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Can the Lacunary Provisions be Covered by a Preliminary Judgement of the High Court of Cassation and Justice?

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ABSTRACT: This study analyzes the possibility, mentioned in the Decision of the High Court of Cassation and Justice no. 77/November 2021 - the Panel for solving some legal issues, in which the supreme court suggests that it could be referred by the judges, entrusted with the solution of the case in the last instance, with a question of law, so as to "facilitate" for them "the elimination of some gaps in the legal texts, the clarification of which is requested, in order to ensure adequate and unified jurisdictional resolutions". In our opinion, if it were to rule in this situation, the supreme court would add to the law by creating a rule of law, and the preliminary ruling, being binding for all courts, by law, would become a true judicial precedent.

KEYWORDS: preliminary ruling, High Court of Cassation and Justice, legislative gap, judicial precedent, the unconstitutionality of the HCCJ Decision

Introduction

According to Art 126 Para 3 of the Romanian Constitution, revised and republished, the High Court of Cassation and Justice has the role of ensuring the uniform interpretation and application of the law by the other courts, according to its competence. Until 2013, the only procedural lever that ensured the unity of interpretation of the law by the courts was the appeal in the interest of the law, a French-inspired procedure with a curative effect of jurisprudence divergences, which is also currently regulated in the new Civil Procedure Code (Law no 134/2010 published in the Official Gazette of Romania, Part 1, no 485/15 July 2010, which entered into force on 15 February 2013) stating that "In order to ensure the uniform interpretation and application of the law by all courts, the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, ex officio or at the request of the Minister of Justice, the Governing Board of the High Court of Cassation and Justice, the governing boards of the appeal courts, as well as the People's Advocate, have the duty to ask the High Court of Cassation and Justice to rule on legal issues that have been resolved differently by the courts" (Art 514 of the Civil Procedure Code).

According to Prof. M. Andreescu, "such a legal institution would not be necessary if all appeals were judged by the High Court of Cassation and Justice. In such a hypothesis, the supreme court could achieve the unified interpretation and application of the law. However, the normative regulations in force also establish the competence of the tribunals and the appeal courts to resolve the appeal, which creates the possibility of different and even wrong interpretations of the laws" (Andreescu 2011, 32-36).

Since litigants were not guaranteed equality in front of the law and the public authorities, including in front of the courts, the predictability of the judicial act and legal security, in order to "fix this serious deficiency" (Nicolae, 2014, 16), the legislator also created a new procedural institution with the role of standardizing the unitary judicial practice at the level of the entire country, but with a preventive feature, also of French inspiration, called the "notification of the High Court of Cassation and Justice with a view to pronouncing a preliminary decision for solving some legal issues" stated in Art 519-521 of the Romanian Civil Procedure Code. This procedure is not new. B. Oppetit in his article "La resurgence du rescrit" mentions that this institution appeared during the Roman Empire, the author defining the rescript as "an opinion

emanating from an authority consulted by a private person or a public body for the interpretation and application of a norm" (Oppetit 1991, 105; Boghirnea 2006, 20-25). In the Union law, the Treaty on the Functioning of the European Union provides in Art 267 the preliminary referral procedure before the Court of Justice of the European Union, which is also a variant of 20th century of the Roman rescript (Boghirnea and Vâlcu 2009, 253-258; Militaru 2005, 26-40; Militaru 2005, 26-40; Vâlcu 2016, 332-337).

Thus, Art 519 of the Romanian Civil Procedure Code provides that if, during the trial, a panel of the High Court of Cassation and Justice, of the court of appeal or of the tribunal, entrusted with the resolution of the case in the last instance, finding that a question of law, the resolution of which depends on the merits of the respective case, is new and the High Court of Cassation and Justice has not ruled on it nor is it the subject of an appeal in the interest of the law pending resolution, it will be able to request the High Court of Cassation and Justice to issue a decision by which the legal matter with which it was referred is resolved in principle.

The legislator uses the expression "matter of law", which "is new", an expression also used in the French legislation which provides in Art 144-1 of the French Civil Procedure Code that "Before ruling on a new question of law, which presents a serious difficulty and which is recurring in several litigations, the judicial courts may, through a decision that cannot be subject to appeal, request the opinion of the Court of Cassation". Similar French judicial procedure created by Law no 91-491 amending the Judicial Organization Code and establishing the "saisine pour avis de la Cour de Cassation" procedure (JORF May 18, 1991).

The referral raises a precise and abstract question of law, independent of the factual circumstances of the initial litigation. In France, the Court of Cassation rejected requests for opinion in cases concerning a mixture of facts and law (Cass. opinion, October 8, 1993, no 09-30009, Bull., opinion no 12), which did not formulate the question of law (Cass. opinion, October 8, 1993, no 09-30012, Bull., opinion no 11) or which was formulated "in a very general manner", in reality not being "any precise question of law" (Cass. opinion, October 27, 2007, no 07-30014, Bull. Civ. 2007, opinion no 12) and, finally, issues that involved the assessment of spatial circumstances, which fell to the sovereign discretion of the trial judge (Cass. opinion, June 14, 1993, n. 09-30003, Bull., opinion no 8) - (jurisprudence extracted from Charbonneau, 2011, 178). And in Romania, the High Court of Cassation and Justice rejected it on the same grounds. See the decisions, the HCCJ from our country, the Panel for resolving some legal issues, Decision no 5/2018, published in the Official Gazette of Romania, Part I, no. 186 of February 28, 2018, Decision no 62/2017, published in the Official Gazette of Romania, Part I, no 797 of October 9, 2017, and Decision no 6/2017, published in the Official Gazette of Romania, Part I, no 144 of February 24, 2017, pronounced by the High Court of Cassation and Justice – the Panel for resolving some legal issues.

Regarding the terminology used by the legislator, we note the fact that he does not use the term new text, new regulation, new provision, but the expression "new legal matter". In the specialized literature (Cornu 2007, 750 apud. Bălan 2015, 22) a meaning of the term "issue" from the lexicon is provided legal meaning of "interrogation, question posed to a person, an assembly, a council, etc.; request for explanations; by extension, a procedure of this interrogative approach".

We thus understand why the legislator used the expression "matter of law" in the Civil Procedure Code, as he had in mind the unravelling of a specific "question" of law, to which the HCCJ should answer for their clarification.

Legislative gaps and prior rulings. Discussions on a Decision of the HCCJ

Considering the rapidity of the current economic-social transformations (Niță 2020, 53-61) as a result of the progress of science, there may be situations in which the legislation does not reflect a current and complete picture at a given moment, or there may be new situations, which the legislator has not regulated or had time to regulate them.

Thus, the problem arises of a newly emerging situation not regulated by the legislator and on which the judge must rule (Grigore-Rădulescu 2014, 37-51), being obliged by law to judge as provided by Art 5 Para 1-3 of Romanian Civil Procedure Code marginally titled "Duties regarding the receipt and resolution of requests" that judges have the duty to receive and resolve any request within the jurisdiction of the courts, according to the law (Para 1).

No judge can refuse to judge on the grounds that the law does not provide, is unclear or incomplete (Para 2). In the event that a litigation cannot be resolved either on the basis of the law or the customs, and in the absence of the latter, nor on the basis of the legal provisions regarding similar situations, it will have to be judged on the basis of the general principles of the law (aspect also valid in the settlement of cases between professionals, who use new legal instruments, on which there may be confusion, Niță 2014, 98-105), taking into account all its circumstances and taking into account the requirements of equity (Para 3).

But, when there is not even a similar text, in the latter situation, since the resolution of the respective case depends on the merits, according to the law, the panel of judges "after contradictory debates" (Art 520 of the Romanian Civil Procedure Code), shall request the High Court of Cassation and Justice to rule a decision giving a "basic solution" to the new question of law with which it was referred.

The High Court of Cassation and Justice, Competence for resolving legal issues, by its Decision no 77/15 November 2021 referred to the "elimination of gaps in the legal texts", stating that "In the procedure of pronouncing a preliminary decision, the High Court of Cassation and Justice does not substitute the fundamental attribute of the courts, of interpreting and applying the law, but is limited to make it easier for the judge to eliminate the ambiguities, inaccuracies or gaps in the legal texts whose clarification is requested, in order to ensure adequate and unified jurisdictional decisions". Analogously, with the same interpretation, we quote another decision of the HCCJ no 11/2016, for which the Panel also ruled that "the premises of the appeal in the interest of the law are those that a legal provision contains doubtful regulations, gaps or unclear, necessary to be clarified in terms of interpretation, in order to remove a non-unitary application of it", decision that has a curative effect. Going by analogy, they can also be the premises for the pronouncement of a preliminary decision, in the case of a legal provision that contains laconic regulations that must be clarified in terms of interpretation, to prevent the emergence of divergences of jurisprudence or its non-unitary application.

How can the High Court of Cassation and Justice eliminate the gaps in the legal texts through this judicial procedure, other than by completing the law?

This possibility, regarding the elimination of lacunar legal texts, invoked by the Supreme Court in its decision, is criticisable in our opinion, since on the one hand we have a legal text (Art 5 Civil Procedure Code) which provides that "If a cause cannot be resolved either on the basis of the law or the customs, and in the absence of the latter, nor on the basis of the legal provisions regarding similar situations, it will have to be judged on the basis of the general principles of the law, taking into account all its circumstances and taking into account the requirements of equity" (Rîpeanu 2021, 91-101).

And on the other hand, when the HCCJ would be referred to resolve some legal issues derived from the legal gaps, it will be able to rule the decision only based on the factual situation, which generated the question for which it has been consulted. Or, if other factual situations arise later, other hypotheses that would concern the same laconic text, it is possible that the decision of the supreme court will no longer be consistent with the new situations that concerned that laconic text so that it will have to change its own decision, which is not possible, because according to the law, decisions on the resolution of a matter of law are binding and, in our opinion, irrevocable. The solving of legal issues is mandatory from the date of publication of the decision in the Official Gazette of Romania, Part I, and for the court that requested the solution, from the date at which the decision is issued (Art. 521 Para 3 of the Civil Procedure Code).

We agree with Prof M. Andreescu's opinion according to which "Decisions of the High Court of Cassation and Justice must be strictly limited to the interpretation of the law. The supreme court cannot complete, modify or abrogate the rules stated in the law. Otherwise, the principle of separation and balance of powers in the state explicitly enshrined in the provisions of Art .1, Para 4 of the Constitution is violated, because the court exceeded the limits of judicial power and would manifest itself as a legislative authority. The rule of compliance with constitutional norms also refers to other provisions of the Constitution" (Andreescu, p. 33).

The process of legislation, in our legal system, belongs exclusively to the legislator. By Decision no 838/2009 (published in the Official Gazette of Romania no 461/3 July, 2009) the Constitutional Court ruled that "In exercising the powers provided by Art 126 Para 3 of the Constitution, the High Court of Cassation and Justice has the obligation to ensure the unified interpretation and application of the law by all courts, respecting the fundamental principle of the separation of powers enshrined in Art. 1 Para. 4 from the Romanian Constitution. The High Court of Cassation and Justice does not have the constitutional competence to establish, modify or abrogate legal norms with the force of law, or to carry out their constitutional review". Such a decision of the High Court of Cassation and Justice, which is binding *erga omnes*, would be unconstitutional, as it would allow the judge to add to the law, thus exceeding the limits of judicial power. We appreciate that the solution imposed by the French legislator, that notices for referral are optional for the courts and not mandatory (Boghirnea 2022, 34-37), was precisely in order not to end up in such situations where the supreme court would create judicial precedents through interpretive decisions.

Conclusions

The previous decisions of the High Court of Cassation and Justice have value only as binding interpretive judicial precedent for the courts, and not normative (Grigore-Rădulescu 2014, 76-77).

First of all, it is desirable for the High Court of Cassation and Justice to reject the possible notifications made by the courts regarding the "elimination" of the laconic regulations, by covering them with legal norms, since we have a law text that in such situations the judges must decide based on the general principles of the law, taking into account all its circumstances and taking into account the requirements of equity" and on the other hand, the mentioned constitutional principles are violated.

Secondly, given this imperative legislative text, which requires the judge to rule according to the general principles of law and equity, we consider that it is prohibited for the courts to refer the High Court of Cassation and Justice in order to pronounce a preliminary decision to resolve some matters of law that aims to cover the gaps in the legal texts whose clarification is requested as it must apply the analogy of law and equity.

We believe that, in such a situation, the formation of a constant judicial practice (just as a custom is formed, over a long period of time) at the level of judicial courts that apply the law in equity in the case of some lacunar regulations, although it creates divergences of jurisprudence lead "in the end, to balancing the dynamics of the legal order and, without a doubt, to the progress of the law" (Croze 2003, 221).

This solution, imposed by the legislator, has the major advantage of the fact that judges come into direct contact with concrete social realities, the court being "a center for receiving" real and individual facts, and "a laboratory" for observing, identifying and processing signals objective reality, under all the assumptions made in practice (Naschitz and Fodor 1961, 98).

Time, in the case of gaps in the legal texts, makes the legal issue "leaven", generating a constant judicial practice (for example: the institution of contingency, currently codified in the New Civil Code).

A constant judicial practice does not compel the judges, who judge subsequent similar cases, to apply it mechanically because it is, in principle, in the Romano-Germanic legal system, that the judge is subject only to the law, and not to the judicial precedent.

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