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ANALYSIS OF THE FRENCH DOCTRINE REGARDING THE NORMATIVE POWER OF THE OPINIONS OF THE COURT OF CASSATION

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ABSTRACT

In this article I continue to research the decisions of the supreme courts, which have the constitutional role of unifying the interpretation of the law at the national level, and implicitly of the judicial practice, by studying the French legal doctrine regarding the legal nature of the notices for appeals of the Court of Cassation.

KEYWORDS: notice for appeal, the French Court of Cassation, legal nature, normative power

INTRODUCTION

The opinion of the French Court of Cassation develops the written rule of law, interpreting it through a new technique, by issuing an opinion on a new question of law. This procedure appeared on May 15, 1991, by Law no. 91-491 of December 31, 1987, amending the Code of judicial organization and establishment procedure "saisine pour avis de la Cour de Cassation" (JORF, May 18, 1991) according to the model of the State Council, before which, by art. 12 of Law 87-1127 of December 31, 1987 on the reform of administrative litigation[1], the procedure called *renvoi pour avis* ("referral for opinion") was created, a procedure that aims to unify the interpretation of the law at the national level.

The referral for opinion is also close to the appeal in the interest of the law, a procedure with a curative effect of the non-unitary judicial practice, provided for by art. 618-1 of the new French Civil Procedure Code. The jurisprudence of the supreme court is a specific one: it is a genuine jurisprudential legislation as said by those who established it in 1837[2] – "The Court of Cassation and in general the Supreme Courts have a legislative mission, by offering an interpretation of the official texts, an interpretation which, like the law, it has a general nature and binding force", according to F. Zenati[3].

However, through this new procedure, the legislator assigns the High Jurisdiction[4] a new, consultative mission to prevent divergent jurisprudence[5].

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[1] Published in JORF January 1, 1988, repealed by art. 4 of the Ordinance no. 2000-387 of May 4, 2000, on the Code of administrative justice. Currently, the provisions of art. 12 of this law are found in art. 114-1 of the Code of administrative justice.

[2] The preparatory work for the Law of 1837, quoted by Z.-L. Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, PUF Publ.-house, Paris, p.135

[3] F. Zenati, La saisine pour avis de la Cour de Cassation, Loi n. 91-491 du 15 mai 1991. Decret n. 92-228 du 12 mars 1992. *Recueil Dalloz Sirey*, Cronique – XLIX, 1992, p.252

[4] Analogous to this procedure, we also meet at the CJEU level, which has the role of a supreme court (since there is no other control court above it) which, through the procedure of preliminary questions, has the same role, to unify the interpretation of the Union regulations and follow our books. See in this regard: F.-Ch. Jeantet, *Originalité de la procédure d'interprétation du Traité de Rome*, Juris Classeur Périodique, La semaine juridique – Édition générale, 1966, I Doctr. 1987; E.-N. Valcu, "*The expedited procedure and the urgent preliminary procedure- Procedure for trial specific to the form of judicial cooperation within the European Union*", presented during the International Conference "*Society based on knowledge. Norms, Values and Contemporary*

The question is raised in the specialized literature, if the supreme judge, by interpreting a new legal matter with which he is referred, adds or creates a legal norm by issuing notices for referral.

Regarding the rule-creating character of the opinions[6] of the French Court of Cassation, it is shown in the French specialized literature[7] that it is all the more obvious as their purpose is to clarify the meaning of new legislative or regulatory provisions.

The issue of exceeding the limits of judicial power is raised here, through the Court of Cassation, called by the legislator to respond to a problem that arises in numerous litigations, knowing that the law forbids "the judge to rule by way of general provisions and regulation on cases that are subject to his judgment", as provided by art. 5 of French Civil Code (similar to art. 5 of the Romanian Code of Civil Procedure).

Morgan de Rivery-Guillaud agrees in his article with the opinion of several authors[8] who consider that the opinion of the Court of Cassation contributes to the formation of jurisprudence, participating, at the same time, in its normative power, whose reality is no longer contested today.

Practically, a proof that it is an instrument for developing jurisprudence[9] and its normative action[10], F. Zenati brings as an argument the fact that the referrals for opinion are published in the Official Journal of the French Republic, as provided by art. 1031-6 of the French Code of Civil Procedure.

They are also published in the "Bulletin des arrets" (the jurisprudence bulletin).

Art. 144-3 of the French Code of Civil Procedure provides that "the opinion issued by the Court of Cassation does not bind the court that formulated the referral request for the opinion", thus the legislator avoids establishing a new form of regulatory ruling (*arrêt de règlement*)[11].

Landmarks", 12th Edition, Faculty of Law and Administrative Sciences, Valahia University of Targoviste, Romania, June 10-11, 2016 and published in the Supplement of Valahia University – Law Study, pp.332-337; I. Boghirnea, E.-N. Vâlcu, "*Jurisprudence and the juridical precedent of the European Court of law as source of law*", Lex et Scientia International Journal, LESIJ No. XVI, vol 2/2009, pp. 253-258, I.N. Militaru, *Trimiterea prejudiciară faţa Curţii Europene de Justiţie*, Lumina Lex Publ.-house, 2005, p.80; I.-N. Militaru, *Dreptul Uniunii Europene. Cronologie, Izvoare, Principii, Instituţii Piaţa Internă a Uniunii Europene. Libertăţile fundamentale*, Universul Juridic Publ.-house, Bucharest, 2017, pp. 305-308.

[5] I. Boghirnea, *The analysis of the notions of "divergent jurisprudence" and the "unitary jurisprudence"*, in Legal and Administrative Studies, nr.2 (17)/2017, pp.106-112

[6] Waline, *Le pouvoir normative de la jurisprudence, Melange Secelle*, Paris: LGDJ, p. 622

[7] A.-M. Morgan de Rivery-Guillaud, *La saisine pour avis de la Cour de Cassation. Loi n. 91-491 du 15 mai 1991. Decret n.92-228 du 12 mars 1992.* Juris Classeur Périodique, La semaine juridique – Édition générale, I, 3576, p.176

[8] See this widely debated matter, authors quoted by A.-M. Morgan de Rivery-Guillaud, *op. cit.*, p.176, note 24: E.-L. Bach, *Rep. civ. Dalloz, v. Jurisprudence*; O. Dupeyroux, *La jurisprudence, source abusive de droit*, Melange Maury, Dalloz, 1960, p.349; J. Ghestin, G. Goubeaux, *Droit civil. Introduction*, 3eme édition, LGDJ, 1990, p.422; P. Hebroaud, *Le juge et jurisprudence*, Melanges Couzinet, p.329; Ph. Jestaz, *La jurisprudence, réflexions sur malentendu*, recueil Dalloy, 1987, p.11, Ph. Malaurie, *La jurisprudence combattue par la loi*, Melanges Savatier, Dalloz, 1965, p.603; J. Maury, *Observations sur la jurisprudence en tant que source de droit*, Melanges Ripert, LGDJ, 1950, p.28; M. Waline, *Le pouvoir normatif de la jurisprudence*, Melanges Secelle, LGDJ, 1950, p.613; F. Zenati, *La jurisprudence*, Dalloz, 1991.

[9] The referral may state whether it will be published in the Official Journal of the French Republic. Also, the opinion is notified to the parties and the registry of the Court of Cassation, it is sent to the Public Ministry and the court that addressed the request for the opinion, to the first president of the Court of Appeal and the general prosecutor, when the request does not emanate from the court.

[10] F. Zenati, *La saisine pour avis de la Cour de Cassation, op.cit.*, p.252

[11] A-M. Morgan de Rivery-Guillaud, *op.cit.*, p.176. *Per a contrario*, following this argument of the author Morgan Rivery-Guillaud, did the Romanian legislator, by the fact that it provided the binding force of the decisions of the I.C.C.J. established the regulatory decisions?

Moreover, the opinion of the French Court of Cassation does not know the relativity of the judgment[12] as it provides "a global answer to a series of questions"[13], an interpretation of a new rule of law without dividing the facts from the concrete situations.

Following the line of logical interpretation, if generality is the essential feature of the rule of law and what determines it from a material point of view, we must recognize that the generality of the answer given by the Court of Cassation points to the legislative nature of the opinion[14] and, from here, the consequence that the legislator provided, for this procedure, the publication of the opinion in the Official Journal of the French Republic "the vehicle of the law par excellence" (art. 1031-6 of the Code of Civil Procedure).

Morgan de Rivery-Guillaud considers that the binding nature of the opinion of the Court of Cassation does not result from the texts but from the adherence of the substantive jurisdictions to the interpretation it enunciates, considering that this interpretation is given by a prestigious panel of the Court of Cassation which gives it an exceptional authority[15].

The normative power of the Court, being "closely linked" to its power of control over legal legality, logically, it can be considered that it exercises its normative power before the settlement of disputes, exercising, at the same time, an *a priori* control of the legal legality of decisions which follows[16].

Art. 5 of the French Civil Code has had its justification so that the litigants would not be subjected to a standard trial, thus ensuring their individual freedom and equality. However, in the case of referral for opinion, there is no standard judgment but an interpretation of a standard concept, which, moreover, is not stated by the Court of Cassation but by the legislator, because "the interpretation of certain important concepts must be uniform, without ambiguity and fast"[17].

CONCLUSIONS

Through this procedure, the French doctrine[18] considers that the Supreme Jurisdiction turns into a direct auxiliary of the legislator, the referral procedure for opinion being created to deal with the inadequacies of the law.

[12] F. Zenati, *La jurisprudence*, Dalloz, Coll. "Méthodes du droit", Paris, 1991, p.123
[13] Morgan de Rivery-Guillaud, *op.cit.*, p.177
[14] Morgan de Rivery-Guillaud, *op.cit.*, p.177
[15] P. Drai, *Rapport de la Cour de Cassation*, 1990, p.46
[16] Morgan de Rivery-Guillaud, *op.cit.*, p.177- 178
[17] Morgan de Rivery-Guillaud, *op.cit.*, p.178
[18] Morgan de Rivery-Guillaud, *op.cit.*, p.179

BIBLIOGRAPHY

1. I. Boghirnea, *The analysis of the notions of* "*divergent jurisprudence*" *and the* "*unitary jurisprudence*", in Legal and Administrative Studies, no. 2/2017
2. I. Boghirnea, E.-N. Vâlcu, "*Jurisprudence and the juridical precedent of the European Court of law as source of law*" Lex et Scientia International Journal, LESIJ No. XVI, vol 2/2009, pp.253-258; I. Deleanu, *Dialogul judecătorilor. Forme şi implicaţii ale dialogului judecătorilor* in Revista Română de Drept Privat no. 3/2014
3. P. Drai, *Rapport de la Cour de Cassation,* 1990
4. Z.-L. Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi,* Ed. PUF, Paris, 1965
5. Jeantet F. Ch., *Originalité de la procédure d'interprétation du Traité de Rome*, Juris Classeur Périodique, La semaine juridique - Édition générale, 1966, I Doctr. 1987
6. I.-N. Militaru, *Trimiterea prejudiciară fața Curții Europene de Justiție,* Lumina Lex Publ.-house, 2005
7. I.-N. Militaru, *Dreptul Uniunii Europene. Cronologie, Izvoare, Principii, Instituții Piața Internă a Uniunii Europene. Libertățile fundamentale,* Ed. Universul Juridic, București, 2017
8. A.-M. Morgan de Rivery-Guillaud, La saisine pour avis de la Cour de Cassation. Loi n. 91-491 du 15 mai 1991. Decret n.92-228 du 12 mars 1992. *Juris Classeur Périodique, La semaine juridique - Édition générale,* I, 3576
9. F. Zenati, *La jurisprudence, La jurisprudence.* Ed. Dalloz, Coll. Méthodes du droit", Paris, 1991
10. F. Zenati, *La saisine pour avis de la Cour de Cassation, Loi n. 91-491 du 15 mai 1991. Decret n. 92-228 du 12 mars 1992.* Recueil Dalloz Sirey, Cronique - XLIX, 1992
11. Waline, *Le pouvoir normative de la jurisprudence, Melange Secelle*, Paris: LGDJ
12. E.-N.Vâlcu,"*The expedited procedure and the urgent preliminary procedure-Procedure for trial specific to the form of judicial cooperation within the European Union*" presented during the International Conference "Society based on knowledge. Norms, Values and Contemporary Landmarks", 12th Edition, Faculty of Law and Administrative Sciences, Valahia University of Targoviste, Romania, June 10-11, 2016, and published in the Supplement of Valahia University – Law Study.