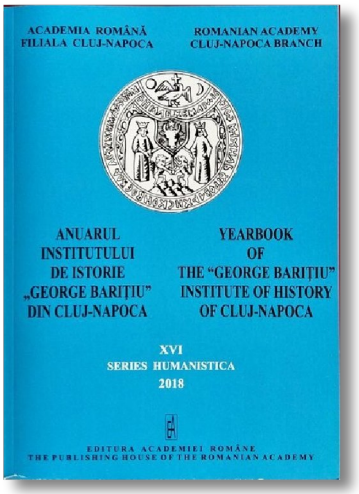

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CASE-LAW AS A SOURCE OF LAW

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Abstract. *The legal norm is the only social norm enforced by the state. The law has to be clear, for people to know what the desirable conduct is. Case-law plays an important role in the clarity of the law. In the Romanian legal system, case law is not traditionally considered a source of law. Nevertheless, the demand for equality before law led to the creation of different procedural mechanisms for the convergence of case-law, through decisions of the High Court of Cassation and Justice. According to the Romanian Constitution, international conventions regarding human rights and the legislation of the European Union prevails in the face of national law. With the international legal acts, the case-law of international courts that interpret them becomes a source of law. The paper is analysing the way case-law of the international courts and even national case-law is more and more a source of law in Romania, against the traditional view that considered it was not.*

Keywords: *case-law; legal norms; sources of law, equality before law.*

INTRODUCTION

Law is a social science that traces rules of conduct and behaviour for the members of societies. Unlike other social regulations, law becomes mandatory, in case its regulations/norms are unconditional, being applied by force, under the state right of constraint, or, in case this is not possible, by the state applying sanctions for those in violation of the law requirements. The obligation to comply with the legal rules provided by the state highlights the fact that they are appreciated by society as the most important. The rest of the social norms are not separated from law regulations, but they are close connected to them, legal rules bringing forth rules for the society's important values. As stated in the doctrine, at the foundation of law there is "a system of values existing at a given moment in society... the law protects a system of values, a system which the state is interested in preserving and implementing" (Dumitrescu, 1998, pp. 48-49).

In any society, normative order is tightly connected to the global meaning of culture, with all its components (Fodor, 2003, p. 9). Culture embraces three major elements: human action achievement models, norms for the conduct of the society

members and the resulted material and symbolic products, subsequent to human action and interaction, which influence lifestyles (Craiovan, 2001, p. 133). The fact that law considers within its norms ideas on how the members of society should behave from other norms, either religious, moral, social, or for ordinary cohabitation, only reflects the unity of a culture. Trying to argument law's scientific fundamentals, Mircea Djuvara operates with the so-called „scale of sciences", in which, from the lower to the upper position, the sciences order is: mathematics, physics, biology, psychology, sociology, morals and the law (1941, p. 69). According to the same author, „Positive law does nothing but admit or not, in specific ways and by certain methods, what a smaller or larger number of people think about in this respect; everything it does is to add something to a previous element (Djuvara, n.d., pp. 93-94). In order for the members of society to develop lawful conducts, rules must be clear, clarity to which jurisprudence brings its contribution as well.

THE PLACE OF JURISPRUDENCE IN THE ROMANIAN LAW

In our law, jurisprudence is traditionally considered a formal source of the law. The peculiarities of various situations placed under the same legal regulation, the interpretation which the judge gives to the legal regulation depending on her/his preparation, on her/his intellectual possibilities of perceiving the inter-disciplinary approach required to settle the case, on the meaning conferred to the normative provision within the context of the multitude of situations which have led to formulating the law text, give the formal, subsidiary nature of jurisprudence as a law source (Boboş, 1999, pp. 190-191).

In the Romanian law, as in other continental law systems, the judge is not a law creator, as she/he resumes to applying the positive law regulations. A legal decision is implemented only upon the parties of the trial and does not have a compulsory nature for any other court of law. Related to this traditional conception, things have evolved, on the one hand, due to changes in the normative framework in which the judge performs her/his activity, and, on the other hand, because of the evolution of the understanding of how the judge should interpret the legal norms/regulations.

Law attains its goal in two ways. One requires the observance and execution of the legal provisions by the members of society while the other provides the enforcement of the legal regulations by the state organisms (Popa, 2014, p. 193). In what respects the latter, the most important role lies with the judiciary courts. They are called upon, by means of the requests addressed to them, to establish certain rights or to ascertain their existence and to decide the measures to be carried out in order for the legitimate rights and interests underlying the legal rules to be met. The provisions of court judgments are contained in judgments, which together form the case-law.

One of the most important moments during a trial is represented by the choice of the law regulation enforceable upon the state of fact traced subsequent to the probation, a process in which the judge must take into account the hierarchy of legal norms (Popa, 2014, pp. 200-201). This hierarchy has currently become more complex.

According to constitutional provisions, in case of inconsistencies, the pacts and treaties on fundamental human rights, to which Romania is a party, take precedence over national law, unless the Constitution or the internal laws contain more favourable provisions (Article 20 para. 2). Likewise, as a result of Romania's acceding to the European Union, the provisions of the European Union's constituent treaties, as well as the other binding Community regulations, take precedence over the contrary provisions of the internal laws, in compliance with the provisions of the accession act (Constitution, Article 148 paragraph 2). As for the Convention for the Protection of Human and Fundamental Rights (better known under its simplified name of the European Convention on Human Rights, hereinafter referred to as the Convention), developed within the Council of Europe and signed in Rome in 1950, it provided in its content a mechanism to control the way in which the signatory states meet their assumed obligations. At present, as a result of the adoption and ratification by the Convention signatory states of Protocol no. 11, the check of compliance by the signatory states with their obligations is carried out by the European Court of Human Rights as the only judicial body with such competence. The decisions issued by the European Court of Human Rights, which form the case-law of this court, interpret the Convention. The jurisprudence of the European Court of Human Rights has shaped the autonomous notions of "civil rights", "criminal charge", "family", "domicile", highlighting the content of these notions in the Convention, unlike national legislations. The case-law of the European Court of Human Rights has thus had a unifying role, explaining the meaning that the signatory states have to give to the notions with which the Convention operates when it comes to rights it protects. At the same time, the European Court of Human Rights has formulated in its case-law principles closely related to the rights protected by the Convention, some of which are not explicitly included in its articles. Such principles are those relating to arms equality and contradictoriality, the principle of predictability and accessibility of law or the principle of the stability of legal relations. In its jurisprudence, the European Court of Human Rights has appreciated that the term "law" (drept) appearing in the articles of the Convention, encompasses both the rules of legislative and case-law origin and meets qualitative conditions, inter alia, those of affordability and predictability1. Thus, whether by interpreting certain legal norms or in their absence, the courts create a constant and predictable case-law, which afterwards acquires the value of predictable law.

[1] Resolution in the case Dragotoniu si Militaru-Pidhorni against Romania (2007), para. 34.

To give precedence to the provisions of the European Convention on Human Rights means applying its provisions in the manner interpreted by the European Court of Human Rights. Thus, in our law, the case-law of the European Court of Human Rights is indissolubly linked to the Convention, constituting a block of conventionality (Bârsan, 2005, p. 103). This Conventionality block has a constitutional and super legislative force (Popescu, 2000, p. 268), thus imposing on the national judge with the power of law.

The same is the mechanism by which the case-law of the Court of Justice of the European Union, the court of law which ensures the unitary interpretation of the European Union law by all its Member States, forms a unit with this legislation, being part of the constitutionality block in our national legislation, being binding on all national courts.

EVOLUTION OF THE ROLE OF CASE-LAW IN ESTABLISHING THE LEGAL NORM IN THE NATIONAL LEGAL SYSTEM

As far as national case-law is concerned, as indicated before, as a matter of principle, it is not a source of law. However, unitary case-law leads to better compliance with the constitutional requirements of equality before the law (Article 16, para.(1)). Romania has been condemned by the European Court of Human Rights for its non-unitary case-law solutions, manifested even within the supreme court, whose role should be, among other things, to unify the interpretation of law. In the case Păduraru v. Romania (2005), it was indicated that, in the absence of a mechanism designed to ensure the consistency of the case-law of national courts, these deep, persistent, long-term divergences relating to a field of high social interest[2] "are likely to give rise to permanent uncertainty and to diminish public confidence in the judiciary/legal system, which is one of the essential elements of the rule of law, creating a general climate of uncertainty and legal insecurity".

It is nevertheless true that a court decision carries in itself the particularities of the judge's thinking. In the continental law system, the judge also achieves her/his own abstraction process when defining the legal norm enforceable to the particular situation referred to justice, even if it starts from the text of the law. Many times, even the law content/text offers the judge the opportunity to bring to the resolution elements outside the law, when referring to morality, good behaviour, custom, equity (Fodor, 2003, pp. 169-183). It is generally argued that the judge is not a creator of law herself/himself, because her/his resolution will not necessarily fit into another cause, which will have its own peculiarities in turn. After 1990, social reality has shown that, in many situations, there have been repetitive causes, for the settlement of which different legal case-law and currents of opinions have been created.

[2] The case concerned the application of the laws of restitution of properties abusively taken over during the communist regime.

The classical procedural method of unifying the case-law solutions provided by the old civil and criminal procedure codes, the appeal on points of law (recurs în interesul legii) is a difficult one, and many years can pass, as it has been proved in the case of establishing the effects of Law no. 58/1974 and Law no. 59/1974, before the issuance of an appeal decision on points of law[3]. We have indicated in the context of those times that the state must provide the mechanisms required for the existence of unitary case-law solutions (Fodor, 2006). A salutary solution was provided by the new codes, of civil procedure (Law No. 134/2010[4], Art. 519) and of criminal procedure (Law 135/2010[5], Art. 475), by introducing the possibility of referring the High Court of Cassation and Justice with a request to pronounce a prior decision for the resolution of some legal issues (hotărâre prealabilă pentru dezlegarea unor probleme de drept). For the settlement of such complaints, the supreme court pronounces judgments which are a source of law, as in the case of appeals on points of law, being binding on all the courts of law. The positive role of this latter mechanism is obvious, given that, for example, in 2017, 51 such judgments were passed, allowing the clarification of certain legal issues, as compared to only 19 pronounced judgments which admitted appeals on points of law[6]. Thus, the number of judgments that constitute a source of law is increasing.

As far as other judgments are concerned, there is a natural process whereby, for repetitive situations, simple judgments end up enforced not only on the parties, but also on the whole of the legal community and on all citizens through a process of legal settlement, where arguments are used by analogy, or authority is given to significant or innovative solutions (Bergel, 2003, p. 79). This is particularly the case of validating solutions by the supreme court, whose mission is to inspire a unitary case-law. In Decision no. 369/2017[7], the Constitutional Court of Romania stated that the role of the High Court of Cassation and Justice "as cassation court is to ensure the unitary interpretation and enforcement of the law by all judiciary courts, a role enshrined in Art. 126 para. (3) of the Constitution". In order to fulfil this role, the Supreme Court has also organized mechanisms such as the legal practice unification commissions, in which presidents of the Courts of Appeal submit to debate the non-unitary case-law solutions and formulate recommendations on the solutions that should be considered fair. Such conclusions remain at the stage of recommendations, and are not binding on the courts. Nevertheless, in time, practice has proved that, in particular situations, due to the resolutions issued by

[3] In this matter, it was not until 2006 that the Decision no. IV of 16 January 2006 was pronounced, admitting an appeal on points of law (recurs în interesul legii), as contrary decisions have been pronounced since the early 90's.

[4] Published in the Official Gazette of Romania, Part I no. 545 dated 03 August 2012 and republished with amendments in the Official Gazette of Romania, Part I no. 247 dated 10 April 2015.

[5] Published in the Official Gazette of Romania, Part I no. 486 dated 15 July 2010.

[6] http://www.scj.ro/1303/Completele-pentru-dezlegarea-unor-chestiuni-de-drept-Cautare-rapida-pe-ani, accessed 18.03.2018.

[7] Published in the Official Gazette of Romania, Part I no. 582 dated 20 July 2017.

the High Court of Cassation and Justice or by Courts of Appeal, and pronounced in appeals (căi de atac), the case-law has gradually and in most cases turned to a unitary solution. In such situations, we are dealing with a source of law that is imposed not by express procedural provisions, but indirectly, by means of constitutional provisions requiring equal treatment before the law.

A situation which highlights the source force of case-law in the context described above is the removal from enforcement of a rule contained in the text of a national organic law, by invoking a principle deduced from the case-law of the European Court of Human Rights.

Subsequent to the enforcement of Law no. 554/2004[8], the High Court of Cassation and Justice has raised an objection of unconstitutionality regarding the text modified with the amendments brought to Article 4 of this law by Art. II para. 2 of Law no. 262/2007[9]. This law text has established that the provisions relating to the objection of illegality contained in Art. 4 of Law no. 554/2004, according to which the legality of an administrative act can be investigated at any time in the case of a trial, irrespective of the date of its issuance, are also applicable to the cases pending at the moment when the law enters into force. It was also pointed out that the objection of illegality can also be raised for unilateral administrative acts issued prior to the enforcement of Law no. 554/2004 in its initial form, the causes of unlawfulness being analyzed by reference to the provisions in force at the time of issue of the administrative act the legality of which is thus verified. By grounding the formulated objection of unconstitutionality, it was stated that "the criticized law texts allow the invocation of the objection of unlawfulness of an administrative act issued prior to the enforcement of Law no. 554/2004, thus violating the principle of non-retroactivity of the law, the principle of the legal relations stability and the principle of "the acquired rights and the legally constituted legal situations" and "the right to a fair trial". The provisions of Art. 6 of the Convention for the protection of human rights and fundamental freedoms, in relation with the right to a fair trial, with regard to the principle of the security of legal relations and the right to justice, were mentioned. What is to be noticed is that the main reasons of the High Court of Cassation and Justice, which have been more widely expressed in numerous court rulings before and after the resolution of the unconstitutionality objection which we have referred to[10], were mainly based on the "legal relations security principle", a principle which the text of the European Convention on Human Rights does not expressly mention, but it is a creation of the case-law of the European Court of Human Rights, mentioned mainly in relation with civil rights and civil obligations (see Păduraru v. Romania, para. 41). Although the Constitutional Court of Romania rejected the objection by Decision

[8] Published in the Official Gazette of Romania, Part I no. 1154 dated 07 December 2004.

[9] Published in the Official Gazette of Romania, Part I no. 510 dated 30 July 2007.

[10] See for example Judgment no. 350/2006, Judgment no. 548/2006, Judgment no. 567/2006, all published (High Court of Cassation and Justice, 2006, pp. 10-21).

no. 425 of 10 April 2008[11], the High Court of Cassation and Justice continued to remove from enforcement that part of Law no. 554/2004 which states that the objection of unlawfulness may be raised for any individual unilateral administrative act "regardless of the date of its issuance". Thus, courts of appeal judging such an objection to the merits[12], although some of them have initially accepted to enforce the provisions of Law no. 554/2004 in line with the Constitutional Court's opinion, being now aware of the constant position of the High Court of Cassation and Justice, have finally embraced the latter's opinion, in order to eliminate the possibility of their decisions being quashed. As a consequence, they adopted the same opinion in judging appeals against decisions of the administrative and fiscal litigation sections of the county courts (tribunale), gradually imposing on them the supreme court's opinion, on the same grounds, regarding the risk of cassation, thus obtaining a unitary case-law.

Thus, the express provision of an organic law, therefore a provision of the national law with a legal force inferior to the Constitution, but superior to any other normative rule, has come to be removed from application following the case-law of the High Court of Cassation and Justice, founded on a principle derived from the case-law of the European Court of Human Rights, which has clearly been given the value of a source of law.

CONCLUSIONS

We can therefore conclude that, with regard to the traditional approach to the role of jurisprudence as a source of law, the affirmation of the priority of the international conventions provisions on human rights and of the European legislation in the field of national law has made case-law of the international institutions that verify the observance of these international conventions to be imposed on our legal system as a true source of law. It is true that this status of source of law attributed to the case-law of the European Court of Human Rights has also been criticized, considering that the intervention of subjectivism in the Convention interpretation illegitimates the force of case-law. On the other hand, though, we agree that national law is a product of political will. Therefore, it can easily violate human rights, while the courts, being bound by the obligation of enforcing the International Convention on Human Rights, will be guided by the case-law of the European Court of Human Rights, which, through the autonomous notions and formulated principles aim at unifying the views of the Convention signatory states and give substance to its provisions (Letsas, 2004).

[11] Published in the Official Gazette of Romania, Part I no. 354 dated 8 May 2008.

[12] Prior to the amendments introduced by Law no. 76/2012, published in the Official Gazette of Romania, Part I, no. 365 of May 3, 2012, the competence to rule on the objection of illegality was the sole jurisdiction of the administrative courts.

Although in the present paper our comments have considered the case-law of the European Court of Human Rights, the same applies to the case-law of the Court of Justice of the European Union, case in which we can mention the judgments issued by the national courts which evoke the decisions in the files Budisan v. Romania [C-586 / 14], Nicula v. Romania [C-331/13] or Manea v. Romania [C-76/14], relative to the vehicle fee (taxa auto) or to the environmental stamp (timbrul de mediu), the case-law of the European Court of Justice leading to the removal from enforcement of the national legislation.

As for the national jurisprudence, the increasing number of repetitive cases with the possibility of referring the High Court of Cassation and Justice in order to issue a preliminary ruling for the resolution of legal issues has raised the number of judgments with a value of source of law. The case-law of the European Court of Human Rights has called for the unification of national case-law, highlighting the role of the High Court of the Cassation and Justice in achieving such a desideratum.

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