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THE SPECIAL PROCEDURE “LA SAISINE POUR AVIS DE LA COUR DE CASSATION”. LEGAL BACKGROUND AND IMPORTANCE

Iulia BOGHIRNEA*

Abstract

*The French legislator has created in 1991 the procedure of the “notification for opinion” ([*la saisine pour avis*](#)) of the Court of Cassation as a procedural incident which solves a new legal issue arose in a pending trial, which presents serious particularities for the judges of the litigation and to which it depends the solution of the first court.*

In this article, the author analyzes the French incident legislation and the importance of the notification for opinion of the Court of Cassation, scientific approach having as purpose the understanding of such procedure from the perspective of the adoption of a similar one in the Romanian legislation.

Keywords:

French Court of Cassation, notification for opinion, prevention, divergent jurisprudence.

Introduction

France is the state which has two systems of jurisdiction: the jurisdictions of common law, achieved through the courts, having as supreme authority the Court of Cassation, on the one hand and the administrative jurisdictions, headed by the State Council, on the other hand. The two jurisdictions have complete autonomy and are characterized by the lack of a mutual control, none of them being superior to the other one, for which there is, in the event of a conflict of jurisdiction, a specially organized court called the Jurisdictional Court.

As any other system for organizing the courts, the French legal system is pyramidal, on top of which is the Court of Cassation. Within this system are organized both the civil, commercial, social and criminal jurisdictions. But, the French system is characterized also by the existence of specialized courts. (Les, 2005: 35). All of them are first courts or first-degree

courts. The second degree of jurisdiction is achieved in front of the courts of appeal. The French judicial system is, traditionally, based on the principle of the two degrees of jurisdiction: the first court and the court of appeal.

The French Court of Cassation may be reunited in a plenary assembly (*Assemblée Plénière*) with the purpose of establishing the jurisdiction upon an issue dividing or attempting to divide the position of the first courts and even of the supreme court. It is a court for judicial control ruling upon the legality of the decisions issued by the courts of appeal and, exceptionally, upon the legality of the decisions rendered as final by the courts (Les, 2005: 55).

The role of the French Court of Cassation is different than the one held by our national supreme court. The French doctrine presents the particularities of the Court of Cassation using 2 essential rules: the Court does not represent a third degree of jurisdiction and it is a jurisdiction of cassation.

Finally, we need to mention that the competence of the Court of Cassation to solve the appeal in the interest of the law and the appeal for excess of power. The first can be declared against a decision under the rule of *res judicata* and has as purpose the guarantee of the jurisprudential unity. The second aspect has as purpose the compliance with the principle of the separation of powers and can determine the annulment of the acts concluded with non-compliance (Les, 2005: 58).

The administrative jurisdictions are characterized by two fundamental features: (1) it performs an activity with jurisdictional feature and (2) are completely different than the judicial jurisdictions, also from the active administration (Rivero & Waline, 1996: 179-180).

The State Council is mainly seen as a judge of cassation, namely as a supreme judge within the administrative jurisdiction. (Militaru, 2005: 26) The crisis of the cassation and the slowness of the supreme court have determined the preoccupation of finding new procedures referring to the concept of “abstract interpretation”.

First, there were serious reserves in the approach of the abstract interpretation (Lindon, XLIX, 1992: 247) because the judge must be cautious, to settle conflicts of opinions between the parties, opinions in direct relation with the human conscience and with the common perception of the law. But, the judges’ independence and methods ease the making of wise decisions, but the inconvenient of the abstract interpretation may be overcome if it is done during an incidental procedure.

In France, during the reform of the administrative contentious, Art 12 of the Law No 87-1127 of December 31, 1987 on the reform of the administrative contentious¹, in front of the Council of State was established the procedure called “*renvoi pour avis*” (sending for approval), with the purpose of unifying the interpretation of the law.

“Only a process of the type of the Roman rescripts (“*rescript*”) could be able to solve the antinomy between the principle which makes the jurisprudence an excellent interpreter of the law and the practice that obstructs the judge to interpret the new issues, because it falls under the incidence of the jurisprudence” (A-M. Morgan de Rivery-Guillaud, 35761992: 179).

F. Zenati noted in his article “La saisine pour avis de la Cour de Cassation” that “the failure to develop the jurisprudential law becomes less and less bearable in a time marked by precariousness and obsolescence. [...] The supreme jurisprudence cannot be unified, because the law which it completes is already overcome”.

The idea of notifying the Court of Cassation in order to rule an opinion in relation to a matter of law has emerged on May 15, 1991² by the Law No 91-491 modifying the Code of judicial organization and stating the procedure “*saisine pour avis de la Cour de Cassation*” (JORF, May 18, 1991).

This procedure of the notification for opinion is “a procedural incident by which it is solved a matter of law emerged in a pending litigation and on which it depends the first solution of the case” (Buffet, 2000).

Thus, the High Jurisdiction receives, according to the model of the Council of State, the possibility to issue opinions interpreting new legal provisions, presenting serious difficulties (Les, 2005: 57) for the judges of the first courts of judicial jurisdictions, without waiting for an appeal for cassation.

The law of 1991 is a response to the accentuation of slowing down the rhythm of the judicial body in front of the “intensified and aggravated flood of files”(Drai, 1990:46) and of an effervescent legislation stimulating the contentious.

¹ Published in the Journal officiel de la République française (JORF) of January 1, 1988, repealed by Art 4 of the Ordinance No 2000-387 of May 4, 2000 regarding the Code of administrative justice. Currently, the provisions of Art 12 of this law are found in Art 113-1 of the Code of administrative justice

² Similar instrument to the one applied by the French Council of State

Therefore, beside the traditional contentious attributions, the legislator offers the High Jurisdiction a new mission, consultative, of prevention of the divergent jurisprudence.

The notification for opinion is also close to the appeal in the interest of the law, a curative procedure of the non-unitary judicial practice, stated by Art 618-1 of the new French Code of Civil Procedure³.

In this way, the French national jurisdictions have access to a system of “preliminary question” (Militaru, 2004:61-81), (Militaru, 2017: 305-308), (Valcu, 2016:182-189) comparable with the one mentioned in Art 177 of the Treaty of Rome (Art 267 TFEU) allowing the jurisdictions of the Member States to use the interpretation of the CJEU (Morgan de Rivery-Guillaud, (I, 35761992) :173).

F. Zenati stated that “The indisputable borrowing from the community procedure of the preliminary question may suggest that the procedure for an opinion is another form of the preliminary procedure. The judge invites another jurisdiction to rule upon an aspect of the litigation before a decision of the first court be taken According to certain authors, (A-M. Morgan de Rivery-Guillaud, (I, 35761992): 173, F.) this procedure is similar, to a certain extent, with the legislative report, established 225 years ago by Law 16 of August 24, 1790. According to other authors: 252), it is excluded a similarity to the historical form of this institution because in the case of the notification for opinion the Court of Cassation does not depend on the legislative power, the judges having the ability to submit requests for interpretation to the Court.

Subsequently, this law has been amended, for the practice of this institution, by Decree No 92-228 of March 12, 1992. Thus, are inserted within the French Code of Civil Procedure, Book 2, Title VII, Chapter VI, Art 1031-1 to 1031-7 on the notification of the Court of Cassation.

The Organic Law No 2001-539 of June 25, 2001 on the statute of magistrates and of the Superior Council of Magistracy (JORF No 0146/ 26 June 2001) states new procedural rules, expanding the procedure of the notification for opinion for criminal matters,(Perdriau, 2001: 1657-1659) due to the fact that for the past decade the French Court of Cassation was compelled to receive only requests in civil matters (Law No 91-491 of May 15, 1991).

³ It is similar especially through the fact that the General prosecutor attached to the Court of Cassation can intervene at the time of the notification for opinion.

Ordinance No 2006-673 of June 8, 2006⁴ republished the Code for judicial organization, and the provisions regarding the notification for opinion, Art 151-1 and next become Art 144-1 and next, with the same content.

Through this mechanism of the notification for opinion of the Court of Cassation it is answered to a double objective. (Morgan de Rivery-Guillaud, (I, 35761992) :173)

First, it allows *the acceleration of the unification of the interpretation of the new rules of law* (Buffet, 2000). The notification for opinion should be made “in the appropriate” moment for the contentious, because the Court of Cassation must rule within 3 months upon the submitted request, with the purpose of not allowing the years upon the procedure in order to be summoned with an appeal on the same matter. This rush in the unification of the interpretation of the law allows the incrementation of the judicial security, justice seekers being aware of their rights in time (Robine, 1998: 2).

A-M. Morgan de Rivery-Guillaud considers that such procedure operates in the meaning of a democratization of the access to justice, because it provides for a quick and preliminary response to any decision of the first court, by combating the slowness of the procedure⁵, “which may discourage the most ardent justice seekers and, moreover, the less fortunate ones”. (A-M. Morgan de Rivery-Guillaud, (I, 35761992) :173).

Second, *the legislator aimed to insure the prevention of litigations*, because the interpretation of a matter of law gives to the court of jurisdiction “the final word”.

It was drafted as an instrument at the disposal of the first instance judge, simultaneously optional and without being mandatory, with the purpose of preventively remedying “the legislative inflation” and the extra-charging of the courts (Buffet, 2000).

The legislator, with the purpose of removing the extra-charge of the High Jurisdiction, has limited the accessibility of the notification, and in order not to derogate from the interdiction of the judge stated by Art 5 of the French Civil Code, attributes only a consultative feature for the opinion of the Court of Cassation.

⁴ Ratified by the Law No 2009-526/ 12 May 2009

⁵ Around 5-6 years for a litigation to be analyzed by the Court of Cassation

Conclusions

The procedure of opinion has the advantage of allowing, in a very quick way, the acknowledgement of the interpretation given by the Court of Cassation to certain new texts, rising numerous difficulties, thus anticipating the divergencies of interpretation between first instance jurisdictions (Canivet, 2001)

Unlike the Romanian legal system which has adopted, starting with 2014, through the new Code of Civil Procedure and the new Code of Criminal Procedure, a similar judicial institution which has imposed as mandatory the effects of the decision issued by the supreme court, the French legal system provides for it only a consultative role.

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