SOME CONSIDERATIONS REGARDING THE RULE OF LAW, ELABORATION, INTERPRETATION AND ENFORCEMENT OF CIVIL LAW (II)

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Abstract: *Courts, necessarily, interpret law in the process of solving cases. In this regard, interpretation represents an essential stage in the enforcement of the law.*

Law – as a work of art of the legislature – cannot be exhaustive, and if it is deficient, the law system, even a Romano-Germanic one, like ours, in which the judicial precedent does not represent a source of law, recognizes, however, the creative role of the judge.

Regarding the divergences in interpretation, over the time, three main causes were identified: legislative incoherence and instability, the situations in which the legislature is not expressing clearly enough, the enactment being poorly written, and the situation in which the interpreter, in his approach, substitutes the will of the legislature.

Keywords: *separation of powers in state, interpreting law, legislative gaps, legislative differences*

We previously referred to the regulator role of the laws, to the relation between law, justice and moral, but, also, to the danger that the excess of power represents, both in the elaboration, as well as in the enforcement of law.

We intend to, further more, make some appreciations on the importance of the legal doctrine and legal practice, which, over time, have offered defining milestones for the Romanian legal culture, important milestones for clearing and explaining legal rules, representing, many times, sources of inspiration for adopting reform measures.

In this context, it must be remarked that the Romanian law school – a school of value and tradition – has proven it self as an important vector for promoting innovation and progress, for integrating European and universal values, with a decisive role in the processes of law elaboration, clarification and perfecting.

Any discussion regarding the separation and balance of powers in state, the place, role and functions of these powers starts, necessarily, from the rules of principle value written in the Fundamental Law.

Therefore, according to the dispositions of Article 4, 5th alignment of the Romanian Constitution, revised, the state is organized according to the principle of separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy.

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In Romania, respecting the Constitution, its supremacy, and its laws is binding.

In his speech, held with the occasion of the beginning of court year 1939 – 1940, Andrei Rădulescu, at that time first president of the High Court of Cassation, listing the competences of the Supreme Court – much enhanced than the ones appointed to the Court at its foundation, by the law promulgated in 1861, elaborated in the light of the principles of the Paris Convention from 1858 – referred to a problem as controversial than as now: the limits of judicial powers, in general, and of the High Court in particular, in the context of separation and balance of powers in state.

Regarding the High Court, Andrei Rădulescu was noting that „it has the right to control the way the laws are interpreted and the way the courts judge, as well as the duty to establish the consistency of laws. These are the only attributions that similar courts from other countries have, this being its role as a cassation body.

It also has some powers to abrogate some of the acts of the executive power, if they violate law, right that – in other parts – belongs to the State Council or to other institutions with administrative character.

The Court is the only one that has the right to inquire the constitutional character of the laws and to preclude the application of those laws that are not in accordance with the fundamental pact. The importance of this right is well known, right that is recognized in few countries and, even there were is consecrated, it is now given into the competences of the Court of Cassation, right that our High Court of Cassation has exercised in conditions that do not justify the critics brought from other parts".

At present, according to the dispositions of article 142, alignment (1) and article 146 of the Romanian Constitution, revised in 2003, the Constitutional Court represents the guarantor of the Constitution's supremacy, having, among others, the competence to decide over the constitutional character of the laws, before their promulgation, as well as to decide on the unconstitutional exceptions regarding laws and ordinances, brought before the law courts or commercial arbitration courts.

In relation to the dispositions of articles 124 and 126 of the Romanian Constitution, justice – realized through the High Court of Cassation and Justice and through other law courts established by law – is done in the name of law, the Supreme Court assuming the role to ensure consistent interpretation and application of law by the other law courts, under its jurisdiction.

As, in a democratic state, social life must take place according to the constitutional principles and in compliance with laws, a power to assume the role of interpreting and enforcing the laws and to re-establish the rule of law, when it is broken, is necessary.

In the judicial doctrine[1] it has been asserted that the separation of powers in state materializes, on the one hand, through the legislative separation of government, and on the other hand, through the separation of the jurisdictions in

[1] I. Muraru, *Constitutional right and political institutions*, Volume II, Publisher Proarcadia, Bucharest, 1993, p. 217.

relation to the governors, which allows the control of the latter's actions by independent judges, judicial independency representing the premise for the rule of law, and the fundamental guarantee of a fair trial.

For ensuring the quality of the justice act, Romanian Constitution states, at article 124, alignment (3), that judges obey only the law, this condition representing itself a guarantee of the judge's independence.

The role of the judge is to solve a pre-existing litigation, through an act that states and realizes law in a determined law case. His act includes an ascertainment, the result of verifying the conformity of the disputed facts with the rules of law, and a decision, expressing the will of the laws, to which it is subject to. [2]

Judges are obliged, through their whole activity, to ensure the supremacy of law, to revere the rights and freedoms of people, as well as their equality before law, to ensure a non-discriminatory judicial treatment to all the participants to the judicial procedures, regardless of their roles.

Furthermore, a judge cannot refuse to judge, based on the reason that the law does not stipulates, it is unclear or incomplete.

Therefore, the judge, essentially, has the role to interpret the law.

In the Constitutional Court jurisprudence, has been stated that interpreting laws is a rational operation, used by any subject of law, in order to apply and comply with the law, having as purpose the clarification of the meaning of a legal regulation or of its field of application.

Law courts – has been noted by the constitutional contentious court – necessarily, interpret law in the process of solving cases with which they have been invested. In this regard, interpretation is the indispensable phase in the process of law enforcement.

The complexity of some cases can lead, sometimes, to different ways of enforcing the law in the law courts practice. In order to eliminate possible judicial qualification errors in some cases, and in order to ensure the consistent enforcement of law in the practice of all law courts, it has been crated, by the legislator, the institution of appeal in the interest of law. The interpretation decision pronounced in such cases is not *extra lege*, and, even more, cannot be *contra legem*.[3]

„The principle by which the judge obeys only the law, according to article 123, alignment (2) of the Constitution – the Constitutional Court underlined – does not have and cannot have the meaning of differently or even contradictory enforcing the same legal norms, in accordance, exclusively, with the subjective character of interpretation, belonging to different law courts. Such a concept would lead to the consecration of solutions that might represent a violation of law, even on the grounds of judge independence, fact that is unacceptable, as law being one and the same, her enforcement cannot differ, and the personal beliefs of judges cannot justify such a consequence". Also, the Court considered that

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[2] V. M. Ciobanu, *Theoretical and practical treaty of civil procedure*, Volume I, General theory, Publisher Naţional, Bucharest, 1996, p. 30.

[3] *Constitutional Court*, decision number 93/2000, published in the Romanian Official Gazette, Part I, number 444 from the 8th of September 2000.

„ensuring the consistency character of judicial practice is imposed also by the constitutional principle of equality between citizens before law and public authorities, therefore inclusively before law courts, as this principle would be severely affected if by enforcing one and the same law the solutions of the law courts would be different or even contradictory".[4]

The European Court of Human Rights has found, repeatedly, in the cases regarding the Romanian state, the violation of the right to a fair trail under the aspect of inobservance of the principle of security of the judicial relations because of inconsistent practice at the level of national courts.

Therefore, for example in the case of Beian against Romania[5], the European court of Human Rights has drawn attention to the divergence of cases existing at the level of the High Court of Cassation and Justice, retaining the fact that to the extent to which the states decide to adopt laws in order to indemnify the victims of the injustice done in the past, these laws must be enforced clearly and coherent enough as to avoid, as much as possible, the judicial insecurity and uncertainty for the entitled persons. In this regard, it must be underlined that uncertainty, even legislative, administrative of jurisdictional, is an important factor that must be considered in order to evaluate the state behaviour.

The jurisprudence divergences - has been also noted – represent, through their own nature, the inherent consequence of any judicial system that relies on an ensemble of instances, with competences in their jurisdictions. Nevertheless, the role of a supreme court is to regulate these contradictions in jurisprudence.

More recently, in the case of Ştefănică against Romania[6], the European Court of Human Rights has found, also, that the provisions of article 6 of the Convention have been broken, underlining that different solving of similar cases leads to a state of uncertainty, that, in the end, creates a lack of trust in the judiciary system, given the fact that this element is essential in the rule of law.

The Court's findings regarding the inexistence of an efficient remedy to eliminate the inconsistency character of jurisprudence, have led, among others, to the reconsideration of the unification mechanism of legal practice through the means of appeal in the interest of law, and to modifying the dispositions of the Code of Civil Law, in the sense of regulating a procedure more flexible, that allows a rapid intervention of the Supreme Court for solving controversial law cases, and for bringing the jurisprudence divergences within reasonable limits.

As it has been, for good reason, noticed in the doctrine, jurisprudence has, among others, the role to ensure a certain security in the legal relations, so that the judge will look not just to solve actual case, but also to coordinate his decision with the other judicial decisions, thus ensuring the consistency and coherence of the decisions taken, and to draw out some guiding ideas in the process of law enforcement. But, if this need for consistency and coherence, that generates

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[4] *Constitutional Court*, decision number 528, from the 2nd of December 2007, published in the Romanian Official Gazette, Part I, number 90, from the 26th of February 1998.

[5] Published in the Romanian Official Gazette, Part I, number 66, from the 21st of August 2008.

[6] Published in the Romanian Official Gazette, Part I, number 175, from the 15th of March 2011.

security, turns the precedent into a source of justice, though not a source of law in the strict sense.[7]

The Law, as I. Micescu was observing, „does not content, like other sciences, to ascertain what is and to express what ascertains. [...] The role of the science man is to be careful and to control the accuracy of its reproductions, in intelligible forms, as a result of ascertainment learned through observation. In the field of these sciences, the mind observes, registers and concludes; Law has an extra requirement: after it has determined, after it has observed, after it has been accustomed with the relations as they are, to judge them from the point of view of moral values and in stead of looking with resignation what it is, to impose with authority what must be." [8]

What skipped the attention of the legislator, those aspects indissolubly connected with the dynamics of social life and of progress, which usually precede and anticipate the changes of different regulations, must be treated by the judge, in order to solve contentious issues.

Law – as the legislator's work of art – cannot be exhaustive, and if it has gaps, the legal system, even one Roman-Germanic, like ours, in which the judicial precedent does not represent a source of law, recognizes the creative role of the judge.

Even though he cannot pronounce himself based on general provisions, the judge is not allowed to refuse judgment, based on the fact that law does not stipulate, therefore the judge is forced to complete the gaps in laws, but not by adding a new regulation to the judicial system, but by discovering a regulation that exists by default in the system. [9]

In this respect, the present Civil Code [10], recently entered into force, establishes the rule according to which insufficient regulation in any field can and must be complemented by recourse to the analogy argument, to legal dispositions regarding similar situations, and when such dispositions do not exist, to the general law principles.

Nevertheless, according to the dispositions of article 10 of the new Civil Code, analogy is forbidden in the case of laws that derogate a general provision, which restrain the exercise of some civil rights or that foresee civil sanctions, special regulations being applied only in the expressly and limited cases provided.

According to the dispositions of article 6 of the Law 24/2000 regarding regulations of legislative technique in the development of normative acts[11], with all its subsequent amendments and supplements, the draft of normative act must establish necessary rules, sufficient and possible, that will lead to a better

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[7] I. Dogaru, *Some considerations regarding the jurisprudence as source of law*, in *Juridical texts*, Publisher Universul Juridic, Bucharest, 2011, p. 326.

[8] Micescu, I., *The new Civil Code and the method of its interpretation*, in *Course of Civil Law*, Publisher All Beck, Bucharest, p. 390

[9] I. Dogaru, *op. cit*., p. 323.

[10] Law number 287/2009 regarding the Civil Code, republished in the Romanian Official Gazette, under the article 218 of the Law number 71/2011 for the implementation of the Law number 287/2009 regarding the Civil Code, published in the Romanian Official Gazette number 409 from 10th of June 2011.

[11] Republished in the Romanian Official Gazette number 206, from the 21st of April 2010.

legislative stability and efficiency. The solutions contained must be thoroughly documented, taking into consideration the social interest, the legislative politics of the Romanian state, the requirements for corelation with all the domestic regulations, and the requirements for harmonization of the national legislation with the Common legislation and with the international treaties, to which Romania is part of, as well as with the jurisprudence of the European court for Human Rights.

For the substantiation of the new regulation it will be started from the present and future social desiderates, as well as from the insufficiencies of the legislation in force.

The preliminary evaluation of the impact that the development of normative acts has, is considered to be the way of substantiating the legislative solutions proposed, and must be realized before adopting the normative acts. This implies the identification and analysis of economic, social, environmental, legislative, and budgetary effects that the proposed regulations produce.

Substantiating a new regulation must take into consideration both the evaluation of the impact of the specific legislation in force at the moment of the elaboration of the draft normative act, as well as the evaluation of the impact of the public policies that the draft normative act implements.

Legislative solutions foreseen by the draft normative act are meant to cover the whole problematic of the social relations that represent the object of the regulations, in order to avoid legislative gaps.

In order for the solutions to be fully covering, the different hypothesis that might appear when enforcing the normative act will be taken into account, using either the enumeration of such situations taken into account, either synthetic enumerations or framework formulations, of principle, applicable to any possible situations.

Within the foreseen legislative solutions an explicit configuration of the concepts and notions used in the new regulation must be realized, concepts and notions that have a different meaning than the common one, in order to ensure their correct understanding, and in order to avoid misinterpretations (articles 24, and 25).

The systematization and unification of the legislation are also being regulated, by integrating the draft of the new normative act into the legislation framework, by avoiding duplications, by inning the law, as well as by its systematization and concentration in codes.

As for the form of the legislative act, article 8 of the Law 14/2000 states that the law drafts, legislative proposals, and all other drafts of normative acts shall be in the form of their own prescriptive legal norms.

From the way it is being expressed, the normative act must ensure its dispositions have a mandatory character.

The dispositions enclosed in the normative act can be, by case, imperative, flexible, permissive, alternative, derogatory, facultative, transitory, temporary, for recommendation, or others alike; these situations must result expressly from drafting regulations.

The legislative text must be clearly, fluently and intelligible formulated, without any syntactic difficulties and obscure or equivoque passages. Terms with emotional load are not to be used. The form and aesthetics of language must not prejudice the legal style, precision and clarity of the dispositions.

In what regards the divergences in interpretation, it must be noted that these are not new. Over time, there have been identified three main causes: legislative incoherence and instability, the situations in which the legislator does not express himself clear enough, the normative act being deficiently drafted, and the situations in which the interpreter, in his approach, substitutes the will of the legislator.

Looking beyond the methods, principles and regulations of interpreting the legal rules, the difficulties with which the interpreter can be faced in the process of understanding the meaning of the regulation and its enforcement, and in his efforts to identify and correctly understand the intention of the legislator, can be generated, both by form and substantive aspects.

With regards to the first, it must be noted the specificity of the terminology with which the law operates. Many times, words receive in the legal text a different meaning than the one in the common language, and even, in different normative acts, the same notion can have different meanings – sometimes explained, sometimes not.

Or, „it cannot be conceived a legal thinking without its exteriorization in a perfectly adapted form and language".[12]

Discussing the nature of the contextual meaning within the context of each language system, Ferdinand de Saussure was observing in the Course for general linguistic that „the language is a system whose terms are united and in which the value of one of the terms results from the simultaneous presence of the others."[13]

We can distinguish numberless types of languages – standard, literary, academic, scientific, technical, juridical, etc. – by language being understood „a linguistic system more or less specialized in expressing the content of ideas, specific to a professional activity, to one or more fields in the social and cultural life ... that have, or tend to have words, expressions, and their own rules of organizing, resulted from the different restrictions imposed to the language."[14] But, linguists draw the attention that „specialized languages are in an inclusion relationship, by referencing to the general language and in an intersection relation with the common language, with which they share their characteristics, and with which they keep a relationship of constant unit and convention exchange."[15]

Therefore, it is desirable that the writers of the normative act grant a special attention to the meaning of words, and to the way they are using them, to manifest concern and care for using one scientific terminology, that must be used uniform and consistently.

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[12] R. Teodorescu, *The issue of writing codes*, Printer's ink Luceafărul, Bucharest, 1936;

[13] Ferdinand de Saussure, *Cours de lingvistique générale*, 1971 Edition, p. 159, cited by A. Bălan Mihailovici in *About words life and the issues of the present terminology*, Publisher Oscar print, Bucharest, 2009, p. 22.

[14] I. Coteanu, *The functional stylistic of the Romanian Language, volume I, page* 45, cited by A. Bălan Mihailovici, op. cit., p. 35-36.

[15] A. Bălan Mihailovici, *op. cit.,* p. 67.

In the juridical style – this is not destined to produce emotions, but addresses only the intellect, in an expression based on logic – „due to its very reason to be, the same terminology that it is being used contains technical words that correspond exactly to the juridical notions. The juridical style, as well as the scientific style in general, implies reflection over notions and their specification; this can only be done by reusing the same words that become enshrined expression." [16]

The style of the normative acts must be characterized by clarity, precision, concision (without the law being abstract or with gaps), by applying stable principles, predictable and accessible, must be intelligible for wide and diverse categories of recipients, having in mind the general and mandatory character of the legal norm.

Referring to the process of writing laws, R. Dimiu, noted, since 1940, that „from reading the texts the commandment that the law imposes must be found, and how else better will be the text understood than if not by finding the will of the legislator in the very wording adopted? This is how the jurists, beside their own professional preoccupations, will have to take care of the matters regarding the style and grammar, in order to understand and interpret the texts as exactly as possible. Many controversies born with the occasion of explaining laws and endless discussions regarding the interpretation of conventions, are due, in their big majority, only to the faultiness in drafting the texts, and to the possibility of multiple significations of principles equivocal written." [17]

The problem of terminological unity gains new dimensions in the context of juridical harmonization through legislative means within the European Union, the constant and unitary use of the same terms with the same specifications being a condition necessary to achieve coherence and convergence of the national legislation of the Union.

The new challenges have not left indifferent the juridical world, preoccupied with conciliation of possible differences, with the purpose of a better regulation, that will respond to the practical needs, without sacrificing the theoretical coherence.

An example in this regards it is represented by the interest in elaboration of a Common reference framework in the field of European contract law, which represent the objective of the Framework programme of the European Community for unifying private law, preoccupation reflected in the elaboration of some paperwork regarding the common contractual terminology and the guiding lines of the European contract law, by the Henry Capitant Association and the Society for compared legislation.

As it has been noted in the legal doctrine[18], the terminological analysis takes into consideration terms that are essential for the consistent regulation of the contract matter – obligation, legal act, legal fact, imperative regulations, public

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[16] R. Dimiu, *Juridical style*, Publisher Rosetti, Bucharest, 2004, p. 19.

[17] *Ibidem*, p. 50-51.

[18] M. Uliescu, *A European private Law*, communication presented at the Scientific Session of the Institute for Juridical research form 17th of April 2008, in *Communitarian Law and Domestic Law*, Publisher Hamangiu, 2008, p. 7-8.

order – terms that are conceptual determined and defined, because, without any common terminology, it cannot be discussed about harmonization in applying a common reference framework, and much less it can be discussed about the establishment of a European Private Law.

Regarding the substance of the regulation, it must be noted that, relatively recent, in the case of Atanasiu versus Romania[19], the European Court of Human Rights has criticized the Romanian legislator the lack of consistency, some deficiencies in the internal legal order and the administrative practice, which have gathered recurrent and persistent problems, encountered at large scale in the enforcement of compensation laws, and not the least, have determined, largely, the inconsistent jurisprudence of the courts in the respective matter.

„The main cause appears to be the gradual extension of the scope of the reparation laws to include virtually all nationalised immovable property, compounded by the absence of a cap on compensation.

221. The complexity of the legislative provisions and the changes made to them have resulted in inconsistent judicial practice and in a general lack of legal certainty as to the interpretation of the core concepts in relation to the rights of former owners, the State and third parties who acquired nationalised properties (see Păduraru, cited above, §§ 94 et seq.).

222. The Court notes that the domestic authorities, faced with the multiplicity of restitution procedures, responded by enacting Law no. 247/2005 establishing a single administrative procedure for claiming compensation, applicable to all the properties concerned.

223. This harmonisation, which represents a step in the right direction by putting in place simplified procedures, would be effective if the competent authorities, and in particular the Central Board, had sufficient human and material resources at their disposal to cope with the tasks facing them.

224. In that context the Court takes note of the fact that the Central Board, faced with a substantial workload from the outset, initially dealt with files in random order. Although the criteria for examining claims were amended, by May 2010 only 21,260 out of a total of 68,355 cases registered with the Board had resulted in a decision awarding a "compensation certificate", and fewer than 4,000 payments had been made (see paragraph 77 above).

225. The absence of any time-limit for the processing of claims by the Central Board is another weak point in the domestic compensation mechanism, identified by the Court in Faimblat, cited above, and acknowledged by the HCCJ. The latter criticised the Central Board's lack of expedition and ordered it to examine the claims submitted to it within a "reasonable time" (see paragraph 76 above).

226. However, in the absence of a binding statutory time-limit, the Court considers that the above-mentioned requirement is in danger of remaining theoretical and illusory and that the right of access to a court in order to complain of delays on the part of the Central Board is liable to be deprived of its substance.

227. Lastly, the Court notes the very considerable burden on the State budget which the legislation on nationalised property represents, and which the

[19] Published in the Romanian Official Gazette, number 778, of the 22nd of November 2010.

Government concedes to be onerous. Nevertheless, it is struck by the slow rate of progress towards having the Proprietatea Fund floated on the stock exchange, despite the fact that the flotation was due to take place in 2005 and that the trading of shares would enable some of the claims from persons in receipt of "compensation certificates" to be dealt with through the stock market, thus easing pressure on the budget.

228. In view of the large number of problems besetting the restitution and compensation mechanism, which have persisted after the adoption of the Viaşu, Faimblat and Katz judgments, the Court considers it imperative that the State take general measures as a matter of urgency capable of guaranteeing in an effective manner the right to restitution or compensation while striking a fair balance between the different interests at stake."

In regards to the reaction of the legislator towards the jurisprudential solutions – that give life, and reality to regulations – these can materialize, case by case, in a conviction of jurisprudence, „either by ignoring the pressure of the courts to legislate in a certain way, either by adopting a law that annihilates the jurisprudential regulation", or, on the contrary, in the reception of the jurisprudential creations and their legislative assimilation. [20]

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[20] I. Dogaru, *op. cit.*, p. 332.