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NATIONAL AND EUROPEAN CASE LAW – A REMARK FOR THE HIGH COURT OF CASSATION AND JUSTICE IN PRELIMINARY JUDGMENTS

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Abstract: *The High Court of Cassation and Justicehas the responsibility to ensure consistency and predictability in case law. This is essential to maintain individual confidence in the judicial system and to respect the principle of legal certainty, which is a fundamental element of the rule of law. Consistent case law helps guarantee the right to a fair trial and strengthen the rule of law, giving citizens the confidence that they will be treated fairly and according to the law in any litigious situation. According to art. 126 para. (3) of the Romanian Constitution, the High Court of Cassation and Justiceensures the uniform interpretation and application of the law by the other courts, thus having the fundamental role of resolving or clarifying the legal issues that have created or may create a non-unitary judicial practice through the unification mechanisms regulated by law. One of these mechanisms, of French inspiration, introduced by the new procedural legislation in order to prevent non-unitary jurisprudence, is the preliminary ruling for resolving some legal issues. This mechanism comes to analyze the majority case law, as well as the practice at the European level, imposing its binding considerations and in case the notification was rejected as inadmissible, if the resolution given to the question of law, arising from the majority practice of courts, analyzed by the supreme court, or from the previous ruling of the supreme court, can be found in the recitals. In this sense, it is interesting to analyze the importance of the analyzed national and European jurisprudence in the formation of the panel's opinion that resolves the respective legal issue.*

Keywords: ***c****ase law; preliminary decision; non-unitary practice; European Court of Human Rights.*

Introduction

According to the doctrine, judicial practice, also called jurisprudence, represents the totality of judicial decisions pronounced by courts of all levels.

The term „jurisprudence", also called „customs of the courts", has known several meanings in Romanian law. It meant the science of law created by jurisconsults. (Boghirnea, 2009, p. 62). In a broad sense, jurisprudence refers to all decisions made by courts of law, regardless of the court that issued them or their nature. These decisions can influence the interpretation and application of the law and provide guidance for future cases.

In a narrow sense, jurisprudence focuses on the ability of courts to influence the development and interpretation of the law through their decisions. These decisions may supplement or clarify existing law or set precedents for future cases, even in the absence of a specific legislative rule. Jurisprudence can be a crucial tool in the adaptation and evolution of the law in the face of social, technological, and political changes. Courts may develop new principles or adapt existing legal interpretations to better reflect the needs and values of society at a given time. This process allows the law to remain relevant, dynamic and provide solutions in the context of a constantly changing world.

Judicial practice can include both court decisions that can be considered wrong for reasons such as the incorrect interpretation of the law or its erroneous application to a particular case, as well as decisions that become benchmarks for the improvement of future law enforcement activity.

Decisions that become landmarks are often those that provide a strong and clear case for solving a specific problem. These rulings may establish or clarify the meaning of principles, interpret legislation in innovative ways, or address aspects of the law that were not previously well defined. Thus, they can serve as guides for future courts in resolving similar cases and contribute to the development of jurisprudence in a

constructive and useful way. The authority that a court decision has over similar cases is called judicial precedent (Popa, 2021, p. 68). It consists of judicial decisions which, although they solve specific cases, are of wide interest, because they have value for the future as well, being able to inspire future solutions for similar cases, which is why they are also called „principle decisions" (Popescu, 2002, p. 155).

Such court rulings contribute to the interpretation and application of the law, which can be useful for the subsequent practice in the respective field. In essence, the jurisprudence of the High Court of Cassation and Justice recognizes that Law no. 134/2010 on the Code of Civil Procedure established the possibility for the courts to ask the High Court of Cassation and Justice to issue preliminary rulings to clarify some legal issues. These rulings are essential to the merits of cases and are requested when judges believe that the intervention of the supreme court is necessary to definitively settle a legal issue discussed in the trial.

Through this procedure, the trial court can request the High Court of Cassation and Justice to rule on some essential legal issues, which are of major importance for the resolution of the case. Thus, a uniform and coherent interpretation of the law can be ensured within the entire judicial system, and the judgments issued by the High Court of Cassation and Justice in these circumstances become binding for the lower courts and final for the respective case (Ene-Dinu, 2022, p. 89).

This practice has the benefit of ensuring consistency in the interpretation of the law and providing clarity on key legal issues that may influence court proceedings.

This new competence of the High Court of Cassation and Justice was introduced to prevent the emergence of non-unitary jurisprudence at the level of national courts. By granting binding solutions, both for the court requesting the preliminary ruling and for the other courts facing similar legal issues, consistency, and unity in the interpretation of the law is ensured throughout the judicial system.

The decisions of the High Court of Cassation and Justice in these cases have only prospective effects, which means that they apply only in subsequent cases and do not have retroactive effect. This contributes to

the predictability and consistency of judicial decisions over time, providing a clear framework for the application of the law in all similar cases that may arise in the future.

The High Court of Cassation and Justice exclusively analyzes the specific issue indicated by the judge of the case. This judge, anticipating the complexity of the matter and the risk that it may generate different interpretations within other courts, requests the intervention of the supreme court to issue a decision that provides clarity and establishes a unitary interpretation, applicable at the level of the entire judicial system in the country.

This approach ensures uniformity in the application of the law and prevents divergent interpretations in various courts. By establishing a unified perspective, the High Court of Cassation and Justice contributes to the coherence and predictability of judicial decisions throughout the country.

According to art. 516 para. 5 Civil Procedure Code, after the composition of the panel according to art. 516 para. 4 of the Civil Procedure Code, its president will appoint 3 judges from among the panel members to draw up a report on the appeal in the interest of the law. For the preparation of the report, the president of the panel may request the written opinion of some recognized specialists on the legal question whose release is requested. According to art. 516 para. 7 Civil Procedure Code, the report will include: the options related to the resolution of the legal issue and the arguments in support of each of them; the relevant jurisprudence of the Constitutional Court; the relevant jurisprudence of the European Court of Human Rights; the relevant jurisprudence of the Court of Justice of the European Union; the doctrine in the matter and when required, the opinions expressed by the consulted specialists.

In the present study, we propose to analyze some preliminary rulings issued by the High Court of Cassation and Justice in the resolution of some legal issues to highlight the way in which domestic and European jurisprudence contributes to the interpretation of the normative acts that go through this procedure.

Relevant jurisprudential examination

We can highlight in this study some examples of judgments pronounced in the resolution of some legal issues in which the domestic jurisprudence, as well as the European one, had a decisive role in forming the opinion of the High Court of Cassation and Justice judges and are the basis of the interpretations of the normative act that is the subject of the analysis.

I. A first example in this regard is Decision no. 38/2022 pronounced by the High Court of Cassation and Justice - Panel for the resolution of some legal issues (published in the Official Gazette, Part I no. 671 of July 5, 2022), regarding the resolution of the referral made by the Alba Iulia Court of Appeal - Criminal Division, in File no. 4.184/107/2017/a9.1, by which a preliminary ruling is requested.

The legal issue subject to the analysis of the High Court of Cassation and Justice concerns the legal nature of the term of 6 months during the criminal investigation, respectively 1 year during the trial, during which it is necessary to periodically verify the existence of the grounds that determined the taking or maintenance of the preventive measure, in the interpretation of art. 2502 Criminal Procedure Code.

Taking into account the legal issue under analysis, it was found that the jurisprudence of the Panel for the resolution of legal issues in criminal matters established the inadmissibility of referrals related to legal issues regarding preventive measures, since the clarification of these issues could not influence the decision that will be taken on the merits of the case (in this sense, High Court of Cassation and Justice – Panel for the resolution of some legal issues in criminal matters, Decision no. 11/2014 (published in the Official Gazette of Romania, Part I, no. 503 of July 7, 2014), Decision no. 17/2014 (published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014), Decision no. 24/2014 (published in the Official Gazette of Romania, Part I, no. 823 of 11 November 2014).

Although this referral concerns preventive measures, these are still procedural measures, which are incidental during the criminal process and on the resolution of which neither the criminal action nor the civil action depends.

If we refer to the provisions of art. 249 para. (1) of the Code of Criminal Procedure, we note that preventive measures aim either to ensure the enforcement of criminal law sanctions (when they are taken with a view to special confiscation, extended confiscation or to guarantee the execution of the fine), or to ensure the repair of the damage caused by crime or guaranteeing the execution of legal expenses. Therefore, precautionary measures are procedural measures that affect the exercise of the right to property (in components regarding the right to dispose) to ensure the execution of some provisions contained in the court decision by which the criminal action or the civil action was resolved.

By Decision no. 65/2021 of the High Court of Cassation and Justice (published in the Official Gazette of Romania, Part I, no. 81 of January 27, 2022), the Panel for the resolution of some legal issues in criminal matters specifies that the notion of "solution on the merits" must be understood in a broad sense, including not only substantive law issues, but also those of procedural law, provided that the substantive resolution of the case depends on their resolution.

In another decision, in the same context, it was decided as follows; „with regard to the first criterion in relation to which the fulfilment of the condition related to the connection of the legal issue that is requested to be resolved with the substantive resolution of the case is examined, it should be noted that it is also considered fulfilled in the cases where the notification of the referring court refers to the interpretation of procedural norms, it being essential that the resolution of the case depends on the clarification of the legal issue" (Decision no. 7/2020, published in the Official Gazette of Romania, Part I, no. 568 of June 30, 2020).

From the perspective of the condition that the resolution of the case depends on the clarification of the legal issue, we note that in the jurisprudence of the Panel for resolving some legal issues in criminal matters, it was decided, in principle, on the meaning to be attributed to

the phrase “legal issue whose clarification depends on the merits of the case”.

Thus, in Decision no. 16/2018 (published in the Official Gazette of Romania, Part I, no. 993 of November 23, 2018), the Panel for the resolution of some legal issues in criminal matters stated that „this must be understood as the resolution of the criminal legal relationship born as a result of the violation of social relations protected by the norm of incrimination, including in the aspect of civil consequences, and not the resolution of an incidental request invoked during the trial of the case in the last instance”, and in Decision no. 23/2014 (published in the Official Gazette of Romania, Part I, no. 843 of November 19, 2014) it was emphasized that „this condition of admissibility, through the explicit reference to the „substantive” resolution of the case, requires that the resolution of the legal issue which forms the object of the notification to be decisive for the resolution of the criminal action or the civil action in the criminal process”.

In Decision no. 2/2022 (published in the Official Gazette of Romania, Part I, no. 234 of March 9, 2022), the Panel for the resolution of some legal issues decided that "in the case brought to trial, the legal issue that was referred to the High Court concerns the preliminary chamber procedure whose object is regulated in the provisions of art. 342 of the Code of Criminal Procedure, situation in which the provisions of art. 453 para. (1) lit. e) from the Code of Criminal Procedure cannot be applied by analogy to these provisions, nor can they be subsumed under the notion of solving the criminal action on the merits of a case. Thus, the High Court was not notified by the Court of Appeal with a case with which it was entrusted to resolve the criminal action on its merits. The conclusion of the judge of the preliminary chamber is a conclusion by which he ruled definitively on the legality of the administration of evidence in two separate files, and not at all in the judicial procedure of solving the criminal action on the merits of the case".

However, in the case that generated the pending legal issue, the panel of the Alba Iulia Court of Appeal is vested with the resolution of the appeal exercised against the decision to maintain the preventive

measure previously ordered during the criminal investigation phase. The solution to this legal problem, in the sense of maintaining or terminating protective measures, is not related to the solution of the criminal or civil action in the criminal case. Moreover, even if the insurance measure had also been ordered for the purpose of recovering the civil damage, the existence, when the judgment that has to be pronounced on the basis of the civil action remains final, of some assets under the power of this measure has an effect only on the method of recovery of the damage, and not of the solution given on the civil action. From the perspective of the theoretical arguments presented in the decisions mentioned above, it can be observed that the insurance measure does not constitute, by itself, a coverage of the damage, having only the role of guaranteeing its repair. At the same time, the existence of this measure is not likely to contribute to establishing the substantive solution of the civil/criminal side in this case, since it will facilitate the recovery of the damage caused by the crime, the covering of legal expenses or the confiscation of assets.

Therefore, the question highlighted in the present notification, which aims to establish the legal nature of the terms provided by art. 2502 of the Code of Criminal Procedure does not meet the analysed admissibility criterion representing an incidental matter, so the answer to this question does not influence the solution that could be given to the legal report of the conflict brought to the judgment nor the resolution of the civil action.

Consequently, considering the interpretations given by the relevant jurisprudence in the case, the referral made by the Alba Iulia Court of Appeal – Criminal Division was rejected as inadmissible.

II. Another example in this regard is Decision no. 64/2023 pronounced by the High Court - Panel for the resolution of some legal issues (published in the Official Gazette, Part I no. 1047 of November 20, 2023), having as its object the notification formulated by the Court of Appeal Bacău - Criminal Section and for cases involving minors and of family in File no. 3.556/103/2022/a1, by which a preliminary decision is requested to resolve some legal issues, including the one related to the

following aspect: "If in the procedure provided by article 148 para. (3) of the Criminal Procedure Code, as well as Article 150 para. (5) of the Code of Criminal Procedure, notification to the judge of rights and liberties in order to issue the technical supervision mandate is mandatory if the prosecutor considers it necessary for the investigator to be able to use technical recording devices, these legal provisions establishing a special procedure derogation from the provisions of art. 139 of the Code of Criminal Procedure, in the case there is a technical supervision mandate, previously issued under these latter provisions."

The supreme court ruled that the undercover investigator or collaborator can wear recording devices, an aspect that emerges unequivocally from the provisions of art. 148 para. (3) of the Code of Criminal Procedure, but only in the conditions in which the judge of rights and freedoms assesses that there is a proportionality between the seriousness of the suspected criminal offense and the strong interference in private life (the investigator or collaborator, participating in the criminal investigation as interlocutors of the person targeted by this have, ab initio, increased possibilities to determine, to surprise, to occasion, to collect data and information, even without exceeding the limits of a passive investigation, by comparison with an object or another person carrying technology of surveillance without his knowledge).

Therefore, the goal pursued by the legislator, that of granting an effective and adequate protection to the private life of the person suspected of committing a crime, in the case of video or audio recordings by an investigator or collaborator, cannot be achieved to the extent that the judge of rights and freedoms, at the time of issuing the technical supervision mandate, under the conditions of art. 139 of the Code of Criminal Procedure, he did not know the use of the undercover investigator or the collaborator and, consequently, he did not have the opportunity to analyse the legality and opportunity of taking photos, video or audio recordings by him.

Limitations to the fundamental rights of individuals must be subject to the test of necessity, proportionality, and subsidiarity, which is why

any restriction must take place under strict conditions and, in this case, authorized by the judge of rights and freedoms.

The use of such special methods of surveillance or research involves a high level of interference in a person's private life, an aspect that makes it necessary to refer to the jurisprudence of the European Court of Human Rights and the Constitutional Court regarding the importance of the control exercised by an independent magistrate (the judge) in cases where such measures are required.

In the pending case, the High Court analysed the jurisprudence of the Court of Strasbourg, referring to the Case of Valenzuela Contreras v. Spain, Judgment of July 30, 1998 (application no. 27671/95, Collection of judgments and decisions 1998 V), and the Case of Roman Zakharov v. Russia (Grand Chamber, application no. 47143/06), Decision of December 4, 2015, by which it was judged that secret surveillance or interception of communications by public authorities constitutes interference by a public authority in the right to respect for private life and correspondence, such interference violating article 8 para. 2 of the ECHR, unless it "in accordance with the law" pursues one or more legitimate aims under paragraph 2 and, in addition, is "necessary in a democratic society" to achieve them (Judgment Kopp v. Switzerland from March 25, 1998, request 23224/94, Reports 1998-II, p. 539, para. 50).

In the same context, the European Court of Human Rights emphasized that "...it is aware of the difficulties involved in the fight against serious crimes and the need for the authorities to sometimes resort to more elaborate investigation methods. The Convention does not prevent, at the stage of preparation of the criminal investigation material and when the nature of the crime can justify it, the use of sources such as anonymous informants... Recourse to such sources is acceptable only if it is accompanied by adequate and sufficient guarantees against abuses, in especially within a clear and predictable procedure for authorizing, implementing and controlling the investigative measures in question" (Judgment of February 5, 2008, in the Case of Ramanauskas v. Lithuania, application 74420/01, Grand Chamber, point 51).

From this jurisprudence, the High Court concluded that the main condition for not having violated art. 8 para. 2 of the ECHR is that the interference must be "prescribed by law", i.e. have a basis in domestic law, which respects all the quality conditions of the law.

Thus, it is not enough that the interference is provided for by a predictable law, with clear and detailed rules, but it is imperative that the state authorities, when using such special methods of surveillance or research, strictly comply with the legal provisions.

Consequently, the special nature of the procedure that does not allow derogations, the arguments related to the role conferred on the judge of rights and freedoms in the architecture of the criminal process in the context of the separation of judicial functions, the aspects highlighted by the previously mentioned jurisprudence regarding the constitutional and conventional standard of protection of freedoms individual require the conclusion that, in cases where the prosecutor resorts to the procedure provided by art. 148 para. (3) of the Code of Criminal Procedure, he is obliged to notify the judge of rights and liberties even in the case of the existence of a previously issued supervision mandate, a legal requirement which, under no circumstances, can be evaded.

The High Court of Cassation and Justice, based on the interpretations provided by European jurisprudence, admitted the referral made by the Bacău Court of Appeal - Criminal Section and for cases with minors and family cases in File no. 3.556/103/2022/a1, by which a preliminary ruling is requested to resolve the stated legal issue and states that in the procedure provided for by article 148 para. (3) of the Criminal Procedure Code, as well as Article 150 para. (5) of the Code of Criminal Procedure, notification to the judge of rights and liberties in order to issue a technical surveillance mandate is mandatory if the prosecutor considers it necessary for the investigator to be able to use technical recording devices, even if there is a surveillance mandate technique of the same nature previously issued, these legal provisions establishing a special procedure, derogating from the provisions of art. 139 of the Criminal Procedure Code.

Conclusions

The need to carry out an analysis of the role played by national and European judicial practice in the activity of the High Court of Cassation and justice in the pronouncement of decisions regarding the resolution of legal issues is a priority because the activity of interpreting the law by the High Court ensures the link between the legal norm in its theoretical expression and its practical application. The basis of the study is both the legislation in the field of decisions regarding the resolution of legal issues and the practice of the courts in Romania, the European Court of Human Rights and the Court of Justice of the European Union, jurisprudence analyzed to highlight its role not only in the interpretation but also in the creation of law. The purpose and objective of the paper resides in researching the sources of law, especially the jurisprudence of the European and national courts, with special regard to the decisions regarding the resolution of some legal issues.

Over time, the place and role of jurisprudence in the system of sources of law has fluctuated from the decline in prestige and the concrete meanings of judicial practice to its recognition as a source of law, at least in terms of human rights, but not only, because we have here in view not only the decisions of the ECHR, but also those of the CJEU. The tendency is to have a unitary right both at the national level and at the EU level.

From the analysis of the High Court's jurisprudence, from which I briefly presented in this study some eloquent examples, it follows with certainty that, at least in the matter of decisions regarding the resolution of some legal issues, the supreme court analyzes both the national jurisprudence and the jurisprudence of the CJEU and ECHR. The opinions of national and European judges obviously contribute to the shaping of the opinion of the High Court at the time of the pronouncement of preliminary decisions, thus ending up having a decisive influence in terms of the interpretation and application of the law, thus appearing as genuine sources of law, with an increasingly obvious direct role.

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