

ABSTRACT
DOCTORAL THESIS
DECLARATION OF THE ADMINISTRATIVE ACT'S UNLAWFULNESS
BY WAY OF EXCEPTION

Keywords: principle of legality, principle of legal certainty, means of defense, indirect control of administrative acts, statute of limitations, inadmissibility, unenforceability, individual administrative act, inter partes effects

This work addresses the scenarios in which the illegality of an administrative act is judicially verified and determined through means other than the filing of a cancellation request, with a particular focus on the incidental mechanism provided by Article 4 of Law no. 554/2004. The declaration of the illegality of an administrative act by way of exception is not a foreign subject to doctrine, being a recurring topic before national judges. The choice of theme and the relevance of this research are justified in relation to the evolution of judicial perspectives, changes in the jurisprudence of the High Court of Cassation and Justice and the Constitutional Court, as well as legislative amendments affecting the fundamental institutions of administrative litigation, which have shaped the legal relationship between individuals and public administration, particularly when based on an administrative act issued by the executive power. Practical questions and situations, especially regarding court rulings that deemed the exception of illegality inadmissible for various reasons (exceeding the deadlines for direct action, the legal nature of the contested act, the procedure or procedural stage in which it was invoked, the court's jurisdiction to resolve it, etc.), have demonstrated that there are still aspects to be explored.

This method of challenging the legality of an administrative act by way of exception involves the following coordinates: (a) it exclusively concerns individual administrative acts, expressly excluding normative acts; (b) it can be raised by any party, including ex officio by the court; (c) it can be invoked in any type of litigation, regardless of the procedural stage, including during appeal; (d) it is adjudicated by the court vested with the merits of the case where the exception was raised, even if that court is not competent to rule on the act in the context of an annulment action; (e) the resolution of the case on the merits must depend on the administrative act; (f) a decision admitting the exception results in a determination of illegality by interlocutory judgment, which can be

appealed along with the merits, or by court ruling, and the case will proceed without regard to the illegal act. From these, a functioning mechanism can be deduced: the illegal administrative act is not directly examined, but its illegality is relevant to resolving the claims before the court. In other words, the illegality of the act will permeate the process, "contaminating" in some way the claims or defenses to which it is connected.

Beyond the express conditions mentioned in the legal text—which, at first glance, do not seem particularly problematic—the appeal of the exception of illegality lies in the legal framework that legitimizes its application. The indirect control of the administrative act has affected not only the relationship between individuals and public administration but also the relationship between the latter and the judiciary, the High Court of Cassation and Justice, and the Constitutional Court. Long before 2004, when it was expressly regulated in the Administrative Litigation Law, this mechanism was always at the intersection of the principle of legality and the principle of legal certainty. This particular characteristic of the provisions of Article 4 of Law no. 554/2004 has been the "red thread" of the entire work.

These two fundamental values are constantly encountered in all areas of discussion in this work: from the very legal foundation that legitimizes it, to the procedural premises in which it can be raised, the specific procedural rules it imposes, the court competent to analyze it, and the decisions it can render, as well as the effects that the court ruling produces in the legal order. Regardless of the subject addressed, the explanations boil down to balancing, depending on the concrete situation, in favor of one of these two principles. Alternating between divergence and complementarity, either legality or security has justified one form or another of the text of Article 4 of Law no. 554/2004 but, more importantly, has influenced how these provisions can be interpreted.

Thus, although the themes of the research are (also) traditional concerning the procedural and material legal regime of the mechanism provided by Article 4 LCA, they have been placed in the context of the principle of legality and the security of legal relations. Through a more extensive approach to its legal nature, we have tried to identify the issues it involves and propose a solution. The purpose of the work was to offer a systematization of all the particularities of this judicial technique and how, ultimately, they reflect the contradiction and/or cooperation between justice (associated with legality) and peace (seen as an equivalent to the security of legal relations).

Although this conclusion is evident at first glance in the court procedure of the exception of illegality, some of its conditions of application have oscillated between radically different positions (for example, those related to the legal nature of the act that can be the subject of the exception or those related to the court competent to judge it). The recurrent changes in the legislator's perspective raised a question mark and prompted research into the historical evolution of each of the conditions of admissibility and the reasoning behind their establishment. Therefore, without understanding the elements that built the foundation of the exception of illegality, any explanation of its legal construction would have been fragile and incomplete.

Naturally, the research was structured starting with the legal nature of the exception of illegality (**Part I**). At this stage, we aimed to trace the landmarks of this legal institution by analyzing how it has transformed and reinvented itself over time, observing how faithfully it has remained to the original idea of the "exception of illegality" and how the "legality-legal security" binomial has consistently influenced its coordinates. A plan of the foundations of this technique of indirect verification of the legality of an administrative act also required a radiograph of the conditions for invoking it from the perspective of the procedural means provided in the Code of Civil Procedure, as well as an identification of the overlaps and differences with other similar procedures in which a legal act is contested. Therefore, in **Chapter I**, we established the foundations of this legal institution, determining its coordinates within contentious procedures and, at the same time, the type of procedural means it falls under (a true lawsuit or a procedural defense). In **Chapter II**, we highlighted its landmarks in relation to the annulment action, the exception of unconstitutionality, and the exception of nullity of the civil legal act.

An analysis of the legal basis of the exception of illegality began with a review of the influences that legality and legal security have, in general, in the area of administrative acts litigation. The tension between legality and legal security, public interest and private interest, justice and peace is felt throughout the entire field of administrative law, especially concerning the conditions for challenging an administrative act, even more so as the prevalence of public interest over private interest or its exorbitance compared to the civil act are basic rules of this branch of law.

Thus, the principle of legality, recognized at the European and national levels, characterizes not only the relationship between the administrative act and the law but also the relationship between the judge and the supremacy of the law. The administrative act must align with the legal

norm, and a deviation from its rigors opens the way for its revocation or judicial removal of what is non-compliant. The judge, in turn, is subject only to the law, and the justice he administers is also carried out in the name of the law. Specific to administrative litigation, this constitutional rule translates as follows: "the judge is not subject to an illegal administrative act." Therefore, the same imperative that imposes the strictness of the law on the executive branch's activities also guarantees corresponding control mechanisms, including by resorting to judicial bodies. Legal security aims to protect citizens against any form of abuse by public authorities (legislative, judicial, or executive). Maintaining a climate of stability is ensured both by a standard of quality and precision of administrative acts and their rules of challenge, as well as by maintaining the stability of individual legal situations. In this latter situation, the application of the principle implies a judicial review conditioned by the existence of a harm, the mandatory filing of a preliminary procedure, and the conditioning of the annulment request and the awarding of damages by compliance with statute of limitations and preclusion periods.

The conclusion reached was that when public administration enters into an administrative legal relationship with an individual, it will have the responsibility to comply with all legal rules existing at the time of issuing the act, as conformity with the rigors of the norms creates in the person of the act's recipient and third parties to this act the expectation of maintaining this legal relationship over time. The passage of time should provide stability to an administrative legal relationship. The risk of annulment of the act cannot loom forever, especially in the case of acts that establish rights, even if they are illegal. But the mere issuance of the administrative act does not exempt it from any possibility of having its compliance with the law verified. The same principle of legality will allow, as the case may be, the revocation or annulment of the act, to bring it, when it has deviated from the legal path, back into the legal norm's mold or, if that is not possible, to remove it from the legal order. Stability and security must thus give way to the power of the law.

Security prevails over legality in the case of an annulment action by establishing much shorter deadlines for administrative litigation compared to those in common law, at the expiration of which the administrative legal relationship enjoys the protection of stability. The administrative act will gain an authority similar to that attributed to court judgments, and hence stability, only when the deadlines for challenging it have expired, and the act can no longer be brought before the judges. Within these deadlines, legality prevails. However, to what extent can legal stability

be protected if it has been generated by an illegal act of public administration? Although the statute of limitations for annulment action has expired, its objective illegality cannot be overlooked, as the passage of time does not correct the act's irregularity. And when such an act is opposed in litigation to another individual, the principle of legality does not allow the recognition of effects in such a case: the illegal administrative act does not acquire absolute immunity, as it can be verified by way of exception.

The relationship between the principle of legality and the security of legal relationships in administrative litigation has thus brought the exception of illegality to the forefront. The articulation of its foundations began with the provisions of Article 4 LCA, which justify its presence among the procedural means of challenging the legality of an administrative act. Before its express regulation by Law no. 554/2004, the exception, although representing a procedural means of removing the effects of an illegal administrative act, did not have a *de lege lata* procedure that outlined the conditions for its invocation. The absence of strict regulatory norms ensured its survival throughout all political changes, as it was anchored in the need to respect the principle of legality, particularly reflected in the principle of the hierarchy of legal norms.

A product of the repressive judiciary, it was born jurisprudentially as a tool allowing the judge to remove a regulation (normative administrative act): the judge, without a regulated procedural instrument, applied the principle of the hierarchy of legal norms, comparing the lower norm with the higher one. Since it did not affect the act's place in the legal order, being only a defense of the individual against the norm issued by the public administration, the court, based on the principle that "the judge of the action is also the judge of the exception," had the competence to analyze the illegality of an administrative act. Later, it extended to individual administrative acts, had timid mentions in some normative acts, and began to raise questions about its relationship with direct action.

Its historical trajectory allowed for a clearer observation of its contours, drawn by concepts such as the separation of powers, the hierarchy of legal norms, the legality of public administration activities, the relationship between law and administrative acts that implement it, the limits and effectiveness of the fundamental right of access to an administrative litigation court, the clarity and coherence of legal rules, the desideratum of maintaining the stability of individual legal situations. Among all, legality stood out, as this principle justified (and explained) its functioning mechanisms even when no norm translated it into domestic law. Therefore, the immediate

consequence of this conclusion is that the repeal of Article 4 of Law no. 554/2004 would not equate to the abolition of indirect control over the individual administrative act, a control expressly guaranteed by Article 126(6) of the Constitution (such a repeal would be unconstitutional). Moreover, fixing legality as the fundamental principle of the exception of illegality allows another conclusion that could circumvent the unjustified restriction of Article 4(4) of Law no. 554/2004 concerning normative administrative acts. The judicial image of the exception—conceived to apply the principles of the Kelsenian pyramid—can be revitalized into a jurisprudential instrument through which the judge checks the legality of the rule he is called upon to apply and removes it from resolving the case if it is found to be non-compliant or incompatible with higher legal norms. The draft Administrative Procedure Code seems to offer a legislative solution in this sense, extending the control provided by Article 4 of Law no. 554/2004 to normative administrative acts, which will be judged in accordance with the principle of specialized jurisdiction. For the latter, the exception will (again) have the nature of a preliminary question.

Placed in the broader context of administrative litigation—where the jurisdiction privilege imposes stricter rules than those provided by civil procedural law—and examined through the lens of Constitutional Court decisions, the technique of incidental challenge provided by Article 4 LCA has also reflected another foundation that strengthens its position, namely the security of legal relations. The same principle that seems to threaten its rules—especially imprescriptibility—comes with a motivation applied since Roman law *quae temporalia sunt ad agendum perpetua sunt ad excipiendum*. What is prescriptible by action is not prescriptible by exception, as the latter is a measure of protection, a defense for legal subjects against whom an illegal administrative act is opposed—a defense that came as a reaction to a claim or assertion based on an illegal administrative act. Consequently, legal security is not affected as the one invoking the exception has a defensive, not offensive, attitude towards the administrative act.

The doctrine that dealt with it (either specifically or in the context of other legal topics) defined the exception of illegality by referring to the famous definition offered by Tudor Drăganu, as a means of defense. Examined closely, the author's reaction to the exception is not purely defensive, rather taking the form of a counterattack. The court is explicitly vested with a request to check the legality of an individual administrative act, a request that can only be discussed under adversarial conditions (with the mandatory involvement of third parties in the litigation—the issuing public authority and the beneficiary of the contested administrative act), with evidence

typical of an annulment action, and the court's verdict is included in the judgment and enjoys the authority of *res judicata* for the participants in that litigation. Compared to an annulment request, the exception of illegality, although it is also directed against the act, does not confront it directly, addressing its illegality only incidentally, with a (more) reduced degree of aggressiveness. Outside the litigation, the administrative act enjoys immunity. The metamorphosis of this mechanism over time has also influenced the degree of overlap with procedural templates. From complete identification with a defense on the merits to the tendency to transform into a lawsuit, three periods are defining for this "procedural" journey of the exception: (a) from the beginnings of the exception until its express regulation by Law no. 554/2004 (the classical period), when it was qualified as a defense on the merits; (b) from 2005 to 2013, from the entry into force of the Administrative Litigation Law until the amendments made by Law no. 76/2012 (the modern period) when, once regulated, it acquired an atypical legal nature, being a hybrid between a defense on the merits and a lawsuit; (c) the period after this latter moment, up to the present (the postmodern period), remaining a hybrid procedural mechanism, a means of defense that borrows from the characteristics of a lawsuit in administrative litigation.

Analyzing closely the procedural means provided by the Code of Civil Procedure, we could conclude, finally, that the notion of defense does not completely describe it, and framing it as a lawsuit is not possible given its effects; we accepted that, in reality, it is a hybrid procedural means that borrows both from the characteristics of defenses and from those of an annulment action.

Viewed from the perspective of the principle of legality, which legitimized its application from the beginning, the exception of illegality was intended to be not just a simple defense on the merits that the party can use but a form of paralyzing an abuse by the public administration, respectively, an instrument through which the judge, called to apply an illegal administrative act in a concrete case, can remove its application without affecting the security of civil legal relations. Thus focusing on the administrative act and its scrutiny, the exception of illegality is a defense directed against the individual administrative act and the illegality that contaminated it. The one invoking it does not strictly defend himself against a party to the litigation (although, ultimately, the purpose is to prove the unfoundedness of the latter's assertions) but against a violation of the principle of legality that took the form of an administrative act. For this reason, even the judge, who is subject only to the law, is allowed to raise this procedural mechanism.

Without Law no. 544/2004 establishing an option between the direct path of challenging the administrative act and the indirect one, we observed a frequent practice of courts creating obstacles to the mechanism of the exception. For example, on the grounds that the injured party either already requested annulment and the request was definitively rejected or missed the deadlines for challenging. Such limitations do not exist *de lege lata*. The tension between the exception of illegality and direct action was not found in the relationship with the exception of unconstitutionality or the exception of nullity of the civil legal act: it lost its symmetry with the former, as constitutional control is exercised over laws and ordinances (norms), while Article 4 of Law no. 554/2004 is limited to individual administrative acts; it does not overlap with the latter, having a different object, but the provisions of common law on nullity can apply in addition, with the help of Article 28 of Law no. 554/2004, in the case of the exception of illegality.

Setting the landmarks of the exception of illegality by establishing its legal nature, defining the terms of its relationship with direct action, with the exception of unconstitutionality, or the exception of nullity only slightly opened the way to the multiple legal issues that this procedural mechanism can raise. The particular element of indirect control is that it delimits two "processes": the one in which the exception is raised and the actual process of the exception, about which we discussed in **Part II** of the work regarding the legal regime of the exception of illegality. In the **first chapter**, we addressed the procedural premises for invoking the exception of illegality: under what conditions it can be invoked, in what type of process and at what stage, who can claim the illegality of the act, and the legal nature of the act that can be the subject of the exception. Then, in the **second chapter**, we explained the specific rules for judging the exception of illegality: which court is competent to judge it, what is the condition for it to be useful in the process, what kind of procedural framework the exception imposes, and what specific evidence it requires. **The third chapter** dealt with the merits of the exception, while **the fourth chapter** addressed the possible solutions to the exception of illegality, both substantive and procedural.

At first glance, from a procedural point of view, the exception of illegality does not seem to leave much room for discussion: it can be invoked in any type of process, at any time, being available to any interested party, including the court, and concerns exclusively an individual administrative act. However, court practice has shown that these can be interpreted differently, often altering the foundations of the incidental mechanism of verifying the legality of the administrative act.

Depending on the court competent to judge it, it was classified as both a preliminary issue (when it was necessary to refer the competent administrative litigation court) and a prior issue (the current form of the text, when the competence belongs to the judge before whom the exception is raised). The issue related to the court competent to judge it has also attracted the attention of the Constitutional Court, which, however, due to more practical reasons related to the congestion of the courts, preferred the compromise of sacrificing the specialization of the court competent to exercise indirect control of administrative acts in favor of easing the burden on administrative litigation courts. The draft Administrative Procedure Code seems to return the competence to administrative litigation courts regarding normative administrative acts, currently excluded from the subject of the exception of illegality. The legal nature of the administrative act that can be censored under Article 4 LCA has also been a subject of debate in doctrine, but the new proposed measure seems to calm the waters (at least for a while).

Although the controversy regarding the conditions of invocation was more heated concerning the object or the time limit for raising the exception, the others were no less captivating. Especially noteworthy was the newer trend of public administration, which, trying to avoid exceeding the deadlines provided by Article 1(6) of Law no. 554/2004, invokes the illegality of its own act (which it can no longer revoke) through the exception of illegality. In this case, both legality and legal security require the admissibility of such a request.

The illegality of the administrative act is relevant only when it causes harm. Therefore, regardless of whether it is a direct control leading to the annulment of the act or an indirect control allowing the court to ignore it in resolving the case, the judge will verify two cumulative substantive conditions: the illegality of the administrative act and the harm caused by this illegality.

Given the court procedure of this incidental issue, but also the condition of its usefulness (a connection with the resolution of the case on the merits), the debate and solution of the exception cannot remain without effects on the legal order, affecting the fate of the administrative act, the outcome of the process in which it is invoked, the parties, the administration, and sometimes, in particular situations, even third parties. Obviously, the strong impact of the exception is attached to the solution of admitting the exception of illegality, but the rejection of the exception as ineffective, inadmissible, or unfounded has its own consequences. The determination of the act's illegality has a visible effect primarily in the process in which it was invoked: the judge will not take the act into account when judging the case.

Recognition of illegality by way of exception does not and cannot aim to annul the act but only to refuse its application in the case. Although they share the determination of an existing illegality at the time of issuing the administrative act, an illegality that produces consequences on the legal order, this determination is not sufficient to equate annulment with the determination of illegality. Although the administrative act is found to be illegal (in whole or in part), being considered inapplicable from the moment of its issuance, the essential difference from the annulment action is that it is preserved in the legal order. However, this objective illegality of the act has an impact on the parties or the public administration. The trajectory of an act that a court has found to be illegal will no longer be the same, even if it is not removed from the legal order: the administrative legal relationship, even if not altered, may become more fragile.

The rejection of an exception of illegality also produces legal effects. If the reason is the lack of a relationship of dependence with the merits of the case, this situation is equivalent to the admission of the exception of illegality, the effect being the same—the judge will not be able to base his solution on the provisions of the administrative act. The difference between the two solutions lies in the presumption of legality of the administrative act. If the administrative act subject to the exception is not useful in resolving the case, it continues to enjoy the presumption of legality (both for the parties to the litigation and for third parties); the court will not be able to invoke the presumption of legality of this administrative act, as it is not relevant to resolving the case. In the case of admitting the exception of illegality, the judge finds that the act is flawed, so the presumption of legality of the administrative act has been overturned between the parties to that litigation. The rejection of the exception for other reasons, whether as inadmissible or unfounded, has two main effects: (a) the act continues to enjoy the presumption of legality; (b) the court will be able to base its solution on the provisions of the administrative act. The rejection of the exception as unfounded does not absolutely mean that the act is legal. As mentioned above, the presumption of legality produces full effects, but it is possible that the parties did not invoke all the grounds of illegality that could affect the act, or these grounds did not cause harm that would lead to the admission of the exception.

In conclusion, in the matter of contentious individual administrative acts, an aggressive annulment action, violating the legal deadlines for annulment and subject to the invocation of the exception of the statute of limitations, will be dismissed without further debate on the act's illegality. Legal security takes precedence. However, within these deadlines, the principle of

legality prevails: the law is above all, including the executive power, and the principle of separation of powers in the state confers on the judiciary the role of controlling the legality of acts issued by public administration. The passage of time, correlated with the inaction of the injured party, builds a climate of legal security. Stability, although tolerating illegality, is preferred to a just war that would allow perpetual direct challenge.

The expiration of the deadlines for filing an annulment request and the stability over time of the administrative act do not constitute a vocation for eternal immutability. The "peace" established can be disturbed by the mechanism of incidental challenge to the legality of the administrative act under Article 4 LCA. For the beneficiary of the administrative act who relied on the finalization of his legal relationship with public administration, raising the exception of illegality will be an infringement of legal stability, as its admission will allow the verification of the legality of the act issued in his favor, even after the expiration of the deadlines established for direct action. From this perspective, legality seems opposed to the security of legal relations, with the former prevailing. But stability is what mitigates the force of the incidental mechanism provided by Article 4 LCA: the act remains in force, the sanction being only its removal from the process. When a third party harmed by this act or the recipient of an unfavorable individual administrative act is the author of the exception, Article 4 LCA involves an overlap of the two principles. Legality allows the challenge of the act outside the legal deadlines, but at the same time, it operates in harmony with the security of legal relations, as it does not allow the illegal administrative act to serve as the basis for claims or defenses submitted for judgment. The exception of illegality is thus an instrument that ensures peace, but a "crooked" peace: on the one hand, because it allows perpetual challenge of an illegal individual administrative act, and on the other hand, because its mechanism is based on a legal fiction, as the court does not annul it, but only ignores it in constructing the reasoning on the merits of the case. In its "imperfection," Article 4 LCA, through all its internal mechanisms, is a compromise agreed *de lege lata* between the two principles.

Where is the mechanism of the exception of illegality heading? The draft Code of Administrative Procedure transforms it into a prescriptible mechanism, and the courts find more and more obstacles to justify a dismissal on grounds of inadmissibility. The public authority "steals" the individual's weapon against illegality, trying to challenge, outside the deadlines, acts that have become irrevocable. Do all these practices fall under the umbrella of concern for legal security? And even if they have this label, we believe that they indicate an alteration of the core and

foundation of this procedural mechanism: a defense against the harmful illegality of an administrative act.

TABLE OF CONTENTS

INTRODUCTION.....	1
PART I: LEGAL NATURE	11
CHAPTER I: TYPOLOGY AND THE PLACE OF THE EXCEPTION OF ILLEGALITY WITHIN	CONTENTIOUS
PROCEDURES.....	12
SECTION 1: LEGAL FOUNDATION.....	12
§1. The Influence of the "Legality-Legal Security" Binomial in Administrative Litigation.....	13
A) <i>Legality and Its Implications on Administrative Litigation</i>	14
1. The Administrative Act and the Supremacy of Law.....	15
2. The Judge and the Supremacy of Law.....	18
B) <i>Legal Security and Its Implications on Administrative Litigation</i>	20
1. The Standard of Quality and Precision of Administrative Acts and Their Rules of Contestation.....	25
2. Maintaining the Stability of Individual Legal Situations.....	30
§2. The Legal Foundation of the Exception of Illegality: A Guarantee of Legality and (/or) a Threat to Security?.....	38
A) <i>From Jurisprudential Construction to Express Regulation</i>	39
B) <i>The Consequences of Founding the Exception of Illegality on the Principle of Legality</i>	43
1. Is There a Right Where There Is No Express Regulation?.....	43
2. Is There a Right Where There Is an Express Contrary Regulation?.....	45
C) <i>The Influence of the Principle of Legal Security on the Exception of Illegality</i>	50
1. <i>Fraus Omnia Corruptit</i>	51
2. <i>Quae Temporalia Sunt Ad Agendum Perpetua Sunt Ad Excipiendum</i>	52
SECTION 2: PROCEDURAL X-RAY OF THE EXCEPTION OF ILLEGALITY: DEFENSE OR COUNTERATTACK?.....	61
§1. A Theory of Offensive and Defensive Procedural Means According to the Code of Civil Procedure.....	63
§2. The Exception of Illegality – A Hybrid Vehicle for Incidental Verification of the Legality of the Administrative Act.....	74

<i>A) The Classical Period – From Jurisprudential Beginnings to the Entry into Force of Law No. 554/2004.....</i>	<i>74</i>
<i>B) The Modern Period – From Express Regulation through Law No. 554/2004 to the Amendments of Law No. 76/2012.....</i>	<i>79</i>
<i>C) The Postmodern Period – From the Entry into Force of the New Code of Civil Procedure to the Present.....</i>	<i>83</i>
CHAPTER II: THE RELATIONSHIP BETWEEN THE EXCEPTION OF ILLEGALITY AND ADJACENT PROCEDURAL MEANS.....	90
<i>SECTION 1: DIRECT CONTROL VERSUS INDIRECT CONTROL: COHABITATION OR INCOMPATIBILITY?.....</i>	<i>90</i>
§1. The Prescriptibility of Direct Action, Inadmissibility of the Exception of Illegality?.....	90
<i>A) A Jurisprudentially Created Inadmissibility.....</i>	<i>91</i>
<i>B) The Incompatibility of Theory with the Legal Foundations of the Exception.....</i>	<i>94</i>
§2. (IM)POSSIBILITY OF INVOKING THE EXCEPTION OF ILLEGALITY CONCERNING ACTS CHALLENGED BY DIRECT ACTION.....	101
<i>SECTION 2: LOSS OF SYMMETRY WITH THE EXCEPTION OF UNCONSTITUTIONALITY.....</i>	<i>105</i>
§1. Legal Nature.....	106
§2. Legal Regime.....	109
<i>SECTION 3: RELATIONSHIP WITH THE EXCEPTION OF NULLITY OF THE CIVIL LEGAL ACT – OVERLAP OR COMPLEMENT?.....</i>	<i>112</i>
§1. A Typology of Nullity in Administrative Law.....	114
<i>A) Application of the Legal Regime of Substantial Nullity.....</i>	<i>115</i>
<i>B) Application of the Legal Regime of Procedural Nullities.....</i>	<i>117</i>
§2. Determination of Nullity by Way of Exception: Civil Law versus Administrative Law.....	121
<i>A) Legal Regime: A Comparative Perspective.....</i>	<i>123</i>
<i>B) Compatible and/or Complementary Approaches.....</i>	<i>127</i>
PART II: LEGAL REGIME OF THE EXCEPTION OF ILLEGALITY.....	129
CHAPTER I: PROCEDURAL PREREQUISITES FOR INVOKING THE EXCEPTION OF ILLEGALITY.....	130

SECTION 1: LIMITS RELATED TO THE SPECIFICITY OF THE PROCESS	130
§1. Compatibility with Procedures Where Judgments Are Made Regarding the Appearance of Law.....	131
§2. Compatibility with Administrative-Jurisdictional and Arbitration Procedures.....	132
SECTION 2: TEMPORAL LIMITS	133
§1. The Foundation of Temporal Immunity.....	134
§2. Definition of the Concept: Imprescriptibility at Any Procedural Stage.....	137
<i>A) Imprescriptibility: Apparent Exceptions</i>	137
<i>B) The Possibility of Invoking the Exception at Any Stage of the Litigation</i>	139
1. Compatibility of the Exception with Appeal and Recourse: The Mandatory Nature of ICCJ Decision No. 36/2017	139
2. Compatibility of the Exception with Revision and Annulment	142
§3. A Different Kind of Temporal Limitation of the Exception of Illegality.....	144
§4. Examination of the Temporal Condition: Consequences.....	149
SECTION 3: LIMITS RELATED TO ACTIVE PROCEDURAL CAPACITY	149
§1. The "Ex Officio" Invocation of the Exception.....	150
§2. Invocation of the Exception by the Issuing Public Authority.....	150
SECTION 4: LIMITS RELATED TO THE OBJECT OF THE EXCEPTION OF ILLEGALITY	152
§1. The Nature of an Administrative Act Subject to Indirect Review by Way of Exception....	152
<i>A) Manifestations of Will by the Administration That Cannot Be Verified Indirectly</i>	153
1. Inadmissibility of Challenging Administrative Operations	153
2. Inadmissibility of Challenging Civil Legal Acts	160
<i>B) Acts Provided by Art. 5 of the LCA and Art. 121 Para. 6 of the Constitution</i>	163
<i>C) Administrative Jurisdictional Acts</i>	166
§2. The Legal Nature of the Administrative Act.....	167
<i>A) The Legal Exclusion of Normative Administrative Acts from Indirect Legality Review</i>	167
1. The Contribution of Jurisprudence: The Jurisprudential Premises of the Exception of Illegality	168

2. The Contribution of the Legislator: Successive Amendments to Art. 4 of the LCA.....	169
3. The Contribution of the Constitutional Court: A Current Contrary to the ICCJ and Doctrine.....	171
<i>B) Its Legal Reality: The Existence of Normative Administrative Acts That Violate the Principle of the Superior Legal Force of Law.....</i>	<i>175</i>
<i>C) Pragmatic Consequences of the Impossibility of Raising the Exception of Illegality Concerning Normative Administrative Acts.....</i>	<i>177</i>
1. Direct Action – A Less Effective Judicial Approach than the Exception of Illegality....	178
2. The Excessive Duration of Litigations.....	180
3. Lack of Harmonization with European Provisions and the Distortion of the Principle of Legality.....	182
<i>D) Possible Solutions.....</i>	<i>184</i>
1. The Option Proposed by the Administrative Procedure Code Project.....	184
2. Application of the Principle of Hierarchy of Legal Norms.....	186
CHAPTER II: SPECIFIC RULES FOR JUDGING THE EXCEPTION OF ILLEGALITY.....	187
<i>SECTION 1: THE COMPETENT COURT TO RESOLVE THE EXCEPTION.....</i>	<i>187</i>
§1. The Evolution of Rules on Competence to Resolve the Exception of Illegality.....	188
§2. The Exception: A Preliminary or Prejudicial Issue.....	192
<i>A) The Judge of the Action is Also the Judge of the Exception.....</i>	<i>193</i>
1. Incidental Mechanism for Verifying the Legality of the Administrative Act.....	194
2. Criticisms of the Solution.....	195
<i>B) The Judge of the Action Is Not Competent to Judge the Exception of Illegality.....</i>	<i>201</i>
1. Prejudicial Mechanism for Verifying Legality.....	203
2. Criticisms of the Solution.....	207
§3. A Possible Compromise Solution.....	208
<i>SECTION 2: THE SPECIFIC PROCEDURAL FRAMEWORK OF THE EXCEPTION OF ILLEGALITY.....</i>	<i>209</i>
§1. Judging the Exception in Adversarial Proceedings with the Issuing Authority.....	210
§2. Judging the Exception in Adversarial Proceedings with the Beneficiary of the Administrative	

Act.....	213
§3. The Situation of the Civil Servant Responsible for Issuing the Act.....	214
SECTION 3: CONDITIONS IMPOSED BY GENERAL PROCEDURAL PROVISIONS.....	216
§1. Written Form.....	216
§2. Justification.....	217
SECTION 4: OTHER SPECIFIC PROCEDURAL RULES.....	218
§1. The Absence of a Preliminary Procedure.....	218
§2. The Obligation to Submit Administrative Documentation.....	219
SECTION 5: THE EFFECTIVENESS OF THE EXCEPTION OF ILLEGALITY.....	220
§1. The Relationship Between Effectiveness and Admissibility.....	221
§2. The Analysis of the Condition of Effectiveness.....	223
<i>A) The Concept of Effectiveness.....</i>	<i>224</i>
<i>B) Criteria for Verifying Effectiveness.....</i>	<i>228</i>
§3. Possible Solutions: Consequences.....	232
CHAPTER III: THE MERITS OF THE EXCEPTION.....	233
SECTION 1: ILLEGALITY DEFECTS OF THE ADMINISTRATIVE ACT.....	233
§1. The Source of Illegality Defects.....	233
§2. The Moment of Invoking Grounds of Illegality.....	235
<i>A) The Imprescriptibility of the Exception of Illegality.....</i>	<i>235</i>
<i>B) The Possibility of Invoking Defects That Are Not of Public Order.....</i>	<i>236</i>
<i>C) The Impossibility of Modifying the Principal Action.....</i>	<i>237</i>
SECTION 2: INJURY TO A SUBJECTIVE RIGHT OR LEGITIMATE INTEREST.....	238
§1. The Interest in Formulating the Exception Versus the Harm Caused by the Illegal Administrative Act.....	239
§2. The Harm Caused by the Illegality of the Administrative Act.....	240
CHAPTER IV: SOLUTIONS REGARDING THE EXCEPTION OF ILLEGALITY.....	241
SECTION 1: SUBSTANTIVE EFFECTS.....	243
§1. The Solution of Admitting the Exception of Illegality.....	243
<i>A) Effects on the Administrative Act.....</i>	<i>244</i>
1. The Administrative Act is Declared Illegal.....	245

2. The Administrative Act is Maintained in the Legal Order	258
<i>B) Effects on the Parties and the Outcome of the Case on the Merits</i>	259
1. The Unenforceability of the Act in the Case Before the Court	259
2. The Consequences of Declaring the Illegality of the Administrative Act by Way of Exception	260
3. A Concrete Assessment of the Solution on the Merits of the Case	278
<i>C) Effects on the Court</i>	278
<i>D) Effects on Public Administration</i>	280
1. Successive Determination of the Illegality of the Administrative Act	281
2. The Judicial Decision Cannot Impose Any Obligation to Revoke on the Public Administration	282
3. The Decision to Revoke the Act – Between the Principle of Legality and the Principle of Legal Security	283
4. Engaging the Responsibility of the Public Administration	288
§2. The Solution of Rejecting the Exception of Illegality.....	291
<i>A) Rejection Due to Lack of Connection with the Merits of the Case</i>	291
<i>B) Rejection as Inadmissible or Unfounded</i>	292
SECTION 2: PROCEDURAL EFFECTS	293
§1. The Court's Withdrawal from the Case.....	294
<i>A) The Need for a Solution on the Merits of the Case</i>	294
<i>B) The Solution Regarding the Exception is Included in the Dispositive</i>	295
<i>C) The Disengagement of the Court</i>	296
§2. The Executory Force of the Judicial Decision.....	297
§3. Res Judicata.....	299
<i>A) The Relativity of the Effects Produced by the Exception of Illegality</i>	299
1. The Distinction Between the Binding Nature and the Enforceability of the Judicial Decision	299
2. The Effects of the Judicial Decision Admitting the Exception of Illegality	301
<i>B) The Consequences of Res Judicata</i>	305
1. In the Case of a Judicial Decision Annuling the Administrative Act	306

2. In the Case of a Judicial Decision Declaring the Illegality of the Administrative Act.....	307
<i>C) Is the Absolutization of the Effects of the Exception of Illegality Possible?.....</i>	<i>310</i>
CONCLUSIONS.....	312