INCIDENCE AND APPLICABILITY OF ADMINISTRATIVE LITIGATION IN THE FIELD OF HIGHER EDUCATION IN ROMANIA

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ABSTRACT. With the entry into force of Law No.1 / 2011 - national education law, with the subsequent amendments, the scope of the documents issued or adopted at any institution of higher education in Romania has diversified. Administrative proceedings find their application in the field of higher education, where the importance of the administrative documents legality control of the issued and / or adopted by people who occupy unipersonal management positions at the university, meaning the collegiate governing bodies is as high. In national court practice, such documents are considered administrative documents. The exception to this rule is the legal documents regulating labor relations, for which the law provides a specific administrative procedure - jurisdictional. On the first two categories, as administrative documents, are applicable provisions of Law no.554 /54/2004 on administrative disputes, as amended and supplemented.

KEY WORDS: administrative litigation, administrative act, university, law, legal system.

1. INTRODUCTION.

In the totalitarian regime in Romania, the administrative proceedings as a whole had been formally disbanded, in reality replaced by an institution that, theoretically admitted the right of a person aggrieved by a public authority to seek annulment of the act and payment of damages, but basically it emptied of content by the philosophy that was placed at the base of regulation - in that time frame, the regulatory concrete manner, by exceptions which, by their number and consistency, had turned into regulations, and regulations in exceptions [1].

The control of legality of administrative acts has found and finds constitutional regulation by adopting Article 126 paragraph 6, thesis 1 of the Romanian Constitution, revised, which states: The judicial control of administrative acts of public authorities, on administrative litigation, is guaranteed, except for those regarding relations with the Parliament and the military command acts. Administrative courts are competent to deal with requests by persons aggrieved by ordinances or, where appropriate, the provisions of the ordinances declared unconstitutional.

In the complex task of organizing and exercising jurisdiction, public administration bodies are born, amended and go out with a variety of legal relationships that are classified according to several criteria doctrine [2]. A first idea to be retained and from which we started this analysis is that according to which the requests for the court are judged in emergency and

with priority in public sessions, in the panel established by law, and decisions are issued and motivated within 30 days after delivery.

The judgment from the first instance may be appealed, within 15 days from notice. In fact, all these aspects are found in the law - frame. The term administration designates an activity that serves a purpose and that is subordinated to someone [3]. Etymologically speaking, the term administration derives from the Latin word administer which means help, minister, and figurative tool. The definitions of the notion of public administration are numerous and diverse in the specialty literature [4], which prompted a renowned author to assert that the administration, generally and public administration, in particular, allows analyzation and description, but does not allow definition [5].

On the other hand, any institution of higher education of state or private is a legal person of public or private law and public utility, part of the national education system, being treated as a public authority, according to Art. 2 letter b) of Law no. 554/2004, which defines public authorities as any state organ or units and assimilates to the public authorities. In the purpose of the enactment mentioned, private legal persons which, by law, have obtained the status of public unit or are authorized to provide a public service, the regime of public power.

Regarding the inclusion of higher education institutions in the category of central or local public administration authorities, should be considered that higher education institutions, whether public or private, benefit from university autonomy, but this principle does not argue their placement on top of the organizational hierarchy of the national education system level equal to the ministry of resort, given the distinction between powers and responsibilities - as a public institution, responsible for the overall substantiation strategy and application of education.

These legal powers assigned to a central organ of public administration, as the ministry of resort, which means that that higher education institution are considered inferior to the respective ministry. In the same order, according to the dispositions of art. 116 of the Constitution of Romania, the ministries are subordinated to the Government, and in the field bodies specialized the autonomous administrative authorities can only be contained, which lie just under the overall control of Parliament. Therefore, a higher education institution, public or private, cannot be included in the category of autonomous administrative authorities, as the administrative acts they issue are the consequence of a delegation of powers, and not it's investing with the right to work under a public power regime, at the entire national education system level.

The consequence of the above statements is that any higher education institution does not meet the requirements imposed by the legislature to be classified as a body of central public authority but as a local public authority. I made this statement with reference to the provisions of art. 10 para. (1) of Law no. 554/2004 [6], which establishes for determining the competent court material, two criteria, namely: rank of the issuing authority or, where appropriate, conclude the administrative act before the Court, in the public administration system and the value criteria.

Basically, the court vested with solving an appeal against an administrative act issued / adopted at the level of higher education institutions will examine the content of the application of summons, will ascertain whether it meets the requirements of the provisions of art.194- 197 of the new Code of Civil Procedure regarding the claim for suspension of execution of the challenged administrative act and under the provisions of article 202 paragraph 1 of the new Code of Civil Procedure and, given the provisions of paragraph 3 and art.180 paragraph 5 of article 201 of the new Code of Civil Procedure, will have notice of the summons to the

defendant, putting them to submit the claim for suspension of the contested administrative act, within 10 days after notice of the summons. The legal term is a term of 10 days of decay, its failure by defendant (respondent), takes away the opportunity to invoke exceptions and to present evidence.

Further, the same court shall order, by resolution, the communication of the contestation by the applicant (appellant) in which the conditions stipulated by the provisions of article 201 of the new Code of Civil Procedure shall submit a response. In the case in which, the formulated appeal, requesting the suspension of the contested administrative act, the president of the court, through the resolution, will establish the first settlement within for this complaint (petit), with notification of the parties.

Also, given the provisions of Article 131 paragraph 2 of the new Code of Civil Procedure, the same court, ex officio, verifies and determines whether it has general, territorial and material jurisdiction to solve the case, according provisions of article 95 paragraph 1 of the new Civil Procedure Code, in conjunction with the provisions of article 8 and article 10 of Law no.554 / 2004 on administrative litigation, as amended and supplemented. In the event that the claim for suspension of the contested administrative act is in trial they will have regard the provisions of article 14 and 15 of Law no.554 / 2004 mentioned above.

2. THE CASE WELL-ARGUED AND IMMINENT DAMAGE

The well-argued case consists in the fact that, from the administrative act, filed and contested, resulting clues and evidences regarding the illegality of the contested administrative act and. Regarding the imminent loss, if proven, must be shown and proven if, by the measures taken the appellant's interests were affected. Therefore, the interpretation of article 14 paragraph 1 of Law no.554 / 2004, in order to suspend enforcement of a challenged administrative act, several cumulative conditions must be fulfilled: in addition to achieving the preliminary procedure, the existence of a well-argued case and imminent damage which has occurred, so it can be prevented.

Therefore, the provisions of article 14 of Law no.554 / 2004 regulate the suspension of the contested administrative act, the text of paragraph 1 of this law, establishing the necessary conditions. In the legal sense the well-argued cases are those justified circumstances related to the facts and law which are likely to create serious doubt about the legality of the administrative act concerned and imminent damage consists of future and foreseeable material injury, as appropriate, the predicted serious disruption of the functioning of a public authority or a service, as provided in Article 2 lit. ş) of Law no.554 / 2004.

In the same line of thought, Article 2, letter t) of Law no.554 / 2004 defines the term of well-argued cases, in the context of Law no.554 / 2004, as follows: circumstances related to the facts and law which are likely to create a serious doubt on the legality of the administrative act. Therefore, in particular, in support of the application for suspension of the contested act, the reasons invoked by the applicant (appellant) should not address issues related to the merit of the cause and be likely to create serious doubt on the legality of the administrative act, to circumscribe to the notion of well-argued case, stipulated by law.

Even if the suspension of the contested administrative procedure is a summary procedure, in which we only verify the appearance of law, it is required by fulfilling the conditions in which it can be disposed. Per a contrario, the respondent (defendant) must prove that it is not justified

in fact and in law, the suspension of the contested administrative measure, that the conditions set by the provisions of article 14 - 15 of the Law no.554 / 2004 are not fulfilled in the sense that:

a) there is no well-argued case, as long as, for example, the challenged administrative act does not target the individual contestant. The well-argued case cannot be argued on the grounds of aspects related to the legality of an act if it aims the fund of the administrative act, which is analyzed only in an action for annulment.

Until cancellation by a competent court of the administrative act, it enjoys a presumption of legality and the Supreme Court practice is constant in this regard. Otherwise, one would anticipate the given solution on the merits, reaching to a prejudge of the fund, which would be contrary to the provisions of article 14 of Law no.554 / 2004. Suspension of administrative acts is and should be, in fact, an exceptional situation that occurs when the law provides, within the limits and conditions expressly regulated by the decision of the High Court of Cassation and Justice, Contentious-Administrative Section no .2447 / 11.05.2007 [7] and the Decision of the Constitutional Court nr.257 / 27.10.2006 [8].

b) there is no imminent damage that would be required to be prevented.

c) there isn't an overriding public interest, to seriously disrupt the functioning of the public authorities or service, the more, that the measures adopted by the challenged administrative act can be of an organizational nature. Therefore, it is necessary to prove, in order to establish the fact that enforcement of the administrative act has not produced and will not produce imminent damage to the assets of the applicant, by seriously disrupting its activity, from the enforcement of the administrative act.

The mere invocation of reasons of fact and of law that support the alleged illegality of the administrative act, reasons that to be verified require research merits of the case, does not create a reasonable doubt and does not rebut the presumption of legality. Proving the existence of one of the conditions is not sufficient for suspension, as long as the second condition is not met, given to their cumulative character.

If the dispositions whose suspension in terms of execution, is requested, do not circumscribe to the concept of administrative act in the meaning of the provisions of Article 2 paragraph 1, letter c) of Law no.554 / 2004, it may not be subject to suspending the application founded on Article 14 of the same law. Therefore, if the conditions stipulated by article 14 paragraph 1, Article 15 of Law no.554 / 2004 are not met, the complaint filed by the applicant will be retained as not founded and must be rejected. Also this complaint should be dismissed by invoking the provisions of Article 2 paragraph 1 and a) of the Law no.554 / 2004, which states: For the purposes of this law, the terms and expressions have the following meanings:
a) the injured party - any natural or legal person or a group of individuals holding certain private subjective rights or legitimate interests harmed by administrative acts; under this law, shall be treated as the injured party and social organizations claiming harm of a public interest by the contested administrative act.

The decision of the court can comprise as reasoning the fact that, in accordance with article 14 paragraph 1 of Law no.554 / 2004, in duly justified cases and to prevent an imminent damage after notification as provided by the provisions of art. 7 of Law no.554 / 2004 of the public authority that issued the challenged administrative act or the superior authority, the injured person may request the competent court to order the suspension of the unilateral administrative act that, until the court decision. Therefore a first requirement of this exceptional

measure of interruption of the the effects of the challenged administrative act, it is to be in the presence of such an act.

The administrative act enjoys the presumption of legality which, in turn, enjoys the presumption of authenticity and truthfulness, which is the principle source of the execution of the office, representing an unilateral administrative act enforceable. The complainant must be a person injured in the legal sense mentioned above, which in Article 2 lit.a0 stipulates that each person that has this quality is a holder of a right or legitimate interests, harmed by a public authority through an administrative act. In the case of administrative acts, legality means the recognition of a valid character of the acts and effects up to the time of cancellation, based on the presumption of legality, even if it benefits from the public authorities discretionary power cannot ignore the law enforcement whose organization must achieve.

Regarding the condition of the well-argued case, the frame - law does not contain express provisions in this regard, but the enforceability of the office of the administrative act requires the existence of a strong doubt on the presumption of legality. The existence of well-argued case does not require the submission of evidence of obvious illegality, because such a requirement would be tantamount to prejudging the interpretation of the case merits. The circumstances likely to create a strong and serious doubt on the legality of the challenged administrative act, given that the fund cannot be attacked in procedural stage - fund, substantive issues can arise at least in the apparent inconsistencies of the defendant's legal reasoning. That is, the well-argued case may result not only of simple assertions of the applicant, but also from the legal arguments presented and summarily tested, apparently valid in violation of a procedure, failure to state reasons for a decision of enforcement of the primarily administrative act, by nature creates that serious doubt..

3. THE EXCEPTION OF ILLEGALITY

The most famous exception that may be invoked in administrative proceedings is the exception of illegality, in which case the competent court, before which arose this exception, will notice and will retain a reasoned ruling, binding, if it targets an administrative act, where the resolution depends on the merits of the objections raised. This type of exemption is governed by the provisions of Article 4 of the Law no.554 / 2004, which states that the legality of an individual administrative act, irrespective of the date of issue, can be searched at any time in a process, by way of exception, ex officio or at the request of the interested party. For the exception of illegality to be admissible, it must fulfill several conditions: to have a case pending, this exception to refer to verifying the legality of a contested administrative act and the challenged administrative act to be unilaterally with individual character.

As for unilateral administrative acts with normative character, the plenary of judges of Administrative and Fiscal Division of the High Court of Cassation and Justice, met on 28 September 2008 adopted a solution for principle and unifying of jurisprudence according to which the plea of illegality is admissible on unilateral administrative acts with normative character under Art. 4 of Law 544/2004, as it was amended by Law no. 262/2007.

Invoking the exceptions is not prescribed as a means of defense, and in this case, the legality of an individual unilateral administrative act, irrespective of the date of issue, can be researched at any time in the process, and even in appeal. The legislature had in mind when invoking this exception, also the effects it can produce, which are specifically covered by the provisions of art. 4 para. (3) of the Administrative Litigation Law, which provides that where the

illegality of the individual administrative act was found, the court before which the objection of illegality was raised will hear the case, notwithstanding the illegality of the act which was found.

Pursuant to article 4 of the Act: (1) The legality of a unilateral administrative act with individual character, regardless of the date of issue, can be searched at any time in a process, by way of exception, ex officio or at the request of the interested party. In this case, the court, finding that solving the dispute depends on the administrative act, refers the matter, through a motivated conclusion, to the competent administrative court and suspends the case; the interlocutory order of the administrative court is not subject to appeal, and the conclusion rejecting the request for referral may be challenged only on the merits of the case. Suspension of the case is not available when the court before which the exception of illegality was raised is the competent administrative court to resolve or when the plea of illegality was raised in criminal cases.

(2) The administrative court shall determine, by urgent procedure, in public session, summoning the parties and the issuer. If the objection of illegality concerning a unilateral administrative act issued before the entry into force of this law, the causes of illegality are to be analyzed by reference to the applicable legal requirements when issuing the administrative act.

(3) The solution of the administrative court is subject to appeal, stating within 5 days of communication and has emergency judging and priority.

(4) If the administrative court found the illegality of the act, the court before which the exception was raised will hear the case, notwithstanding the act which the illegality was found.

The provisions, express and unequivocal of art. 4 para. 1 of Law no. 554/2004, as amended by Law no. 262/2007, and art. II par. 2 final thesis of Law no. 262/2007 regarding the unilateral administrative act with individual character issued before the entry into force of Law no. 554/2004 have been declared inapplicable by the decisions of High Court of Cassation and Justice-Department of Administrative and Fiscal through the effect of applying the principles of European law in purely domestic cases.

4. CONCLUSIONS

Therefore, litigation, during which the provisions of Law no.554 are / 2004 on administrative litigation, as amended and supplemented, are subjected to a jurisdictional double degree, and special procedural rules mentioned under this act. Recognition of the doctrine of illegality exception occurred since the interwar period, and legislative consecration was performed by Law no. 554/2004 and subsequent Law no. 262/2007, being a controversial institution of modern administrative law

The specific legal regime of this type of exception is known, and therefore it has found its regulation by the Law no.554 / 2004., which is where, otherwise this exception belongs. Normative administrative acts cannot form the subject of the objection of illegality. The judicial control of administrative acts with normative character shall be exercised by administrative courts in the action for annulment. With respect to the competent court disputes concerning administrative acts issued or concluded by local and county authorities and those concerning taxes, contributions, customs duties and accessories thereof up to 1,000,000 lei shall be settled in fund administrative and tax courts, and those concerning administrative acts or concluded by government, as well as those regarding taxes, contributions, customs duties and accessories thereof greater than 1,000,000 lei shall be settled in polling administrative litigation and fiscal

courts of appeal, where the special organic law provides otherwise. Therefore, the specific disputes that take place between individuals or legal entities and public administration determines necessarily the existence of mandatory rules on jurisdiction of the administrative courts.

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