Considerations on the Relationship between Jurisprudence and the Way of Law's Interpretation by the Public Administration

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Abstract. The paper aims at answering the question of the relationship between jurisprudence and the way law is interpreted by public administration in the conditions of respecting good administration's requirements. The research is grounded upon previous studies published in the framework of the project "*The right to a good administration and its impact on public administration's procedures*" (code PN II IDEI 698/2007) financed by the Romanian National Research Council (CNCSIS) and is based on comparative and interdisciplinary approaches of public administration and administrative law. The present research concludes in favor of a special role ensured for the legal norms' interpretation effectuated by justice reported to the ones given by public administration. The implications of such interpretations translates themselves in reducing the number of judicial causes generated by conflicts of juridical interpretation and ensuring a good administration through observance of beneficiaries' legitimate expectations. The research addresses both academics and practitioners in the field of justice and public administration, bringing to their attention a new approach of the relationship between justice and public administration in the process of law implementation.

Keywords: jurisprudence; judicial power; good administration

1 Does Public Administration have the Role of *giving work* to Justice? Preliminary Considerations

The question from the title has, obviously, a rhetorical sense! It was generated by the numerous situations from practice when the Justice and the Executive power seem to look and to interpret with another critical apparatus the same normative reality.

A recent example is offered by the implementation of Law no. 221/2008, in the field of teaching staff's remuneration. Into the dispute is majoring with 33% of the teachers' salaries from the quota of 50% provided by law, increment obtained through judicial decisions by the teachers that addressed to justice, against public administration. The judicial instances' decisions were pronounced in implementation of the Law no. 221/2008, for whose implementation the first called was the public administration from the educational sector, namely Executive power!

In this context it was made clear a conflict of interpretation between Justice and Executive Power, regarding the same legal norms. The press reveals that „... 175.000 from the total of 275.00 professors sued the State for Law's 221..."[1]

Those stated above stimulate us to research the possible influence that jurisprudence must exercise on the way public administration interprets law and the configuration of this relationship in the conditions of a good administration of the public affairs, having as a starting point some basic concepts of the General Theory of Law.

2 Law's Implementation

Law's elaboration represents the first stage of the social relations' juridical regulation process, according to political will. The natural consequence of the activity creating law is constituted by the translation into life of the legal norms' content, the determination of the law subjects' behavior.

[1] The newspaper *Gândul* from March the 23rd, 2010 - The same media source reveals that „...6000 from the total of 7000 teachers from Buzău County, who won the process with the ministry, starting with November 2009, went with the decisions of the courts to the educational inspectorate that approved their remuneration increment."

Law's implementation, understood as a practical activity of carrying through the legal norms' provisions, implies specific steps of legal prescriptions' achievement.

In the process of legal norms' implementation, a major importance is held by the determination of juridical or natural persons on which or in relation to whose action is going the legal norm to be implemented, as well as determining the most suitable means for transposing into life the legal norms.

The acts of law's implementation are individual acts that produce concrete juridical effects, giving birth, modifying or conducting to the extinction of some juridical rapports. This kind of acts mustn't be mistaken for normative acts, being the result of some different ways of exertion of the public power. Supporter of the normative theory, H. Kelsen affirms that each act placed on a hierarchical scale of the judicial force behaves towards the superior act as an implementation act and towards the inferior act as a normative one. The same reasoning makes Kelsen also affirm that the judicial decision would also be a norm, an individual one. (Ceterchi & Luburici, 1977, p. 372)

The way followed from the normative act to the implementation act supposes the effectuation of many juridical operations. The phases of the law's implementation process, consecrated by the General Theory are: establishing the *de facto* situation, choosing the legal norm, interpreting the legal norm, elaborating the juridical implementation act. In the activity of „implementation" of the legal norm, its cognition has a double aspect: the most thorough cognition of the *de facto* situation, that is going to be framed in the provisions of that norm, and the most thorough cognition of the spirit and of the letter of the norm that is going to be implemented for that *de facto* situation. (Deleanu & Marţian, 2002, p. 161)

3 Law's Interpretation

By the interpretation of legal norms is understood the logical-rational operation performed according to certain methods and rules specific to law, having as goal the establishing of the true or full meaning of the legal norm in its actual application. (Deleanu & Marţian, 2002, p. 161)

As relatively distinct activity, but implicit to the application process, the interpretation of legal norms also raises the issue of if it is subjected to legal regulations or not. In this sense, we must note that the positive law does not contain express regulations regarding the manner in which interpretation should be

performed, which does not mean, however, that this approach would be outside any regulation and, hence, at the discretion of the organ applying it. On the contrary, as the elaboration and application processes, the interpretation one falls within the limits of certain general principles and rules of the legal system.

Hence, a first category of regulations of interpretation can de deducted from the general principles of law, in the sense that interpretation (as the elaboration or application of the legal norms) cannot ignore, contravene or step outside the boundaries of the provisions or directions of these general principles. Secondly, the interpretation activity is based on the general principles and rules of logic; thirdly, the general principles that govern the *regulations* of different branches of law constitute, at the same time, principles of *interpretation* in those branches of law, in the sense that by interpretation one cannot derogate from the general principles that were and are at the basis of the regulations in that particular branch. Fourthly, apart from this framework of regulation principles, interpretation can also be executed through the lawmaker's possibility to issue, upon need, laws or norms with express destination of interpreting certain normative acts issued earlier (interpretative laws or normative acts) or of interpreting elements of the norm issued in the very content of that normative act.

The official i**nterpretation** of law is the mandatory interpretation and it is performed by the state organs with duties in the field of creation of law, or in the process of applying the legal norm.

Hence, the **official** i**nterpretation** represents the establishing of the meaning of a legal norm by the authority issued the normative act. In this sense, the lawmaker is facing the situation to establish that the law he adopted applies non-uniformly, giving rise to a diversity of legal solutions that the non-contradictory of law does not accept. In such cases, he can intervene, by means of an interpretation law, in order to make all addressees of the law apply it in the same manner.

Depending on its area of mandatory character, the **official** interpretation may be, in its turn, of two kinds: *general* interpretation and *case* interpretation, or of case.

The general interpretation — is the form of official interpretation performed by the organ that issued that legal norm and is achieved by the issuance or elaboration of normative acts of interpretation with mandatory character. By means of such norms or interpretation laws, is targeted the clarification by the very factor of less clear aspects of its norm issued earlier. This by virtue of the fact that the organ that

issued the norm can also interpret it. Such interpretation is called "authentic" and is the most frequent situation of general interpretation. The interpretative norms issued by the organ that issued the norm subjected to interpretation have mandatory force equal to the one of the norm interpreted. At the same time, they have retroactive character, because their interpretation object is constituted by the norm issued earlier.

In the situation of the general-mandatory interpretation, it is, in principles, allowed, that the superior organs can also interpret with mandatory character the normative acts of inferior organs. This on the grounds of hierarchical competences, according to which a hierarchically superior organ can control and even modify — within certain limits — the acts of the inferior organ, and even more so, to interpret them. However, the reverse situation, of an inferior organ being able to interpret with general-mandatory character a norm of the superior organ is, in principle, not allowed.

The case interpretation — is the form of official interpretation performed by the law-enforcement organ (court of law or competent organs of the state administration etc.) with respect to an actual situation or case. The interpretation given by the law-enforcement organs has legal force (it is mandatory) only for the respective case or situation and only with respect to the subjects of that case. Depending on the competent organ that performs the interpretation and application, the case interpretation is also called **judicial** interpretation — when it is performed by court organs. The expression „judicial interpretation" does not comprise, in the strict sense of the term, the entire sphere of case interpretation because the interpretation is performed not only by the court organs, but also by the competent organs of public administration, which are not „judicial" organs in the strict sense of the term (Deleanu & Marţian, 2002, pp. 163-164).

The unofficial interpretation, also called scientific or doctrinaire, is performed in different scientific works, by researchers in the field of law, by doctrine-people. Unlike the official interpretation, the unofficial one has no legal force, is not mandatory, is not imposed to the one applying the law, but is facultative for him. (Mazilu, 2007, p. 341)

The opinions formulated in the legal doctrine:

- opinions of *lege lata* - opinions through which a legal text in effect is being interpreted;

- opinions of *lege ferenda* – target a proposal to regulate which does not exist in the current legislation, which s proposed to be introduced into legislation in the future.

The facultative interpretation comprises the attorney's statements; that analysis of the case can be taken into consideration by the judges, but it can also be rejected. However, the person taking it into consideration or rejecting it must rely on grounds, which he must not explain in the solution given. The organ applying the law gives its own interpretation to the applied legal norm and only this interpretation constitutes the intellectual support of the decision made. (Vida, 2009, p. 89)

4 Interpretative Sources of Law

Whereas the legal norms have abstract character, is necessary the existence of exterior forms of presenting them, called *formal sources of law.* From the point of view of the evolution of law, the formal *sources of law* comprise: *legal custom, court practice and legal precedent, doctrine, normative contract and normative act.* (Popa, 2008, p. 157)

Not all legal systems acknowledge these formal sources of law, some acting solely as interpretative sources of law, which may serve to the law-enforcement organs in their process of guidance and provision of good documentation.

Jurisprudence as a source of law *The application of both the law and the legal custom and also of the doctrine is performed by the proper courts and, from this point of view, jurisprudence is, of course, the source of law by excellence of positive law, directly; the other three sources of law (custom, law, doctrine) create positive law only indirectly, by intermediating jurisprudence.* (Djuvara, 1930, p. 461)

In the Anglo-Saxon legal system, the law – created by the lawmaking power – is completed and modified through the solutions of the courts of law, through jurisprudence.

The current Romanian doctrine manifests an attitude of reserve towards the acknowledgement of the character of source of law of the jurisprudence, attitude of reserve also grounded on the principle of separation of powers; the role of jurisprudence is to interpret the law on actual cases, the judge's activity being

governed by two great principles: he always decides on the case at hand, without having the right to establish general dispositions, outside the case brought before him and, in general, he is not bound by the decision pronounced by a different judge in a similar case. (Popa, 2008) However, it is considered that these two principles present some gradations, which underline the importance of legal precedent in the Roman-Germanic system.

4.1 The Constitutional Court's Judging Activity

According to the Article 144, first paragraph, letter d) of the Fundamental Law, the Constitutional Court decides on the unconstitutionality exceptions concerning laws and ordinances, raised in front of the courts of law or of commercial arbitration and that these exceptions can be also raised directly by the People's Advocate.

This represents a novelty for our system, because prior to 1991, the law could not be directly infirmed by the judicial practice. Until that date, the ways concerning law's interpretation were coming to clarify the legislator's will, which the organ of law's interpretation was applying to a concrete case.

Thus, through a unconstitutionality exception concerning Article 93, the 4th paragraph from the Teaching Staff Statute, according to which *the teaching staff from the state education, as well as that from the private educational institutions authorized and accredited, can fulfill at most two didactic norms, with the approval of the educational unity where he is titular with work permit*, the Court of Justice of the 1st District, Bucharest, was asked to transmit the cause for settlement in front of the Constitutional Court.

Into the motivation there were invoked the dispositions of the Article 38, the first paragraph of the Constitution, according to which the right to labor cannot be restricted, the restriction of some right being possible only in the cases limitative provided by Article 49 from the Fundamental Law. Moreover, the dispositions of the Article 93, the 4th paragraph from Law no.128/1997 are contrary to Article 20 from the Constitution, because it is infringed the first point, Article 6 from the International Pact concerning economic, social and cultural rights, to which Romania is part to.

By Decision no. 30/1998[1], the Constitutional Court admitted the exception of unconstitutionality and the dispositions attacked were considered automatically void.

In this labor law matter Constitutional Court confirmed the legal basis of the juridical labor rapport which is the citizens' right not to have restricted his job choosing, his employer, and the unrestricted practice of this right. The provisions of the Decree no. 212/1974 through which it has been ratified the International Agreement concerning economical, social and cultural rights according to which *the right to labor comprises the right of a person to obtain the possibility of gaining his existence through free chosen or accepted labor* remain in force.[2]

The doctrine admitted that the decisions of the Constitutional Court in the case of the unconstitutionality exception present the characteristics of the judicial precedent. Being mandatory *erga omnes*, the Court's decisions are evoked as precedents, because a legal text, once declared as being unconstitutional, on the basis of rising of an exception during a trial, cannot make the object of a unconstitutionality exception. From the date of its publication into the Romanian Official Journal, the decisions of the Constitutional Court are general binding and have power only for the future (Article 147 paragraph 4 from the Constitution of Romania, republished).

We consider that in the case of the applying to Constitutional Court with the exception of unconstitutionality, the instance's opinion is built on the request of the party that invokes the exception. The applying to the Court will be made through a closure of the sitting which is going to comprise not only the parties' points of view, but also *the opinion of the court.* If the exception is raised *ex officio,* the closure of the sitting must be motivated, comprising also the parties' sustains, as well as the necessary evidences, the court of law associating to the constitutionality control.

The Constitutional Court's judges, on the basis of their professional capacity, general culture moral, and intellect adopt decisions that can confirm or infirm the legal norms adopted by the Parliament. In many of its decisions, the Constitutional Court affirmed that it exclusively carries out the role of a *negative legislator,* and never a role of *positive legislator*, and thus it never sanctioned legislative voids

[1] Published in the first part of the Official Journal of Romania no. 113/1998.
[2] Ratified by Romania at 31st of October 1974.

although it was confronted with such cases: "Constitutional Court pronounces itself only on the constitutionality of the acts that it has been applied with, without being able to modify or to add to the provisions submitted to control."[1]

4.2. The Appeal in the Interest of the Law

The appeal in the interest of the law is regulated in civil, criminal, commercial and administrative contentious fields and represents a procedural institution whose existence finds it reasoning into jurisprudence's stabilization and the unitary implementation of the law by the courts of justice.

The action brought in front the court in the interest of the law is made by the General Prosecutor when it is noticed that in the practice of diverse courts of law a certain text law is interpreted and implemented in different manners, The Highest Court of Cassation and Justice being called to pronounce itself on the questions of law that received a different solution from the appeal courts of law. These decisions pronounced by the united sections of the Court are brought to the knowledge of the courts of law by the Ministry of Justice, they are published in the Official Journal of Romania, the first part, and they are binding.

These interpretative solutions, constant and unitary, are sometimes invoked as judicial precedents in the judicial activity, on their basis being settled the causes with which there are appealed the courts of law. For this reason, Nicolae Popa (2008, p. 158) considers that the interpretative solution pronounced by the supreme instance can be inscribed in the category of the secondary law sources. The assurance of the unitary character of the judicial practice it is also imposed by the **constitutional principle of the citizens' equality in front of the law and public authorities,** so including the judicial authorities.

4.3. The Importance of the Jurisprudence

The importance of the jurisprudence as a source of law is also set off by Article 3 of the Romanian Civil Code that provides that *the judge who refuses to judge, on the ground that the law does not provide, it is obscure or insufficient, will be*

[1] Article 2, paragraph 3 from Law no.47/1992 concerning Constitutional Court's organization and functioning, republished in 2004, published in the first part of the Official Journal of Romania no.502/2004.

followed for denial of justice. Thus, the judge is obliged to compensate the voids of legislation or its opacities, and the decision he gives, although it is not binding for other courts of law, transforms into judicial precedent.

4.4. Administrative Practice

The administrative practice figures a solutions' body that relieves in the process of law's interpretation – rich in sociological content, the administrative act also represents the result of the process of law's interpretation and implementation to concrete cases.

Law's implementation by public administration in diverse concrete situations sometimes presents different interpretations, given to the same legal norm. In order to avoid such situations, in the fiscal field, through Article 4 from the Govern Ordinance no.92/2003, republished, it was provided in the framework of the National Agency for Fiscal Administration (A.N.A.F.) of the Commission for Fiscal Procedures, a body with responsibilities concerning the elaboration of the decisions referring to the unitary implementation of the Fiscal Procedural Code and of the legislation regarding A.N.A.F.'s sphere of competence.[1]

The acts emitted by the Commission for Fiscal Procedures represent binding obligations for the fiscal organs. Contributors will be able to bring these decisions in front of the administrative contentious, if their interpretations damage them or if they harm their legitimate interests.

5. Conclusions

To answer the question that we started this article with, we formulate another question: can public administration, who implements the law in a certain manner, to change its vision on the basis of the numerous judicial decisions pronounced in diverse cases and that unitary promote another interpretation?

We appreciate that the consistent, unitary and constant attitude of the justice to interpret a legal norm in a certain manner, observed in a large number of determined cases, constitutes the pre-requisites for a reasonable, legitimate

[1] Government Ordinance no. 92/2003 concerning the Fiscal Procedural Code, republished in the Romanian Official Journal no. 513/2007.

expectation for the legal norm's addressee as the same interpretation to also guide the public administration's steps, public administration being the one who is the first called to implement the respective norm. The rigid interpretation given to the principle of the separation of powers could induce a negative answer to this question: each power has the right to its own interpretation, based on its own evaluation!

Can we talk about the existence of a double truth, one belonging to justice and one belonging to public administration referring to the same juridical situation? The option of the authors of those lines, starting from the need of ensuring the requirements of the good administration, it's in favor of the judicial truth, *"which is not an absolute logical truth, but represents the most probable solution from a series of possible solutions"*. (Ciobanu, 1996, p. 144)

The principle of the administrative hierarchy that is placed at the basis of the construction of the public administration's system requires the existence, in the content of the juridical rapport of hierarchical subordination of the *instruction power* together with the one of *control*. In exercising the power of giving mandatory instructions to the subordinated ones, the Govern, the ministries, could disseminate inside public administration's system the manner of interpretation practiced by Justice, starting from the presumption that the judicial decision expresses the truth, gaining the authority of judged matter and couldn't be contested. Maybe such a solution would contribute to the decrease of the number of causes deducted in front of the judicial instances, through reduction/elimination of those due to the public administration's different interpretation given to the legal norms.

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