

COMPARATIVE ANALYSIS BETWEEN THE PRIOR DECISIONS FOR SOLVING CERTAIN LAW ISSUES AND THE DECISIONS ISSUED WITHIN THE REFERRAL IN THE INTERESTS OF THE LAW, IN THE CONTEXT OF THE NEW LEGISLATIVE REFORMS

Iulia Boghirnea, Assist. Prof., PhD, University of Pitești

Abstract: By the preliminary ruling for solving certain law issues and the decisions issued within the referral in the interests of the law the High of Cassation and Justice has the role to provide a unitary interpretation of the law.

This paper aims to provide a comparative analysis between the two procedural instruments of the High Court of Cassation and Justice, regarding the proceedings, the content and effects of the judicial decision.

Keywords: referral in the interests of the law, preliminary ruling for solving certain points of law, non-unitary judicial practice, High Court of Cassation and Justice, mandatory effect.

The High Court of Cassation and Justice has, according to Art 126 Para 3 of the Romanian Constitution, reviewed and amended, *shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence.*

The legislator has created two different procedures/instruments to unify the judicial practice of the High Court of Cassation and Justice: the decisions stated in solving referrals in the interests of the law¹, and, recently and new in our legislation, the preliminary rulings to solve different matters of law, both of French inspiration.

Thus, besides the referral in the interests of the law (Art 514-518 of the Civil Procedure Code², namely Art 473-474¹ of the Criminal Procedure Code³), a new instrument to insure the unification of the judicial practice, which has been adopted by the Romanian legislator in the new codes of procedure, is the preliminary ruling, which the High Court of Cassation and Justice shall deliver in solving certain points of law, on which it depends the resolution of the merits of the case (Art 519-521 of the Civil Procedure Code and Art 475-477¹ of the Criminal Procedure Code).

Hereinafter we shall analyze only the texts of the new Civil Procedure Code.

The Explanatory Memorandum to the draft of the new Civil Procedure Code states that the purpose of this procedure is *“the creation of a new mechanism for the unification of the judicial practice which shall contribute, besides the referral in the interests of the law, to the transformation of the Romanian jurisprudence into a predictable one, which shall answer*

¹ The referral in the interests of the law is a legal institution with tradition in the Romanian legislation, being stated by the Criminal Procedure Code in 1936, but in a form different than the western classic models, this procedure being considered as a mean to “theoretically correct the solution of a case”. After 45 years, the Law No 45/1993 reinserts the referral in the interests of the law in the legislation as an instrument to guide the general jurisprudence; N. Volonciu, *Tratat de procedură penală. Parte specială, Volume II*, Paideia Publ.-house, Bucharest, 1996, pp. 375-376

² Law No 134/2010 on the Civil Procedure Code, republished in the Official Gazette of Romania, Part I, No 545/3 August 2012, with subsequent modifications and amendments

³ Law No 135/2010 on the Criminal Procedure Code, republished in the Official Gazette of Romania, Part I, No 486/15 July 2012, with subsequent modifications and amendments

*to the reasonable expectations of the justice seekers, and also shall lead to the shortening of the trial, preventing the completion of all means of appeal*⁴.

Up next we shall make a comparative analysis of the subjects that can inform the High Court of Cassation and Justice and the conditions for admissibility (1), the trial procedure (2), the effects of the decisions and their termination (3).

1. The holders of the notification and the conditions of admissibility for the initiation of the proceedings in front of the High Court of Cassation and Justice

Regarding the proceedings of the referral in the interests of the law, Art 514 of the Civil Procedure Code offers the capacity to pursue the proceedings only to 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, of the Directing College of the High Court of Cassation and Justice, of the directing colleges of the Courts of Appeal, as well as of the Ombudsman⁵, who have *the obligation* to ask the High Court of Cassation and Justice to rule in matters of law differently solved by the courts.

In view of the fact that the legislator did not expressly stated the term for submission of the referral for the interests of the law, we conclude that it can be submitted anytime without considering the oldness of the controversy matter of law or of the contradictory judicial decisions⁶.

The *conditions for admissibility* of the referral in the interests of the law stated by Art 515 of the Civil Procedure Code, must be cumulatively fulfilled and only when it exists evidence: of a matter of law (1), the fact that it has been solved differently by the courts, namely the decisions are contradictory⁷ (2); the decisions must be final (3); the decisions must be annexed to the act of apprehension of the High Court of Cassation and Justice (4).

Comparatively, Art 519 of the Civil Procedure Code states that the notification of the High Court of Cassation and Justice for ordering a preliminary ruling, "by which it will state a solution of principle" for certain matters of law, can be performed only by the panel of judges from tribunals, courts of appeal or from the High Court of Cassation and Justice, invested with the competence to solve the case as a last resort, if it is ascertained that there is a matter of law, on whose clarification depends the solution of that case, that it is new and over it the High Court of Cassation and Justice did not ruled before, nor that it is the object of a pending referral in the interests of the law.

The *conditions for admissibility* of the preliminary ruling, stated by Art 519 of the Civil Procedure Code must be cumulatively fulfilled, namely: the existence of a pending case (1); the panel of judges who notify the High Court of Cassation and Justice has the

⁴ Explanatory Memorandum to the draft of the Civil Procedure Code, http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/tabid/648/Default.aspx

⁵ According to professor Nicolae Popa the legislative solution on which the Ombudsman must notify the High Court of Cassation and Justice with a request to rule over a referral in the interests of the law is "meaningless, burdensome and excessive", N. Popa, *Câteva considerații privind recentele inițiative legislative pentru accelerarea judecăților*, in Curierul Judiciar Magazine No 12/2010, p. 665

⁶ M. Nicolae, *Recursul în interesul legii și dezlegarea, în prealabil, a unei chestiuni de drept noi de către Înalta Curte de Casație și Justiție în lumina noului cod de procedură civilă*, in Dreptul Magazine No 2/2014, p. 40

⁷ In the Decision No 1/2011 of the High Court of Cassation and Justice, the panel of judges competent in ruling over the referral in the interests of the law, published in the Official Gazette of Romania, No 751/26 October 2011, states that the "*Referral in the interests of the law shall be admissible only when the legal provisions are unclear, confuse, doubtful, incomplete and have a different interpretation given by the courts, thus until the legislator's intervention, the supreme court must correctly solve the matters of law*".

competence to solve the case as last resort (2); the pending case must be within the legal competence of the tribunal, Court of Appeal or of the High Court of Cassation and Justice (3); the notification must concern only a matter of law, which requires a solution of principle by clarifying the meaning of a judicial norm, which may be susceptible of various interpretations⁸ (4); the matter of law is new, has generated contradictory debates and over it the High Court of Cassation and Justice did not state yet, nor it is the object of a pending referral in the interests of the law⁹ (5); the awarding of a solution on the main issue of the matter on trial, as a last resort, to depend on the matter of law whose clarification is being requested (6).

The panel of judges shall decide to notify the High Court of Cassation and Justice after contradictory debates, by a *court decision*, which must state (Art 520 Para 1 of the Civil Procedure Code) the following:

- The reasons supporting the admissibility of the notification;
- The panel of judges' point of view;
- The parties of the case point of view.

Thus, for the preliminary ruling the High Court of Cassation and Justice can be notified only by the panel of judges who has the competence to solve the case, as a last resort, its solution to depend on the matter of law whose clarification is requested, because it is new, namely the High Court of Cassation and Justice did not rule upon it, nor it makes the object of a pending referral in the interests of the law and is susceptible, due to divergent opinions regarding its interpretation, to create a future non-unitary judicial practice. For the referral in the interests of the law an essential condition is the existence of a non-unitary judicial practice in this area, namely *different solutions given by the courts regarding a certain matter of law by definitive decisions*, which are attached to the *notification*.

The common side of the two proceedings is the existence of a controversy matter/point of law¹⁰, “generating non-unitary practice”¹¹, over which the High Court of Cassation and Justice is the only court competent, based on its constitutional role to insure the unitary application of the law by the courts, and shall clarify it by a decision of principle.

2. Trial proceedings

2.1. According to the new Civil Procedure Code (Art 513 Para 1-4 of the Civil Procedure Code), *the panel* of the High Court of Cassation and Justice competent to trial the referral in the interests of the law shall be formed of: the president or, in his absence, by one of the vice-presidents of the High Court of Cassation and

⁸ The notification of the Supreme Court of Justice shall not be admissible if it concerns a matter of fact from a certain case, see in this regard G. Boroï et al., *Noul cod de procedură civilă, Comentariu pe articole, vol. I. Art. 1-526*, Hamangiu Publ.-house, Bucharest, 2013, p. 1008. In the same meaning, see also the Guide for submitting a prior act of apprehension available at http://www.scj.ro/s_complet%20chestiuni.asp

⁹ If the High Court of Cassation and Justice “ruled a large number of decisions as to shape a constant jurisprudence”, the literature considers that the matter of law can no longer be considered new, nor that over it the High Court of Cassation and Justice did not state; see in this regard G. Boroï et al., *Noul cod de procedură civilă, Comentariu pe articole, vol. I. Art. 1-526, op. cit.*, p. 1010

¹⁰ In terms of terminology, the doctrine appreciates that between the two phrases used by the legislator, namely “matter of law” and “law issue” there are no substantive issues regarding their meanings. See in this regard, the lecture held by M. Nicolae titled „Dispoziții privind asigurarea unei practici unitare. Recursul în interesul legii. Sesizarea Înaltei Curți de Casație și Justiție în vederea pronunțării unei hotărâri prealabile pentru dezlegarea unor chestiuni de drept” during the event *Conferințele. Noul cod de procedură civilă*, Bucharest, June-September 2012, <http://www.juridice.ro/wp-content/uploads/2013/02/Brosura-NCPC-INM.pdf>

¹¹ M. Nicolae, *Recursul în interesul legii și dezlegarea, în prealabil, a unei chestiuni de drept noi de către Înalta Curte de Casație și Justiție în lumina noului cod de procedură civilă*, in *Dreptul Magazine*, No 2/2014, p. 37

Justice (who shall be the panel's president), *the presidents of its four sections*, as well as of 20 judges, among who 14 judges from the section/sections which had competence over the matter of law differently solved by the courts and of 2 judges from the other sections.

The legislator distinguishes on how the matter of law is of interest for two or more sections or on how is not in the competence of any section as follows:

- Art 516 Para 2 of the Civil Procedure Code states that if the matter of law is of interest for 2 or more sections, the president, or, where appropriate, one of the vice-presidents of the High Court of Cassation and Justice shall establish the number of judges from the interested sections who shall be part of the panel of judges, the other sections being represented by 2 judges;
- Art 516 Para 3 of the Civil Procedure Code states that when the matter of law is not in the competence of any section of the High Court of Cassation and Justice¹², the president or one of the vice-presidents of the High Court of Cassation and Justice shall appoint 5 judges from each section. *In this case, for the preparation of the report, the president of the panel shall appoint one judge from each section.*

According to Art 516 Para 4 of the Civil Procedure Code, in all cases, the appointment of judges shall be random from the members of the interested sections and of the other sections which are not directly connected to the controversy matter of law.

To prepare *the report* on the referral in the interests of the law, the president of the panel shall appoint 3 judges of the panel's members (Art 516 Para 5 of the Civil Procedure Code).

- 2.2. Regarding the panel of judges of the High Court of Cassation and Justice for stating a preliminary ruling solving a matter of law, it shall be established depending on *the matter of law which is the object of the notification*, according to Art 520 Para 6-9 of the Civil Procedure Code.

Thus, the notification shall be judged by a panel formed of the president of the appropriate section of the High Court of Cassation and Justice or by a judge appointed by him, and of 12 judges from that section. The section's president, or, in case of impossibility, the judge appointed by him, is the panel's president and shall take all the necessary measures to randomly appoint the judges (Art 520 Para 6 of the Civil Procedure Code). When the panel is complete, its president shall appoint one judge to prepare the report on the judged matter of law.

When the matter of law refers to the activity of several sections of the High Court of Cassation and Justice or if there is no section correspondent to that which ascertained that the matter of law was not unitary solved by the judicial practice, the president or, in his absence, one of the vice-presidents of the High Court of Cassation and Justice shall submit the notification to the presidents of the sections interested in solving the matter of law.

In this case, the panel of judges shall be formed by the president, or in his absence, by the vice-president of the High Court of Cassation and Justice, who shall preside the panel, of the presidents of the sections with interest in solving the matter of law, as well as by 5 judges of that sections randomly appointed by the panel's president. When the panel is complete, its president shall appoint, for the preparation of the report, one judge from each section.

In all cases, the rapporteur judges are not/do not become incompatible.

¹² We are talking about litigations of private or public international law, of inter-temporal law, of electoral law etc. and which, in the absence of a legal provision are not covered by the competence of any section, see also M. Nicolae, *Recursul în interesul legii și dezlegarea, în prealabil, a unei chestiuni de drept noi de către Înalta Curte de Casație și Justiție în lumina noului cod de procedură civilă, op.cit., p. 42.*

Also, in both proceedings, both the report on the referral in the interests of the law, as well as that regarding the solution of the matter of law by a preliminary ruling¹³ are similarly drafted, the procedure for its preparation being common according to Art 516 Para 6-9 of the Civil Procedure Code.

For the preparation of the report, the panel's president shall be able to request to certain known experts their written opinion on the matters of law which can generate different interpretations in courts (Art 516 Para 6 of the Civil Procedure Code).

The report shall state the arguments on which is based on, the relevant jurisprudence of the Constitutional Court, of the European Court of Human Rights or of the Court of Justice of the European Union and if necessary, the doctrine in this area, as well as the opinion of the consulted experts.

Also, the rapporteur judges shall elaborate and motivate the project of the solution proposed for solving the matter of law (Art 516 Para 7 of the Civil Procedure Code).

Also in both cases, the referral in the interests of the law¹⁴ and the preliminary proceedings shall be debated only in the presence of all members of the panel, within maximum 3 months from the notification of the High Court of Cassation and Justice, and the decision for admission or rejection shall be adopted by a qualified majority of two thirds of the panel's members, it shall be motivated within 30 days from its adoption and shall be published within maximum 15 days from motivation in the Official Gazette of Romania, Part I.

3. The effects of the decision and their termination

The solution given to the matters of law is mandatory for all the courts (including for the High Court of Cassation and Justice) from the publication of the decision in the Official Gazette of Romania, Part I (Art 517 Para 2 and 4, Art 521 Para 3 of the Civil Procedure Code), except the court which requested the solution by a preliminary ruling, for which the decision shall be mandatory from its ruling¹⁵.

An important feature of the referral in the interests of the law is that the solutions are ruled only for the interests of the law, have no effect on the examined court decisions or on the situation of the parties from those litigations.

For all cases, the decisions stated by the High Court of Cassation and Justice are decisions of principle, interpretative, having value as judicial precedents of interpretation.

Art 518 of the Civil Procedure Code is common for the both proceedings, so that the two decisions, for the interests of the law, as well as the decision solving a matter of law end their applicability with the modification, repeal or when the legal provision subjected to interpretation is declared unconstitutional, the legal rules being common.

4. Conclusion

¹³ The report shall be communicated to the parties, who within maximum 15 days from the communication, may submit in written, by their lawyer or legal counsel, their points of view regarding the matter of law subjected to trial (Art 520 Para 10 of the Civil Procedure Code).

¹⁴ The referral in the interests of the law is supported in front of the panel, as the case may be, by the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or by the prosecutor appointed by him, by the judge appointed by the Directing College of the High Court of Cassation and Justice, namely of the Court of Appeal, by the Ombudsman or one of his representatives.

¹⁵ I. Deleanu, *Noul cod de procedură civilă, vol. I, Comentarii pe articole*, Universul Juridic Publ.-house, București, 2013, p. 709; The author states that the legislator's wording is "uninspired" because the panel of judges who notified the High Court of Cassation and Justice is not present during the ruling of the decision, becoming effectively aware of the decision's content with its communication.

The High Court of Cassation and Justice, using the two procedural mechanisms, namely by solving the referrals in the interests of the law and the requests to give a preliminary ruling performs its role stated by the Romanian Constitution, to provide a unitary interpretation and implementation of the law by the other courts of law, i.e. to insure a unitary judicial practice.

This paper has been financially supported within the project entitled “*Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research*”, contract number POSDRU/159/1.5/S/140106. This project is co-financed by European Social Fund through its Sectorial Operational Program for Human Resources Development 2007-2013, **Investing in people!**

REFERENCES

Books, treaties and specialized articles

- G. Boroi et al., *Noul cod de procedură civilă, Comentariu pe articole, vol. I. Art. 1-526*, Hamangiu Publ.-house, Bucharest, 2013
- I. Deleanu, *Noul cod de procedură civilă, vol. I, Comentarii pe articole*, Universul Juridic Publ.-house, Bucharest, 2013
- N. Popa, *Câteva considerații privind recente inițiative legislative pentru accelerarea judecăților*, în “*Curierul Judiciar*” Magazine, No 12/2010
- M. Nicolae, *Recursul în interesul legii și dezlegarea, în prealabil, a unei chestiuni de drept noi de către Înalta Curte de Casație și Justiție în lumina noului cod de procedură civilă*, în “*Dreptul*” Magazine, No 2/2014
- M. Nicolae, lecture titled *Dispoziții privind asigurarea unei practici unitare. Recursul în interesul legii. Sesizarea Înaltei Curți de Casație și Justiție în vederea pronunțării unei hotărâri prealabile pentru dezlegarea unor chestiuni de drept*, during the event *Conferințele. Noul cod de procedură civilă*, Bucharest, June-September 2012, <http://www.juridice.ro/wp-content/uploads/2013/02/Brosura-NCPC-INM.pdf>
- N. Volonciu, *Tratat de procedură penală. Parte specială, vol. II*, Paideia Publ.-house, Bucharest, 1996

Legislation

- Law No 134/2010 on the Civil Procedure Code, republished in the Official Gazette of Romania, Part I, No 545/3 August 2012, with subsequent modifications and amendments
- Law No 135/2010 on the Criminal Procedure Code, republished in the Official Gazette of Romania, Part I, No 486/15 July 2012, with subsequent modifications and amendments

Websites

- Explanatory Memorandum to the draft of the Civil Procedure Code, http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/tabid/648/Default.aspx
- Guide for submitting a prior act of apprehension http://www.scj.ro/s_complet%20chestiuni.asp;