possible before the plea is tried (as it is not, in itself, a reason for appeal), stating the reasons behind this decision which are strictly connected to the submitting of evidence.

However, this voids the very solution found by the Supreme Court in what concerns the possibility of invoking the plea during the appeal of its efficiency.

There are, thus, cases where there are no real means through which the legality of a document can be verified during the appeal stage, in the absence of certain pieces of evidence, which infringes upon basic legal principles, as we have previously shown.

Conclusions

The Supreme Court has resolved this judicial issue in a manner which, of course, aims to support celerity, limiting the time consumed by the referrals of the litigation birthed from the plea, as well as the time needed for the possible challenging of the solution given by the court regarding this plea (Fodor, 2017).

These are, however, aspects that are in conflict, on the one side, with all that the quality of the act of justice means, and on the other, with respecting the

rights of all parties found in litigation or of those who should be parties to the procedures of said litigation.

Without any additional specifications or legislative amendments (which Law 212/2018 did not provide), there are a series of unresolved judicial questions and issues remaining (some of which we have mentioned), compared to which the acceleration of the litigation process may possibly become a meagre consolation, both for the litigants, and for the courts of law.

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