INSTRUMENTS TO ASSURE THE UNITY OF THE JUDICIAL PRACTICE IN ROMANIA

Mihai Adrian HOTCA*

Abstract

In the new Code of penal procedure and the new Code of civil procedure, it is proposed the creation of a new mechanism for the unification of the judicial practice which should contribute, along with the appeal in the interest of the law, to the creation of predictable jurisprudence and should have as effect the shortening of the process duration. It concerns: the request to settle a law issue on which the settlement of a trial depends, legal issue that was not unitarily settled in the practice of the courts; the notification of the High Court of Cassation and Justice is made ex officio or upon the request of the parties after contradictory debates and if the conditions stipulated by law are met, through a conclusion that is not subject to any appeal possibility; in order to assure the efficiency of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Gazette, will have a binding character both for the court that formulated the application of clarification of the issue and for all the other courts.

Key- words: *non- unitary judicial practice, unification of the non- unitary judicial practice, jurisprudence, High Court of Cassation and Justice, jurisprudence predictability.*

Introduction

The present study deals with the judicial instruments meant to assure the unity of the non-unitary judicial practice existing *lege lata* in the Romanian law and it also presents some suggestions regarding the introduction of some new instruments meant to contribute to the unification of the judicial practice and to make the act of justice in Romania more predictable.

The subject approached in the lines below is important and topical for the Romanian judicial system because it deals with the efficiency of the mechanisms that assure the unity of the judicial practice stipulated in the legislation in force. At the same time, in the second part of the study, we suggest new instruments that should contribute to the reaching of the same objective – **unification of the non- unitary judicial practice.**

The legislative means and measures suggested in this study are: the creation of some specialized courts of laws and panels starting with the first jurisdictional level in Romania – courts of law; the alteration of the legislation regarding the legislative technique; the reorganization of the Legislative Board; the institutionalization of the Commission in order to assure the judicial practice within the Superior Council of Magistracy; the reinforcement of the part of the People's Attorney in the matter of the appeal in the interest of the law.

In the specialty literature, it was approached another similar subject that would examine the legal instruments through which it can be assured the unity of the jurisdictional solutions from more perspectives – legislative, judicial and social.

In our intercession, we started from the idea that the existence of the status of Rechtsstaat assumes that the judicial courts should unitarily enforce the law for all the „consumers of the act of

* Professor, Ph.D. Dean of the Faculty of Law, „Nicolae Titulescu" University, Bucharest (e-mail: mihaihotca@gmail.com). This study was supported by CNCSIS –UEFISCSU, project number PNII – IDEI 860/2009- cod CNCSIS ID-1094.

justice". Besides, the Constitution of Romania stipulates at art. 124 (2): „The justice is unique, impartial and equal for all". The Constitution of Romania also establishes in art. 126 paragraph (3) that: „The High Court of Cassation and Justice assures the unitary interpretation and application of the law by the other courts of law according to its competences".

But, unfortunately, the practice of the courts of law in our country is unequal, incoherent and not- unitary, consideration valid also with regard to the resolutions of the High Court of Cassation and Justice. This opinion is shared not only by litigants or potential litigants, but also by judges.

To be realistic, we consider that the assuring of a unitary judicial practice is not an easy objective to be carried out, because in Romania, there are almost 250 courts of law and there isn't a single „pure court of cassation" with the entitlement to maintain and impose upon a unitary practice of the courts of law. This fact determines a feeling of distrust in the act of justice on the side of the public opinion.

We mention that, within the PHARE project „The jurisprudence unification of the courts of law and prosecutor's offices in Romania", a group of German experts and Romanian magistrates analyzed the main causes that were leading to the instability, incoherence and unforeseeableness of the current judicial practice[1] and based on them, it drew up a bill with the purpose of unifying the judicial practice that the Association of the Magistrates in Romania adopted and presented to the parliament groups[2].

1. Legal instruments to assure the unity of the judicial practice stipulated by the legislation in force

1.1. Appeal in the interest of the law

De lege lata, the main mechanism through which the lawgiver tries to assure the unity of the judicial practice is the **appeal in the interest of the law** regulated in the Code of civil procedure and in the Code of criminal procedure[3]. The matter of the appeal in the interest of the law was altered through Law no. 202/2010 regarding some measures for the acceleration of settling down the trials[4].

Considering the fact that the texts regarding the institution of the appeal in the interest of the law contained in the two codes of procedure are similar, we will present only the provisions in question of a single code, that is, the Code of criminal procedure.

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[1] www.juridice.ro. This group set a preliminary list of conditions that stimulated the development of a stable and unitary jurisprudence, among which there are:
• creation of specialized panels at all the courts;
• establishing of the panels;
• enforcement of a unitary methodology for the settlement of the causes;
• need to exist some procedures of the High Court of Cassation and Justice for the purpose to create guiding jurisprudence, having at its disposal all the needed means in order to efficiently carry out this part;
• introduction of some procedural mechanisms to support an interpretation or unitary enforcement of the law at the level of the High Court of Cassation and Justice and of the inferior courts;
• reevaluation of the part of the legal precedent and the necessity of a stable and constant jurisprudence as a component of the lawful state

[2] For the content of this project, see www.juridice.ro.

[3] For a complex dealing with of this institution, see D. Lupaşcu, *Recursul în interesul legii în proiectele noilor coduri de procedură*, in LESIJ no. XVI, Vol. I/2009, pages 78-109. For the previous regulation of the matter of the appeal in the interest of the law in criminal matter, see I. Neagu, *Tratat de drept procesul penal. Partea specială,* Global Lex Publishing house, Bucharest, 2007, pages 375-378.

[4] Published in the Official Gazette no. 714 on October 26th, 2010.

According to art. 414^2 of the Code of criminal procedure, in order to assure the unitary interpretation and application of the law by all the courts of law, the general prosecutor of the Prosecutor's Office of the High Court of Cassation and Justice, ex officio or upon the request on the minister of justice, the management board of the High Court of Cassation and Justice, the management boards of the courts of appeal and the People's Attorney **have the duty** to ask the High Court of Cassation and Justice to pronounce itself on the matter of law that had been differently settled down by the courts of law.

Art. 414^3 of the Code of criminal procedure stipulates that the appeal in the interest of the law is admissible only if it is proved that the **matters of law** that make the object of the trial **were differently settled down** through definitive judicial resolutions that are attached upon request.

In art. 414^4 of the Code of criminal procedure, it is stipulated the procedure of ruling over the appeal in the interest of the law. The appeal in the interest of the law is ruled over by a panel made out of the president of the High Court of Cassation and Justice or, in its absence, of the vice-president of the High Court of Cassation and Justice, the section presidents within the High Court of Cassation and Justice, a number of 14 judges from the section that is competent to deal with the matter of law that was settled down differently by the courts of law and each 2 judges from the other sections. The chairman of the panel is the president or the vice- president High Court of Cassation and Justice.

In case the matter of law presents interest for two or more sections, the president or, in its absence, of the vice-president of the High Court of Cassation and Justice establishes the sections from which the 20 judges come.

After informing the High Court of Cassation and Justice, its president or, depending on the case, the vice president will take the necessary measures in order to **randomly delegate the judges** within the section that is competent to deal with the matter of law that was settled down differently by the courts of law, as well as the judges of the other sections that make the panel according to art. 414^4 paragraph (1).

At the receipt of the petition, the chairman of the panel will delegate a judge within the section that is competent to deal with the matter of law that was settled down differently by the courts of law in order to draw up a report on the appeal in the interest of the law. In case the matter of law presents interest for two or more sections, the president of the panel will delegate a judge within each of these sections in order to draw up the report. Those that make the reports are not incompatible.

For the purpose of drawing up the report, the panel chairman can request some acknowledged specialists the written opinion on differently settled down matters of law.

The report will contain different data of the matter of law and the arguments on which it is based, the relevant jurisprudence of the Constitutional Court, the High Court of Cassation and Justice, the European Court of Human Rights, the Court of Justice of the European Union and the opinion of the consulted specialists, if it is the case, as well as the doctrine in the field. At the same time, the judge or, depending on the case, judges that make the report will draw up the bill of the solution that is supposed to be given in the appeal in the interest of the law.

The meeting of the panel is convoked by its chairman at least 20 days before its carrying on. Once with the convocation, each judge will receive a copy of the report and the suggested solution.

All the judges of the panel take part at the meeting. If there are objective reasons, they can be replaced by observing the rules stipulated by art. 414^4 paragraph (3).

The appeal in the interest of the law is pleaded before the panel, depending on the case, by the general prosecutor of the Prosecutor's Office with the High Court of Cassation and Justice or by the prosecutor appointed by this, by the judge appointed by the management board of the High Court of Cassation and Justice, the court of appeal respectively.

The appeal in the interest of the law is trialed within at most 3 months since the information of the court and the adopted solution with at least two thirds of the number of panel judges. No abstentions from the vote are admitted.

According to art. 414[5] of the Code of criminal procedure, the panel pronounces itself on the petition through a decision. The decision is delivered only in the interest of the law and has no effects on the court resolutions examined and neither with regard to the situation of the parties in those trials. The decision is adduced within at most 30 days since its delivery and is published at most 15 days since its adduction in the Official Gazette of Romania, Part I. The solution given to the trialed matters of law is obligatory for the court of law since the publishing date of the decision in the Official Gazette of Romania, Part I.

Based on the legal texts presented above, we consider that the appeal in the interest of the law is, considering its legal nature, a **legal procedural instrument** or, as it was stated in the specialty literature, „a procedural means of unification of the judicial practice"[5].

On the other hand, contrary to the estimation of the Constitutional Court – that shows in a decision that „The only procedural instrument through which it is assured the unification of the judicial practice, starting from the obligatory character of solving the matters of law by the supreme court, is the appeal in the interest of the law regulated through art. 329 of the Code of civil procedure" – we consider that the appeal in the interest of the law is not and it does not have to be the only procedural instrument through which the unitary interpretation and application of the law is assured in Romania[6].

Another legal instrument that contributes to the assuring of a unitary judicial practice is the one offered by the legal mechanism of the constitutional challenge.

1.2. Constitutional challenge

According to art. 146 lit. c) of the Constitution, the Constitutional Court decides on the constitutional challenges regarding the law and the ordinances brought before the courts of law or by the trade arbitrage; the constitutional challenge can be raised also direct by the People's Attorney. According to art. 147 paragraph (4) of the fundamental law, the decisions of the Constitutional Court are published in the Official Gazette of Romania. Since the publishing date, **the decisions are generally obligatory** and have power only for the future[7].

Through certain decisions, the Constitutional Court created vivid controversies especially in the world of the jurists, as well as in other fields of the social life. One of these is decision no. 62/2007 through which the Constitutional Court found that the provisions of art. I item 56 of Law no. 278/2006 for the alteration and completion of the Penal code, as well as for the alteration and completion of other laws, the part referring to the repealing of art. 205 (insult – n.n.), 206 (calumny – n.n.) and 207 (evidence of truth– n.n.) of the Penal code, were unconstitutional[8].

In motivating the decision, it was indicated that "the removal of the penal means of protecting the dignity as supreme value in the Rechtsstaat determines the violation of the actual character of access to justice in this matter. Besides, the Court finds that, through the analyzed rehealing effect, unlike the persons whose rights – others than the right to honor and a good reputation – were violated and that can address to the courts of law to defend their rights, the

[5] D. Lupaşcu, quoted work, page 83.
[6] Decision no. 104/2009 published in the Official Gazette no. 73 on February 6th, 2009.
[7] Regarding the intimation of the Constitutional Court, in doctrine, pertinent recommendations were made (see D.C. Dănişor, *Mic ghid de sesizare a Curții Constituționale*, in the Romanian Pandects no. 1/2011, page 75).
[8] For an examination of the causes regarding the lack of unity of the judicial practice, see M.A. Hotca, *Discussions regarding the causes of the non-unitary legal practice in Romania*, LESIJ nr. XVII, Vol. I/2010, page 23.

victims of the infractions of insult and calumny have no real and adequate possibility to judicially benefit from their dignity – the supreme value guaranteed by the Fundamental law"[9].

Usually in practice, the decisions of the court of contentious constitutional are rigorously observed by the courts of law. Nevertheless, there are exceptional situations when these decisions were disregarded by a number of courts of law. It concerns mainly the High Court of Cassation and Justice that ignored certain decisions of the Constitutional Court.

The last resolution through which the supreme court disregarded a decision of the Constitutional Court is Decision no. 8/2010 delivered by the United Sections of the High Court of Cassation and Justice through which it was admitted the appeal in the interest of the law declared by the general prosecutor of the Prosecutor's Office with the High Court of Cassation and Justice and the information of the Management board of the Prosecutor's Office with Bucharest Court of Appeal in the sense that the "incrimination norms of insult and calumny contained by art. 205 and art. 206 of the Penal code, as well as the provisions of art. 207 of the Penal code regarding the evidence of truth repealed through the provisions of art. I item 56 of Law no. 278/2006, the provisions declared unconstitutional through decision no. 62 on January 18th, 2007 of the Constitutional Court are not in force"[10].

This decision that was not published in the Official Gazette can not be analyzed from the perspective of the considerations, but exclusively from the point of view of its apparatus. But, based on the reasons contained in the memoir of appeal in the interest of the law and considering the grounds of Decision no. 62/2007, including the separate opinion and the one concurrent to this one, we can make a prediction in this sense[11]. A few considerations contained in the two separate opinions to the decision from above are relevant.

So, in the separate opinion expressed by judges I. Vida and K. Gabor, it is stipulated that "The decision to which it refers the current separate opinion was delivered within the precise a posteriori control of constitutionality. Art. I item 56 of Law no. 278/2006 has produced legal effects since the coming into force date of the law; after this date, it was no longer possible to hold responsible those that had committed the deeds stipulated by the former articles 205 and 206 of the Penal code. The decision of the Constitutional Court that determines through its effects the suspension of the effects of the legal norm declared as unconstitutional leads to the re- coming into force of the provisions of art. 205 and 206 of the Penal code on the date of its publication in the Official Gazette of Romania, Part I, which is equivalent to the re-incrimination of the deeds of insult and calumny, incrimination of which the lawgiver is exclusively competent. Under such conditions, the Constitutional Court becomes positive legislator, a right that is not given to it neither by the Constitution nor by it own organic law".

In the concurrent opinion of judge V. Stănoiu it is shown: "A close examination of the reasons brought in favor of this point of view (according to which the Constitutional Court can not alter or complete the legal norms – n.n.) entitles serious reserves with regard to it.

Because, on the one side, through the effect of finding the unconstitutionality of the repealed provisions, the same provisions that had been repealed and not the new ones are coming into force again, it is difficult to sustain that the Court arrogates itself the capacity of positive lawgiver in this way.

As long as the coming into force again of the repealed provisions represents just a mediated effect of the decision of the Court to find the unconstitutionality of the repealed provisions and not a direct effect of this one, there are not enough grounds for the presented thesis.

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[9] Published in the Official Gazette no. 104 on February 12th, 2007.
[10] www.scj.ro.
[11] See also Î.C.C.J., criminal section, decision no. 2203/2010, with a note by E.M. Nica, in the Romanian Pandects no. 1/2011, page 173.

At last, under the conditions under which the interdiction to alter and complete set by art. 2 paragraph (3) of Law no. 47/1992 refers exclusively to the provisions subject to control, and in the present cause, the object of the control is the repealing provision, while the provisions repealed and come into force again as a result of finding the unconstitutionality of the former are subject to alteration and completion and the assumed violation of the legal text mentioned can not be retained".

Analyzing the lawfulness of the two decisions mentioned above, we consider that they both are contrary to the Constitution and the norms in the field. Decision no. 8/2010 of the United Sections of the High Court of Cassation and Justice is contrary to art. 147 paragraph (4) of the Constitution that orders that **the decisions of the Constitutional Court should be generally obligatory**.

But at its turn, the Constitutional Court through Decision no. 62/2007 disregarded its constitutional competence, the provisions of Law no. 47/1992, as well as Law no. 24/2000. According to art. 2 paragraph (3) of Law no. 47/1992, the Constitutional Court pronounces itself on the constitutionality of the acts about which it was informed **without being able to alter or complete** the provisions subject to control. Practically, the only possible legal intervention of the Constitutional Court on the legal norms subject to the constitutionality control is **to find** their **unconstitutionality**. Such a finding is similar to the repealing and according to art. 64 paragraph (3) of Law no. 24/2000, the repealing of a provision or of a norm has a definitive character. **It is not allowed to reinforce the initial norm** by repealing a previous repealing act. The exceptions are the provisions of the Government ordinances that stipulated repealing norms and were rejected by the Parliament through law.

2. Suggestions regarding the assuring of the judicial practice unity

2.1. Widening of the domain of the courts and specialized panels

The widening of the domain of the specialized courts and panels is imperative because, as it is shown in the presentation of reasons of the suggestions made within the project "The jurisprudence unification of the courts of law and prosecutor's offices in Romania", the specialization represents a simple and efficient method for the promotion of a non- contradictory and quality judicial practice. The extension of the domain of the specialized courts to the entire system of courts of law would make the files referring to the specialized domain to be settled down by a limited number of judges. So, the contradictory judicial practice between the various panels of the same court would be, if not excluded, at least rarely encountered[12].

On the other side, the specialization will increase both the judge's capacity to solve the causes in a professional manner and the possibility to solve them in a shorter period of time.

2.2. Alteration of the provisions of Law no. 24/2000

Many of the law matters settled down differently in the judicial practice are determined by the violation of the rules stipulated by Law no. 24/2000 regarding the norms of legislative technique. Among the norms of legislative technique violated, it is: the violation of the rule that forbids the spreading of the regulation with the same object in more norms; the disregard of the rule that binds to the integration of the new norms in the ensemble of the legislation; the overlooking of the rules referring to the clarity and precision of the used language, etc.

[12] Within this bill, the authors suggest that it should be set up specialized panels made out of three judges in the four sections of the High Court of Cassation and Justice and within the sections of the courts of appeal. It is also mentioned that the Management Collages of the tribunals and courts of law can order the setting up of specialized panels.

Such violations of the norms regarding the legislative technique can be avoided through the alteration of Law no. 24/2000 in the sense of stipulating the obligatory character of the notice of the Consulting Council with regard to the observance of the norms of legislative technique for any other initiators of norms, except for the members of the Parliament.

Another suggestion that has in view the alteration of this law refers to the setting up, in charge of the Ministry of Justice, of the obligation to identify the legal norms that generate the non- unitary judicial practice and to draw up the norms that should contain legal interpretative norms in all the cases in which it is found that certain legal norms were interpreted and applied differently by the judicial organs.

We consider that, within Law no. 24/2000, it would be useful to be inserted certain rules that have to be observed on the occasion of drawing up the norms, among which: the social interest; the correlation with internal regulations; the harmonization of the national legislation to the European legislation and the international treaties to which Romania is a party; the harmonization to the jurisprudence of the European Court of Human Rights, etc.

2.3. Alteration of the provisions of Law no. 73/1993

Considering the part of the Legislative Council, dedicated by the fundamental law, of "consulting specialty organ of the Parliament that approves the bills for the purpose of systemizing, unifying and coordinating the entire legislation", we consider that in Law no. 73/1993 for the setting up, organization and functioning of the Legislative Council, it should be inserted provisions according to which the Legislative Council should have in its competence also the systemizing, unifying and correlation of the legislation of Romania.

Such legal provisions are not against the provisions of the Constitution because this one does not forbid this thing. We consider that, by attributing such competences to the Legislative Council, it would mean just the systemizing, unifying and coordinating of the legislation of Romania. The lacking by the law of such a competence that would regulate the organization and functioning of the Legislative Council is at least partially „explainable" also by the lack of unity of the judicial practice in Romania, because the judges dispose of an unsystematized, uncorrelated and often unclear legislation in terms of language.

2.4. Institutionalization of the work group for the uniformity of the judicial practice within the Superior Council of Magistracy

Among the measures that would contribute to the assuring of the jurisprudence stability and unity, we estimate that it is also the institutionalization of the work group for the uniformity of the judicial practice within the Superior Council of Magistracy. This work group made out of representatives of the appeal courts and members of this judicial body functioned within the Superior Council of Magistracy until 2010. Within the above- mentioned group, it was analyzed matters of law that had been differently settled down in the judicial practice and, as a result of the discussions, it was drawn up a document containing the solutions suggested by the commission.

We believe that, within the Superior Council of Magistracy, it should be stipulated by law a commission that should have as attribution the analysis of the non- unitary judicial practice, because the activity of the work group that functioned until 2010 was a useful one for the Romanian judicial system.

2.5. Reinforcement of the part of the People's Attorney in the matter of identifying the non- unitary judicial practice

Through Law no. 202/2010, the lawgiver stipulated among the duties of the People's Attorney also „the duty to ask the High Court of Cassation and Justice to pronounce itself on matters of law that had been differently settled down by the courts of law".

It is obvious that through these legal stipulations, the People's Attorney obtained an efficient legal instrument through which it could contribute to the defense of the rights of the natural persons by assuring the foreseeableness of the act of justice.

In order to be able to carry out the above- mentioned function, we nevertheless consider that these stipulations have to be altered or completed. We take into consideration the extension of the cases for which the citizens can inform through petitions the People's Attorney by adding the hypothesis when the non- unitary judicial practice is invoked. Besides, the Constitution establishes (art. 58) that the People's Attorney has the part to „defend the rights and liberties of the natural persons"[13].

Conclusions

Based on those presented above, we conclude that, although there were made steps in order to assure the unity and stability of the judicial practice in Romania, neither the entire distance was covered nor the route was the right one in all the cases.

Without pretending to have the optimal solutions, in the present study we suggested certain legal instruments that, along with those already existing, we consider to be capable to diminish, within acceptable limits, the lack of unity of the judges' solutions in the similar law problems.

We believe that, along with the appeal in the interest of the law, the regulation of some courts of law and specialized panels, the alteration of Law no. 24/2000 and Law 73/1993, the setting up of a commission with competence in examining the non- unitary judicial practice, as well as the reinforcement of the part of the People's Attorney will contribute to the stability and predictability of the act of justice in Romania.

On the other side, the list of the legal instruments for this purpose remains open and we are convinced that the specialists in the field will bring up for discussion also other suggestions. But what it is important at last is that the lawgiver should have the understanding to choose the most efficient instruments for the judicial system in our country.

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[13] According to art. 15 paragraph (1) of Law no. 37/1997, the petitions to the institution of the People's Attorney have to be in writing and to contain the name and domicile of the natural person trenched upon its rights and liberties, the violated rights and liberties, as well as the administrative authority or the public clerk in question. The applicant has to prove the delay or the refusal of the public administration to settle the legal petition.