CONSTITUTIONALITY AND REFERRAL IN THE INTERESTS OF THE LAW

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Abstract

Currently, in the Romanian legal system, the judge interprets and adapts law to the actual realities, remedies normative gaps and discovers remedies to inspire the legislator. In this regard, we should emphasize the role of the judicial precedent substantiated by means of the decisions of the High Court of Cassation and Justice, ruled within the referral in the interests of the law, given that, such judgments create general rules of interpretation and application of the legal provisions which generate non-unitary practices. There are situations in which the interpretation of the legal texts, offered by the High Court of Cassation and Justice, is subject to a constitutional review exercised by the Romanian Constitutional Court.

Keywords: *referral in the interests of the law, High Court of Cassation and Justice, source of law, supremacy of the Constitution, interpretation, unitary application, exception of unconstitutionality.*

1. Introduction

Whether and to what extent case-law is a source of law has been and remains a controversial topic. This is also because, generally speaking, a paradoxical situation is quite obvious: on the one hand, the inevitable insufficiency of law and its often delayed reaction to changes in social life requires the contribution of the case-law to the fulfillment, adjustment, update, restriction or extension of its normative position, corresponding to the "reality" or "matter" regulated or which is subject to regulation; on the other hand, in the re-accredited and terminus logic of the separation of powers, the exclusivism of the legislative activity of the Parliament seems to have acquired new accents[1]. Currently, in the Romanian legal system, the judge interprets and adapts law to the actual realities, remedies normative gaps and discovers remedies to inspire the legislator.[2]

Without reference to the obligation provided by art. 124 item 3 of the Constitution of Romania, according to which the judge is independent[3] and is subject only to the law, without being bond to the judgments pronounced in other similar cases by other judges or even by themselves, it is worth noting the role of the judge to cover, by the pronounced judgments, potential legislative gaps, as well as to create *de lege ferenda* proposal in the process of interpretation and application of the law, by cooperating with the legislative power, in the spirit of the principle of separation of powers, to the harmonization of legislation with social realities.

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[1] I. Deleanu, *Construcția judiciară a normei juridice*, „Dreptul", no. 8/2004, p. 12.

[2] S. POPESCU, *Introducere în studiul dreptului*, UNEX-AY-Complex Universitar, Bucharest, 1991, p. 158.

[3] Furthermore, the doctrine showed that: "*In what concerns our country, the revised Constitution of Romania expressly regulates the principle of the independence of the judicial power in relation to the executive and legislative power*" (E. E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p.191).

In this regard, we should emphasize the role of the judicial precedent substantiated by means of the decisions of the High Court of Cassation and Justice, ruled within the referral in the interests of the law, given that, such judgments create general rules of interpretation and application of the legal provisions which generate non-unitary practices.

In accordance with the provisions of art. 126 para. (3) of the Constitution. "The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by the other courts, according to its jurisdiction." The decisions pronounced in the procedure of the referral in the interests of the law are the main way in which the Supreme Court fulfills the constitutional attribution to ensure the unitary interpretation and application of the law. Therefore, the referral in the interests of the law is not only a civil and criminal procedural institution, but, at the same time, is an institution which is legally based on the aforementioned constitutional regulation.

Given the constitutional provision, the legislator shall be bound to regulate in the Codes of civil and criminal procedure, the legal instrument by which the High Court of Cassation and Justice can fulfill its constitutional duty to ensure the unitary interpretation and application of the laws by all the courts of law. The constitutional provision referred to in art. 126 para. (3) of the Constitution is also a guarantee of the fundamental law. Given the principle of the compliance of the entire law with the constitutional regulations, the legislator cannot regulate the material jurisdiction of the Supreme Court without establishing the procedural instrument by which it ensures unitary interpretation and application of the laws by all courts of law. The relevant provisions are found in art. 471 and the following of the Code of criminal procedure and in art. 514 and the following of the Code of civil procedure, the referral in the interests of the law is not a remedy at law with effects on the situation of the parties to the trial, but aims to ensure the unitary interpretation and application of the substantive and procedural laws throughout the country. Therefore, the scope of the legal institution of the referral in the interests of the law is to ensure the unitary observance, at the level of the whole country, of the will of the legislator expressed in the spirit and letter of the law.

The decisions of the High Court of Cassation and Justice – United Divisions, whereby the referrals in the interests of the law are settled, shall be binding and shall be published in the Official Gazette of Romania, part I, being brought to the notice of the Ministry of Justice. The unitary interpretation and application of the matters of law shall be pronounced only in the interests of the law, shall have effect neither on the judgments that have been pronounced differently in the adjudicated matter not on the situation of the parties to the trial. According to the provisions of art. 474 para. 4 of the Code of criminal procedure and to the provisions of art. 517 para. 4 of the Code of civil procedure, the settlement of the legal matters which are judged shall be mandatory for the courts of law. In criminal matters, the decisions whereby the referral in the interests of the law is admitted cannot represent a ground for the exercise of the appeal against enforcement or levy of execution.[4]

The decision pronounced in the settlement of the referral in the interests of the law is part of the category of "norms" of domestic law, therefore it falls under the category of the "*provisions […] of the*

[4] I. Neagu, M. Damaschin, A.V. Iugan, *Codul de procedură penală adnotat. Volumul II. Partea specială,* Edition 2, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2021, p. 341.

domestic law" referred to in art. 148 para. (2) of the Constitution.

The question which arises is whether the decisions pronounced by the Supreme Court in this procedure are formal sources of law. Constantly, in the specialized literature, the term of source of law[5] is defined as being "the forms of expression of the legal norms which are determined by the way of enacting or sanctioning them by the state"[6]

The law provides the mandatory nature of these decisions. The courts must comply with the interpretation of the law rendered by the supreme court, on the contrary, a judgment pronounced in violation of the solutions established by the decisions pronounced in the procedure of the referral in the interests of the law is illegal, with all the consequences arising from it.

In this respect, we appreciate as useful the distinction made in the specialized literature between the sources of law and the roots of the law, which we intend to address in a future study. The obligation established by the law for this category of decisions of the Supreme Court confers them the quality of source of law. On the same grounds, the decisions of the Constitutional Court, which according to the provisions of article 147 para. (4) of the Constitution "are generally binding and have power only for the future", are also a source of law.

2. The Principle of the Supremacy of the Constitution

The concept of supremacy of the Constitution is normatively expressed by the provisions of art. 16 para. (2) of the Constitution: "No one is above the law". The specialized literature provided the following: "The supremacy of the constitution is therefore a complex notion, the content of which includes political and legal features and elements (values) that express the superior position of the constitution, not only in the legal system, but in the entire social and political system of a country. This special position in the socio-political system implies a complex normative content, but also important state and legal consequences"[7]. As a law, the constitution is the expression of the will of the rulers, of the people, the will closely linked (conditioned, determined) by the economic, social, political and cultural context, more precisely of the society in which it is enacted. This feature explains the content and form of the constitution. The supremacy of the constitution is explained by its functions, and the expression of the will of the rulers is the very function of state power. There is very clear the connection between the constitution and power, which is precisely the organized power of the rulers to express and achieve their will as a general will binding on the entire society.

There are legal consequences of the supremacy of the constitution. Our analysis is focused on one of them, namely: the conformity of the whole law with the fundamental law[8].

[5] As example on the sources of law, see E. E. Ștefan, *Manual de drept administrativ Partea I Caiet de seminar*, Edition 4, revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp.43-47.

[6] Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014, p. 137.

[7] Ioan Muraru – coordonator, Andrei Muraru, Valentina Bărbățeanu, Dumitru Big, *Drept contituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest 2020, p. 57.

[8] Elena Anghel, *Involvement of the Ombudsman institution in the mechanism of constitutional justice*, publicat in proceedings-ul CKS-eBook 2021, pag. 559-563, http://cks.univnt.ro/articles/15.html.

Any legal act must be in compliance with the constitutional norms, both in what concerns the form, but also the content. Furthermore, the failure to comply with this consequence entails the nullity of the provisions in question, contained in any legal act. "Any deviation from this concordance is considered a violation of the constitution and its supremacy, leading to the nullity of the legal provisions in question"[9].

3. The Constitutionality of the Approach of the High Court of Cassation and Justice in Pronouncing the Referral in the Interests of the Law

The issue on the right of the High Court of Cassation and Justice to ensure the unitary interpretation of the law by means of the decisions issued in the referral in the interests of the law, as well as of the interpretative nature of these decisions pronounced by the High Court of Cassation and Justice has been raised in practice several times.[10] In this respect, we make notice to the decision to reject the exception of unconstitutionality[11] **which claimed that this approach of the High Court of Cassation and Justice violates art. 123 of the Constitution.**

In the substantiation of the exception of unconstitutionality, the author claims that the provisions of art. 329 last paragraph final thesis of the Code of civil procedure are contrary to the constitutional provisions referred to in: art. 58 para. (1), regarding the Parliament as the sole legislative authority of the country, art. 123 regarding the administration of justice, as well as art.125 para. (2), regarding the courts of law, as they impose "a delegation of legislative jurisdiction, in matters of interpretation laws, from the Parliament to the United Divisions of the Supreme Court of Justice", "affects the authority of the courts of law", "imposes the United Divisions of the Supreme Court of Justice as an extraordinary court with legislative powers".

The President of the Chamber of Deputies considers that the constitutional ground of the referral in the interests of the law is in the content of art. 51 of the Fundamental Law, according to which *"The compliance with the Constitution, its supremacy and the laws is mandatory"*, given that "by ruling on a referral in the interests of the law, the Supreme Court of Justice gives effect to this constitutional text. By resolving only matters of law, without focusing on the factual issues of a case, the supreme court contributes to ensuring the supremacy of the Constitution and of the laws". It is also shown that, on the other hand, the referral in the interests of the law comes under the effort to ensure the equality in rights of the citizens, in accordance with art. 16 para. (1) of the Constitution. Finally, there is the belief that, in such circumstances, the independence of the judge is not affected, therefore, the provisions of art. 329 of the Code of civil procedure are constitutional.

The Government, in its point of view, also considers that the exception is unsubstantiated, as the scope of the referral in the interests of the law is precisely that to

[9] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, C. H. Beck Publishing House, Bucharest, 2003, vol. I, p. 6.

[10] Elena Anghel, *Judicial precedent, a law source*, publicat în proceedings-ul CKS-eBook 2017, pag. 364-368; *The reconfiguration of the judge`s role in the romano-germanic law system*, în Lex Et Scientia International Journal LESIJ nr. XX vol. 1/2013, pag. 65-72.

[11] Decision no. 93 pronounced by the Constitutional Court on May 11 2000 and published in the Official Gazette no**.** 444 of September 8th, 2000.

ensure the unitary interpretation and application of the law on the entire territory of the country. The right conferred by the law to the Supreme Court to ensure, in accordance with the provisions of the Code of civil procedure, the unitary interpretation of certain legal texts does not contradict the idea of the administration of justice defined by art. 125 of the Constitution, by taking into account the position of the High Court of Cassation and Justice in the court system, as well as its role.

The Constitutional Court, by examining the notification ruling, the statements of the author of the exception, the points of view communicated by the president of the Chamber of Deputies and by the Government, the report drawn up by the reporting judge, the conclusions of the prosecutor, the objected legal provisions, in relation to the provisions of the Constitution, as well as the provisions of Law no. 47/1992, notes that the object of the exception of unconstitutionality is represented by the provisions of art. 329 last paragraph final thesis of the Code of civil procedure, as drafted at the time of the analysis.

The author of the exception considers that the provisions referred to in the last paragraph final thesis regarding the binding nature of the *"settlements of law"* of the decisions pronounced in the referral in the interests of the law are unconstitutional, due to the fact they are contrary to the provisions of art.58 para.(1), art.123 and art.125 para.(2) of the Fundamental Law.

By examining the exception of unconstitutionality, the Court notes that the objected provisions do not prejudice the claimed constitutional provisions, due to the fact that the scope of the regulation of the referral in the interests of the law is to ensure unitary interpretation and application of the law on the entire territory of the country. In order to achieve this scope, the High Court of Cassation and Justice rules on the matters of law which were differently settled by the courts of law. According to the same text, the settlement of these matters of law given by the Supreme Court shall be binding on the courts of law. With a view to promoting fair interpretation of the legal norms in force and not the development of new norms, the decisions pronounced by the United Divisions of the High Court cannot be regarded as a duty aimed at the field of lawmaking, situation in which the aforementioned legal wording would contravene the provisions of art.58 para.(1) of the Constitution.

Furthermore, in case of the exercise of the remedies at law, *"settlements of law"* shall be mandatory in case of the retrial of the merits. The administration of justice determines that, in case of cassation, the judgments of the court of appeal on the settled legal matters to be mandatory for the judges of the merits. Not only that this provision does not prejudice the constitutional principle of the administration of justice, but on the contrary, contributes to its achievement.

On the other hand, the Constitutional Court notes that the interpretation of laws is a rational operation, used by any subject of law, in order to apply and comply with the law, with a view to clarifying the meaning of a legal norm or of its field of application. The courts necessarily interpret the law in the process of resolving the cases which were referred to them. In this respect, the interpretation is the needful phase of the law enforcement process. According to a judgment of the European Court of Human Rights (case "*C.R. v. United Kingdom"*, 1995) "No matter how clear the text of a legal provision is, there is inevitably an element of judicial interpretation in any legal

system […]"[12]. The complexity of a case can sometimes lead to different application of the law in the practice of the courts of law. In order to eliminate potential errors in the legal qualification of certain de facto situations and to ensure the unitary application of the law in the practice of all courts, the legislator created the institution of the referral in the interests of the law. The interpretation decision pronounced in such cases is not *extra-legal* and moreover, cannot be *contra legem.*

By ruling on a referral in the interests of the laws, the supreme court contributes to ensuring the supremacy of the Constitution and of the laws, by means of their unitary interpretation and application on the entire territory of the country, which would materialize another fundamental principle, provided by art.16 para.(1) of the Constitution, according to which: *"Citizens are equal before the law and public authorities, without any privilege or discrimination."* Therefore, it is inadmissible for persons in equal legal situations to be subject to different legal regulations.

The Constitutional Court also notes that the interpretative solutions given in the referral in the interests of the law, referred to as *"settlements of law"*, cannot be considered sources of law, in the common meaning of this concept. The institution of the referral in the interests of the law confers on the judges of the Supreme Court the right to provide a certain interpretation, thus unifying the differences of interpretation and application of the same text of law by the lower courts. Such interpretative settlements, which are constant and unitary and do not concern certain parties and have no effect on previously pronounced solutions, which have entered the power of the *res judicata*, are claimed by the doctrine as "judicial precedents", being considered by the legal literature as "secondary sources of law" or "interpretative sources".

4. The Analysis of the Constitutionality of the Decisions of the High Court of Cassation and Justice – United Divisions, Whereby the Referrals in the Interests of the Laws Are Settled

In the conception of the Romanian constituent legislator, the sole scope of the constitutional control performed by the Constitutional Court is the law, as legal act of the Parliament, or normative acts with a legal force equal to that of the law. In this regard, the doctrine states that the issue of the constitutional control has different terms of that for legal acts with administrative nature or legal acts of the courts of law. The compliance control[13] and implicitly the constitutionality control of the legal acts issued by the administrate authorities or by the courts of law shall be performed within the legal control, according to the material jurisdiction of the courts of law.

Although the fundamental law does not provide *expressis verbis* this possibility, the Constitutional Court proceeded with an analysis, from the perspective of constitutionality, of the interpretation that the High Court of Cassation and Justice granted to certain legal texts by means of the referral in the interests of the law procedure.

By Civil Decision no. 984A of 4 April 2019, pronounced in case no. 10.529/302/2018, Bucharest Tribunal – Civil Division III notified the Constitutional

[12] About the European Court of Human Rights, please see L.-C. Spataru-Negura, *Protectia internationala a drepturilor omului*. *Note de curs*, Hamangiu Publishing House, Bucharest, 2018, p. 81 and following.

[13] On the compliance control on administrative acts, see E. E. Ștefan, *Drept administrativ Partea a II-a Curs universitar*, edition 4, revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp.110-177.

Court on the exception of unconstitutionality of the provisions of art. 527 para. (2) and art. 529 para. (1) and of the Civil Code, in the interpretation given by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law.

The author of the exception of unconstitutionality shows, in essence, that the interpretation given by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law on the "interpretation and application of the provisions of art. 527 para. (2) and art. 529 para. (1) and (2) of the Civil Code in relation to the provisions of art. 2 para. (4) and art. 4 para. (4) of Government Ordinance no. 26/1994 (...)", which would allow the removal from the calculation basis of the maintenance support for meal allowance, if it was recognized as "net monthly income" by a final court decision, prior to the publication in the Official Gazette of Romania, Part I, of Decision no. 21 of 19 October 2015, given by the High Court of Cassation and Justice - the Panel with jurisdiction to judge the referral in the interests of the law.

It is argued that the interpretation given by the aforementioned decision creates discriminatory treatment for persons who have applied for an increase in the amount of the maintenance support after the pronouncement of the supreme court (situation in which the author of the exception is found), unlike the persons who benefited from the calculation of the maintenance support in relation to meal allowance before the pronouncement of the same decision.

The settlement of the Constitutional Court for the exception raised was: "Rejects as unsubstantiated the exception of unconstitutionality raised by Anamaria Bianca Drăghici in Case no. 10.529/302/2018 of Bucharest Tribunal – Civil Division III and finds that the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code, in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law, are constitutional in relation to the formulated objections."[14].

The aspect of interest in this study is the legal ground on the basis of which the Constitutional Court proceeded with the assessment of the constitutionality of the interpretation conferred by the High Court of Cassation and Justice in the procedure of the referral in the interests of the law. The following are noted in the content of the Decision: "By examining the act of referral, the report drawn up by the reporting judge, the conclusions of the prosecutor, the objected legal provisions, in relation to the provisions of the Constitution, as well as Law no. 47/1992, republished, the Court notes the following: The Constitutional Court has been legally notified and, according to the provisions of art. 146 letter d) of the Constitution, as well as of art. 1 para. (2), art. 2, 3, 10 and 29 of Law no. 47/1992, republished, has the jurisdiction to settle the exception of unconstitutionality." The reference to art. 146 letter d as a ground of the constitutional control, as well the terms used in the title of the Decision of

[14] Decision no. 851 of 14 December 2021 on the exception of unconstitutionality of the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law, published in OFFICIAL JOURNAL no. 454 of 6 May 2022.

unconstitutionality "the exception of unconstitutionality of the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) Civil Code, in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law" ensured a "legal shield" for the Constitutional Court which could therefore examine on the merits the exception raised, otherwise the settlement adopted would have been an inadmissibility, not a rejection as unsubstantiated of the exception of unconstitutionality.

We state this due to the fact that, apparently, the object of the exception of unconstitutionality is represented by the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code, aspect that falls within the rigors provided by art. 146 letter d of the Constitution, although the essence of the constitutionality control is the interpretation conferred to the regulations provided by Decisions no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law. Furthermore, the entire motivation of the Decision pronounced by the Constitutional Court is based on the interpretation of the normative acts by the referral in the interests of the law. Practically, the Constitutional Court examines the constitutionality of the interpretation given by the High Court of Cassation and Justice in the referral in the interests of the law.

If we follow this perspective, the constitutionality control performed by the Court by Decision no. 851 of 14 December 2021 exceeds the constitutional provisions.

5. Conclusions

The decisions pronounced by the Supreme Court in this procedure can have unconstitutional valences under the adopted settlements.

The reality of a potential unconstitutional valence of the decisions pronounced in the referral in the interests of the law is obvious. This is the reason why other European[15] states provided in the constitutional legislation the jurisdiction of the constitutional courts to exercise constitutional control not only over the laws, but also over other categories of individual or normative acts. Therefore, the Constitutional Court of Belgium has jurisdiction to exercise control over the notification of a jurisdiction on the compliance of the rules for the distribution of powers between the state authorities. The German Constitutional Tribunal has jurisdiction to exercise subsequent actual control over judicial or administrative acts at the notification of the court or at the direct notification of the citizens, by means of the constitutional appeal. Similarly, Spanish Constitution of 1978 provides the jurisdiction of the constitutional court to verify the constitutionality of final judgments by way of an "amparo" appeal. The example of Hungary, a country in which the Constitutional Court exercises abstract or actual *a posteriori* control over delegated acts and over ministerial acts, is also of great importance.

The unconstitutionality of these legal acts could consist in the unjustified restriction of the exercise of some fundamental rights and freedoms defined and guaranteed by the Constitution.

Specialized literature notes that the lack of constitutional control, exercised by

[15] In this respect, it would be interesting to analyse disturbing factors of the European Union legal order, please see L.-C. Spataru-Negura, *Dreptul Uniunii Europene – o noua tipologie juridica*, Hamangiu Publishing House, Bucharest, 2016, p. 234 and following.

means of the Constitutional Court, on decisions pronounced in the procedure of the referral in the interests of the law is likely to allow excessive power in the activity of the supreme court, with serious consequences for the compliance with the requirements of the rule of law and with fundamental rights and freedoms of citizens.

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