AREN'T DECISIONS IN THE INTEREST OF THE LAW ACTUALLY INTERPRETATIVE LAWS? A THEORETICAL STUDY, GROUNDED IN CONSTITUTIONAL LAW AND JURISPRUDENCE, OF THE LEGAL CONCEPTS OF REVIEW IN THE INTEREST OF THE LAW AND DECISION IN THE INTEREST OF THE LAW

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Abstract. Aren't Decisions in the interest of the law actually interpretative laws? *Following a thorough theoretical analysis, of both the constitutional framework, as well as the relevant legal provisions, conducted by always relating to the vast jurisprudence that the Constitutional Court has established in the matter, and also to the doctrinarian studies that have investigated the issue as well, we believe that our current study managed to prove that the question should be answered in an affirmative way. And it didn't stop here, but pressed on to also analyze the practical consequences which derive from such an answer. The result? The shaping of a new theory, whose implications add a bit of color to the constitutional law landscape.*

Rezumat. Deciziile în interesul legii nu sunt de fapt legi interpretative? *După o temeinică analiză teoretică, atât a reglementărilor constituționale, cât şi a celor legale relevante, realizată având tot mereu în vedere şi vasta jurisprudență a Curții Constituționale în materie, precum şi studiile doctrinare care tratează această temă, considerăm că studiul de față a reuşit să demonstreze că trebuie răspuns în mod afirmativ acestei întrebări. Şi nu s-a oprit aici, ci a continuat să analizeze şi consecințele practice care derivă dintr-un atare răspuns. Rezultatul? Conturarea unei noi teorii în materie, ale cărei implicații aduc un strop de culoare în peisajul dreptului constituțional.*

Keywords: Review in the interest of the law, Decision in the interest of the law, interpretative law, the applying of the law over time, the control over the constitutionality of laws

Cuvinte cheie: Recurs în interesul legii, Decizie în interesul legii, lege interpretativă, aplicarea legii în timp, controlul constituționalității legilor

Motto:

"*E Pluribus Unum*"...

(Publius Vergilius Maro "Virgil", *Moretum*)

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A. Role of the Romanian High Court of Cassation and of Justice. Some aspects of comparative law

The High Court of Cassation and of Justice is the court of the highest instance in a four-tier legal system which also includes, in descending order of authority, Courts of Appeal, Tribunals and inferior Local Courts.

According to the two annexes of the Law no. 304/2004 regarding the judicial system[1], the judiciary in Romania is comprised of other 15 Courts of Appeal (plus a Military Court of Appeal), 42 Tribunals (plus three Tribunals specialized in Commercial Law, one specialized in Family Law, and one Territorial Military Tribunal), and a large number of inferior Local Courts (plus four Military Tribunals). A similar military courts system / civil courts system duality can be found in many states around the world, including the United States of America.

The first paragraph of Article 126 of the Constitution of Romania[2] states that "The administration of justice is upheld by the High Court of Cassation and of Justice and the other courts established by law." This article, as well as the entire Section 1 of Chapter VI[3] establish the High Court of Cassation and of Justice as the only court in Romania that has an existence guaranteed by the Constitution of Romania, the supreme law of the state. The content of this paragraph is similar to that of Article III, Section 1 of the United States Constitution, which states that "The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

The third paragraph of the same Article 126 of the Constitution of Romania states that "The High Court of Cassation and of Justice shall ensure that the law is interpreted and applied in the same way by all the other courts of law, according to its competence." This is a statement of the role of the High Court of Cassation and of Justice, a role of such importance that the Parliament chose to reiterate it in the second paragraph of Article 18 of the Law no. 304/2004 regarding the judicial system. This is not an easy task at all, especially considering the large number of courts that make up the judiciary in Romania, as well as the fact that the country's population of 21.680.974[4] constantly supplies the courts with a great deal of trials.

A fact that further shows the difficulty the High Court of Cassation and of Justice encounters in the quest for the achievement of its ultimate goal is that Romania has a civil law or continental law legal system.

Civil law is primarily contrasted against common law, which is the legal system developed among Anglophone people, especially in England. The original difference is that, historically, common law was law developed by custom, beginning before there were any written laws and continuing to be applied by courts after there were written laws, too, whereas civil law developed out of the Roman law of Justinian's Corpus Juris Civilis[5].

The difference between civil law and common law lies not just in the mere fact of codification, but in the methodological approach to codes and statutes. In civil law countries, legislation is seen as the primary source of law. By default, courts thus base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to be derived. Courts thus have to reason extensively on the basis of general rules and principles of the code, often drawing analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in the common law system, cases are the primary source of law, while statutes are only seen as incursions into the common law and thus interpreted narrowly.

In our national juridical literature there have been ample discussions about the sources of law in Romania. The conclusions at which the various authors arrive are more or less the same. There are two main categories of sources of law: primary sources and secondary (inferior) sources. The primary sources include the Constitution, statutes passed by the Parliament and international treaties that are ratified by Parliament according to the law, as they are part of the national law according to Article 11 paragraph (2) of the Constitution of Romania. The secondary sources include customary law, case law and legal writings.

The fact that the case law – sometimes called judicial precedent – is considered to be a source of law, was in the past and still remains controversial, both in our national juridical literature and legal writings from other states. The common law legal system, in opposition to the continental law legal systems, holds case law, alongside the customary law, as the main source of law, even if their supremacy is constantly challenged by the increase in importance of the statutes or national laws as sources

of law. Because of this it has been stated that it is just in the present that statutory law in England isn't at all inferior to case law as a source of law[6].

If we are to analyze case law as a source of law, we must understand that it is not enough that a small number of courts found a particular solution to the legal dispute brought before them, solution that remains isolated versus the great majority of solutions given by other national courts in the same type of legal disputes. In order for case law to exist and be a reputable source of law, the solutions must be similar and agreed upon by the vast majority of national courts, as part of a constant legal practice. The constancy of the legal practice of the national courts needed for it to become veritable case law, makes the passage of time a prerequisite of this process. The constancy and passage of time are also needed in the making of customary law, to which case law has been compared. It has thus been said that case law is in fact savant customary law[7].

Romania has a civil law legal system, the predominant system of law in the world. Traditionally, the civil law legal system of Romania does not consider case law to be a veritable source of law. Our national juridical literature is supportive of this statement, because of the many problems that would arise otherwise: how could the parties of a particular trial know the existing case law, given the fact that it is rarely published in the Official Gazette of Romania, as opposed to normative acts?; what guarantees do the parties posses, that the courts will not change the case law until the date of the trial, or that the court before which the trial takes place will not decide in a way that is contrary to the existing case law?; will the judge be able to justify his decision in a particular legal dispute on the basis of case law?; are court decisions subject to appeals or reviews based on the fact that they defy existing case law?; etc[8].

On the other hand, the Romanian legislation regulates legal concepts with a dual role pertaining to the problem at hand: it challenges the previous statement and solves some of the before mentioned problems (even though it raises others), and also creates a "bridge", a controversial link, between the civil law and common law legal systems. The understanding of the most important of these legal concepts, called Review in the interest of the law and Decision in the interest of the law, is crucial in order to fully grasp the role of the Romanian High Court of Cassation and of Justice: to ensure that the law is interpreted and applied in the same way by all the other national courts of law.

B. A thorough analysis of the legal concepts of Review in the interest of the law and Decision in the interest of the law

The Review in the interest of the law is the procedural means through which a Decision in the interest of the law is issued. This is a clarification that is absolutely necessary in order to understand these legal concepts. Also, it is worth mentioning that the Romanian legislature chose to regulate these legal concepts

separately and in a different way, the criteria of this duality of the regulation being the application of these concepts in civil versus criminal matter.

B. a. A look at the evolution of these legal concepts since the enactment of the Carol II Code of Criminal Procedure

It is important to have a historical view of these concepts and witness their evolution through the various political systems Romania had. Their history is tightly linked with the history of Romania itself, and shows the need for unity in the interpretation and application of the law, no matter what political system our nation had.

One of the first appearances of these concepts in the Romanian legislation can be traced back as far as the enactment of the Carol II Code of Criminal Procedure[9], issued by the Parliament of Romania.

At the time, according to Article 19.3 of Section V of the Code, entitled "Competence of the Court of Cassation", "the Court of Cassation hears and renders judgment upon the Reviews in the interest of the law and those initiated by the Minister of Justice". We can note that the name of the highest court in Romania was different, but its competence in the matter of issuing Decisions in the interest of the law was the same as it is nowadays. According to Article 497 of the Code, "The Public Ministry[10] attached to the Court of Cassation, in a direct manner or by request of the Minister of Justice, *has the right*, in order to ensure unity in the interpreting and applying of the criminal and criminal procedure laws, throughout the entire territory of the country, to demand that the Court of Cassation decide upon the legal issues which received different interpretations by the review courts mentioned by Articles 16 and 17.3[11]".

There are several aspects of this regulation worth mentioning. These aspects are the ones that will change with time. First of all, the competence to promote a Review in the interest of the law belonged to the Public Ministry attached to the Court of Cassation, the highest prosecutorial authority in Romania. The Public Ministry could choose to do so in a direct manner, thus the decisional power in this case would belong to the Prosecutor General of Romania. It could also choose to do so at the request of the Minister of Justice. We use the term "choose" because it is an option, a possibility the Public Ministry has. We emphasized the word group "has the right" when we quoted the text of Article 497 for exactly this purpose: to show that the Ministry has the right, thus isn't obliged to exercise it, no matter which of the two authorities would have the initiative. This is an extremely important fact. We must remember that this article belongs to a Code of *Criminal* Procedure. And criminal law is to be strictly interpreted[12]. If there is one law, and it is to be strictly interpreted in order to offer a guarantee of the fairness of the trial to the accused, then the criminal legal issues should be decided upon in the same way by all the national courts. However, differences in this field continue to exist, thus the need to unify

the dissenting practice of the courts. But to leave only the possibility, and not create an obligation for initiating this much needed procedure in order to establish this unity, isn't satisfactory. This is why, as we will show, in the present, at least in criminal matter, things have changed from this standpoint.

A second aspect is the one concerning the authorities able to initiate the Review in the interest of the law, smaller in number than in the present.

The establishment of the communist regime in Romania, after the monarchy was abolished, enacted new laws, both in civil and in criminal matter.

As far as the criminal procedure is concerned, the Carol II Code of Criminal Procedure was replaced by the Code of Criminal Procedure of the Romanian People's Republic[13], issued by the Ministry of Justice. This normative act did not regulate the legal concept of Review in the interest of the law anymore. The most important reason for this lack of regulation is that criminal and criminal procedure laws had to become more flexible, interpretable, and the court rulings in criminal matters had to also. This is an imperative within a communist regime, in order to be able to effectively preserve the political system.

As for civil law, the Code of Civil Procedure of the Romanian People's Republic[14], issued by the Ministry of Justice, takes the old concept of Review in the interest of the law and adds some twists. Chapter III of the Code, entitled "Special Reviews", states, in Article 329, that: "The Public Ministry attached to the Court of Cassation, in a direct manner or by request of the Minister of Justice, can attack by means of a Review in the interest of the law, before the Court of Cassation, in Joint Sections[15], as a consequence of law violation in rendering the following: 1. Partial Decisions or Decisions reached as a result of a review before the Court of Cassation; this possibility is not affected by an extraordinary review promoted by the parties; 2. Irrevocable Decisions issued as a result of a review before other courts. The Cassation will be done in the sole interest of the law and the interpretation of the legal issues addressed is mandatory for the courts. The Ministry of Justice will notify the courts of these Decisions of the Court of Cassation".

As we can notice, there are a few differences from the regulation contained in Article 497 of the Carol II Code of Criminal Procedure. The first is that the Court of Cassation will decide upon the Review in the interest of the law in Joint Sections. By the Carol II Code, only judges of the Criminal Chamber decided upon the Review. The creation of the Joint Sections was very useful. In this way, all the judges of the Court of Cassation would have the possibility to express their legal opinion regarding the disputed legal issue. However, the downside of this creation was that in a civil matter, for example, the judges specialized in criminal matters could have a vote equal in importance to that of the judges specialized in civil matters.

A second difference is that the Review in the interest of the law stopped being a procedural way of directly challenging various dissenting interpretations of the law by the national courts. It was directed against Partial Decisions or Decisions

that were final (except for the fact that they could have been attacked by the parties by means of an extraordinary review), or against Irrevocable Decisions of other courts, *if in the process of issuing these Decisions the law had been violated*. And there is a huge gap between dissenting interpretations of the law and law being violated. Nevertheless, the Review in the interest of the law remained a procedural means of assuring unity in the interpretation and application of the law, because the interpretation of the legal issues addressed was mandatory for the courts. This legal provision is exceptional, in the way that in a civil law legal system, lower courts are from now on legally bounded to strictly follow, to adhere to a particular interpretation of the law reached by the Court of Cassation. In order to make these Decisions of the Court of Cassation public, as they are now not mere Decisions, but actually interpretative laws, the Ministry of Justice was tasked with notifying the lower courts.

A third and final difference is that this Review can be used in civil matter, as opposed to the one used in criminal matter of the Carol II Code.

Also, a fact worth mentioning is that the Public Ministry had the legal right, according to Article 46 of the Code of Civil Procedure of the Romanian People's Republic, to express its opinion of the legal issue addressed by the Court of Cassation constituted in Joint Sections.

The year 1968 brought important changes to the concept of Review in the interest of the law. Article 38 of Law no. 58/1968 regarding the judicial system[16], stated: "In order to issue its Guidance Decisions[17], the Supreme Tribunal will gather, in plenary session[18], at least once every 3 months. The Minister of Justice and the Prosecutor General of Romania will express their legal conclusions regarding the issues discussed in these plenary sessions". According to this legal statement, the Supreme Tribunal becomes a pseudo-legislative body. It must gather in plenary session at least once every 3 months to discuss problematic legal issues, so its Guidance Decisions will be issued with regularity. These Decisions, although called Guidance Decisions, were actually mandatory for the lower courts to follow. In a communist regime, the state wants to gain the greatest amount of control over the way justice is dispensed, so it can literally choose the way justice is done. That is why no lower court could dare challenge an interpretation given by the Supreme Tribunal by means of a Guidance Decision. But these Decisions were interpretative in nature, and not normative. This is why we state that the Supreme Tribunal becomes a pseudo-legislative body. It issues these Guidance Decisions, which are basically interpretative laws. They are law because they are *de facto* mandatory for the lower courts, and express the will of the communist state regarding how the law should be interpreted.

In the event the Supreme Tribunal would tend to become independent of the will of the leaders of the communist regime, Article 41 of the same Law no. 58/1968 regarding the judicial system would become applicable. This article stated that "The Guidance Decisions of the Supreme Tribunal are subject to the control of the Great National Gathering, and in the period of time between sessions, to the control of

the State Council". We can find concise definitions of the Great National Gathering and State Council in Articles 42 and 62, respectively, of the Constitution of the Romanian Socialist Republic[19]. The Great National Gathering was "the supreme body that held the power of state, and the sole legislative body of the Romanian Socialist Republic", equivalent, at least in theory, to today's Parliament. The State Council was "a supreme body that held the power of state, with a permanent activity[20], subordinate to the Great National Gathering".

The fact that the Supreme Tribunal's Guidance Decisions, issued in exercising the judicial power within the state, were subject to the control of the legislative and executive powers of state is a clear example of the breaking of the separation of powers within the state modern principle by the communist regime. This is true at least formally, if we consider the Guidance Decisions to be issued still in exercising the judicial power within the state. If we view them as issued outside the boundaries of the judicial power, as acts of the legislative power, as interpretative laws, the subordination to the legislative body becomes normal, but the fact that they are subject to control also from the executive power of state remains an anomaly. We will further discuss these implications in our analysis of the modern day legal concepts of Review in the interest of the law and Decision in the interest of the law.

Another law of the year 1968, Law no. 60/1968 regarding the organizing and functioning of the Prosecution of the Romanian Socialist Republic[21], in Article 20, states that "The Prosecutor General of Romania can notify the Supreme Tribunal, in order for it to issue Guidance Decisions, in order to ensure unity in the applying of the law". According to Article 21 of the same law, "The Prosecutor General of Romania will take part in the plenary sessions of the Supreme Tribunal in which Guidance Decisions are issued." Even if the Supreme Tribunal was obliged by law to gather in plenary sessions at least once every 3 months, the Prosecutor General of Romania had the right to "remind" the Supreme Tribunal of its role in ensuring unity in the applying of the law throughout the entire territory of Romania.

Another important addition of the laws of year 1968 was that the concept of Guidance Decisions did not just apply to civil matters anymore, but to criminal ones as well. This was a resurrection of the possibility of the Supreme Tribunal to ensure unity in the applying of the criminal laws and criminal procedure laws by the lower courts.

Just like the way Law no. 60/1968 allowed the Prosecutor General of Romania to intervene in the process of issuing the Guidance Decisions, in the sense that it had the right to notify the Supreme Tribunal whenever considered necessary to ensure unity in the applying of the law, so does Decree no. 85/1973[22] that modified Decree no. 648/1969 regarding the organizing and functioning of the Ministry of Justice, later becoming Law no. 43/1969, as modified and completed to date, allow the Ministry of Justice to do the same, with a few twists.

First one is that, according to Article 2 Section A. Subsection c), "…the Ministry of Justice will notify the Supreme Tribunal of the problems in the applying of the law regarding which it considers necessary that Guidance Decisions have to be issued;…". As we can easily notice, the "will notify" imperative was present, as opposed to the "can notify" present in Law no. 60/1968. The Prosecutor General of Romania could, but the Ministry of Justice had to.

A second twist is also found in Article 2 Section A. Subsection c). The fact that the Ministry of Justice had the prerogative of "organizing the study of the case law and the creation of statistics regarding the activity of the courts" shows that the Ministry had to be actively involved in the study of the activity and decisions of the courts in Romania, as opposed to the Prosecutor General of Romania, which did not have such a legal obligation. This explains the difference noted in the previous paragraph.

As was the case in Article 21 of Law no. 60/1968, so Article 5 of Decree no. 85/1973 states that "The Ministry of Justice expresses its legal conclusions regarding the issues discussed during the plenary sessions of the Supreme Tribunal". Again, the difference that in the case of the Prosecutor General of Romania, it "took part in the plenary sessions", as opposed to the Ministry of Justice which had to "express its legal conclusions", can be noted and shares the same explanation stated before. Also, this is another clear example of the breaking of the separation of powers within the state modern principle by the communist regime, as the executive branch of power interferes with the process of interpreting the law by the judicial branch of power.

The final piece of relevant legislation pertaining to the subject at hand is the 1986 Constitution of the Romanian Socialist Republic. Article 104 of the Constitution states that "The Supreme Tribunal controls the activity of all the tribunals and inferior local courts. The means through which this control is actually achieved are to be determined by law. In order for unity in the applying of the law to be achieved, the Supreme Tribunal, gathered in plenary session, issues Guidance Decisions.". As we can see, this reference is not innovative in nature. It is worth separate mentioning for the sole fact that it represents the first time the competence of the Supreme Tribunal to issue the Guidance Decisions is recognized and upheld by the Constitution itself, the supreme law of the state (at least formally, because we have to remember this was still at a time the communist regime still existed in Romania).

The legal concepts of Review in the interest of the law and Decision in the interest of the law *per se*, were reestablished as part of the Romanian legislation in the year 1993, by the enactment of Law no. 59/1993[23] and Law no. 45/1993[24], following their suppression in the year 1949. We believe that the evolution of the essence of these legal concepts can be truly witnessed only by thoroughly analyzing the pre-1993 succession of legal provisions in this field and that the understanding of this evolution is a prerequisite for understanding the present, applicable form, of the provisions regarding the legal concepts of Review in the interest of the law and Decision in the interest of the law, which we will further examine. We believe that it is unnecessary to

have a look at various changes of the regulations of these concepts that took place post-1993 and up to the present, because the changes do not exhibit a true, real evolution of the concepts anymore, but are merely an expression of confusion as to whether they should be regulated in a different versus unitary way, according to their appurtenance to the fields of law in general, on one hand, and criminal and criminal procedure law, on the other, and also confusion as to how exactly they should be regulated (for example, should the interpretation of the legal issues addressed as a consequence of the promoting of a Review in the interest of the law be mandatory for the courts or not)[25]. A thorough analysis of the way these legal concepts are regulated today will suffice, in our opinion.

B. b. The legal concepts of Review in the interest of the law and Decision in the interest of the law as they are nowadays regulated by the Code of Civil Procedure and the Code of Criminal Procedure

According to the third paragraph of Article 126 of the Constitution, as well as the second paragraph of Article 18 of Law no. 304/2004 regarding the judicial system, "The High Court of Cassation and of Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence.". One of the means through which it fulfills its role is that of the legal institutions of Review in the interest of the law and Decisions in the interest of the law.

Given the fact that the legal concepts of Review in the interest of the law and Decision in the interest of the law are regulated separately and somewhat differently by the Code of Civil Procedure[26] and the Code of Criminal Procedure[27], we will present them in a comparative view, highlighting the differences whenever necessary.

According to Article 4 of the Code of Civil Procedure, "the High Court of Cassation and of Justice hears and decides upon: … 2.the Reviews in the interest of the law …". This legal provision establishes the sole competence of the High Court of Cassation and of Justice when it comes to hearing and deciding upon Reviews in the interest of the law. After the completion of the process of hearing and deciding upon the Reviews in the interest of the law, the Court issues Decisions (according to Article 255 paragraph (1) of the Code), more specifically Decisions in the interest of the law.

Their corresponding articles, found in the Code of Criminal Procedure, are Articles 29, which states that "the Supreme Court of Justice[28]: … 3.hears and decides upon the Reviews in the interest of the law; …", and 311 paragraph (2), which states that the Court issues Decisions after the completion of the process of hearing and deciding upon the Reviews in the interest of the law, respectively.

But let us return to the task at hand. The legal concept of Review in the interest of the law is enunciated by Article 329 of the Code of Civil Procedure, on one hand.

The first paragraph of this article mentions the entities that have the competence to promote a Review in the interest of the law. Therefore, in civil matter, they are the Prosecutor General of the Prosecutorial Office attached to the High Court of Cassation and of Justice, also known as the Prosecutor General of Romania, able to promote the Review in a direct manner or at the request of the Minister of Justice, and, also, the leading bodies of the Courts of Appeal. These entities, according to the article, "*have the right*, in order to ensure unity in the interpretation and application of the law throughout the entire territory of Romania, to demand that the High Court of Cassation and of Justice hear and decide upon legal issues that have received different interpretations by the courts."

According to the second paragraph of the same article, the Decisions issued by the Joint Sections of the High Court of Cassation and of Justice, as a result of the promoting of a Review in the interest of the law, are to be published in Part I of the Official Gazette of Romania, just like the most important and powerful normative acts issued in Romania (such as laws, normative decisions of the government, etc.). This is an important fact because it supports, or, at least does not invalidate our belief that these Decisions in the interest of the law are truly interpretative law. According to Article 78 of the Constitution of Romania, each law is to be published in the Official Gazette of Romania. And because they are published in Part I of the Official Gazette of Romania, we can state that they can be viewed as interpretative law, because of the fact that they meet the degree of publicity needed for a law to become applicable. But we will return to this topic and expand upon our view of these Decisions as actual interpretative law in Section C of our work.

According to the third and final paragraph of the same article, "The Decisions are issued in the sole interest of the law, do not affect any of the examined court decisions, and neither do they affect the parties involved in those trials. The interpretation of the legal issues addressed is mandatory for the courts."

On the other hand, the legal concept of Review in the interest of the law is enunciated by Article 414^2 of the Code of Criminal Procedure.

Just like in the case of the before mentioned article, the first paragraph of Article 414^2 mentions the entities that have the competence to promote a Review in the interest of the law in criminal matter. They are the Prosecutor General of Romania, able to promote the Review in a direct manner, the Minister of Justice, able to promote the Review in an indirect manner, by means of the Prosecutor General of Romania, as well as the leading bodies of the Courts of Appeal and the Prosecutorial Offices attached to them.

As we can see, there are two differences from the civil regulation of this legal concept. First is that, as opposed to the fact that in civil matter, the Prosecutor General of Romania is able (*has the right*) to promote the Review in a direct manner *or at the request of the Minister of Justice*, thus the role and initiative of the Minister of Justice being limited by the ultimate decisional power of the Prosecutor General

of Romania, in criminal matter, the Minister of Justice is able to promote the Review in an indirect manner, by means of the Prosecutor General of Romania. In this case, the ultimate decisional power belongs to the Minister of Justice, and the Prosecutor General of Romania becomes more of a procedural vehicle that allows the Review in the interest of the law to be effectively promoted.

The second is that other entities have been added, entities that do not exist in the regulation of the Code of Civil Procedure. They are the leading bodies of the Prosecutorial Offices attached to the Courts of Appeal.

The change and the addition are useful because they add to the guarantee that the accused will be tried in a fair way because of the fact that the criminal legal issues will be decided upon in the same way by all the national courts, according to their "official interpretation", issued by the Joint Sections of the High Court of Cassation and of Justice.

Another interesting fact to establish is whether the leading bodies of the Military Court of Appeal and the Military Prosecutorial Office attached to it have the competence to promote Reviews in the interest of the law or not. This issue arises because of the fact that Law no. 304/2004 regarding the judicial system has distinct regulations regarding civil Courts of Appeal versus the Military Court of Appeal, as well as civil Prosecutorial Offices attached to civil Courts of Appeal versus the Military Prosecutorial Office attached to the Military Court of Appeal, in almost every possible aspect regarding them.

In short, the issue at hand is whether their competence in this area is limited to the criminal matter or not. As the civil and criminal matters, though distinct, inevitably interlace, what seems to represent a purely theoretical aspect at first glimpse reveals its practical interest and applications. We must state that, at least in theory, whenever incidental aspects only tangential to the field of criminal law arise in certain matters[29], as they are undoubtedly relevant to the unifying of interpreting of criminal law in the end, the competence in this area must be in both criminal, as well as civil matter, in order for the institutions to effectively achieve their role. Also in favor of our current argument, we must acknowledge that in this matter, the legal principle of "*Ubi lex non distinguit, nec nos distinguere debemus*" is totally applicable, thus we must obey it as such.

We are in favor of viewing the leading bodies of the Military Court of Appeal and the Military Prosecutorial Office attached to it as able to promote Reviews in the interest of the law. Based on both legal provisions and logical reasoning, our argument constructed to support this point of view will be stated using a triple standpoint structure. Therefore, we will analyze this fact from a terminological point of view, from a jurisdictional level point of view, and also from a structural point of view.

First off, from a terminological point of view, the Military Court of Appeal is a Court of Appeal. The Military Prosecutorial Office attached to it is a Prosecutorial Office attached to a Court of Appeal. Article 329 of the Code of Civil Procedure

refers simply to "the leading bodies of the Courts of Appeal", while Article 414^2 of the Code of Criminal Procedure uses the expression "the leading bodies of the Courts of Appeal and the Prosecutorial Offices attached to them". The laws do not make any distinction between civil courts and military courts, as far as the legal concept of Review in the interest of the law is concerned. Therefore, we are not allowed to make such a distinction in this case either. It is why we believe that the leading bodies of the Military Court of Appeal and the Military Prosecutorial Office attached to it are able to promote Reviews in the interest of the law, according to the two laws.

Secondly, from a jurisdictional level point of view, we must compare the following regulations. According to the first four articles of the Code of Civil Procedure, the civil judiciary in Romania is comprised, in descending order, according to the level of jurisdiction, of the High Court of Cassation and of Justice, Courts of Appeal, Tribunals and inferior Local Courts. According to the first paragraph of Article 56 of Law no. 304/2004 regarding the judicial system, the military courts in Romania are, in descending order, according to the level of jurisdiction, the Military Court of Appeal, the Territorial Military Tribunal, and the Military Tribunals. As we can see, the Courts of Appeal and the Military Court of Appeal are situated on the same third level of jurisdiction. It's the same in the case of the Prosecutorial Offices. Because of the fact that, according to the first paragraph of Article 89 of the same Law, each Court of Appeal has a Prosecutorial Office attached to it, and, according to the first paragraph of Article 98 of the same Law, each military court, including the Military Court of Appeal, has a Military Prosecutorial Office attached to it, the previous discussion and the conclusion drawn from it are also in effect in the case of the Prosecutorial Offices. We consider this fact as one more argument that supports our belief that the leading bodies of the Military Court of Appeal and the Military Prosecutorial Office attached to it are able to promote Reviews in the interest of the law.

Finally, from a structural point of view, we will show that the civil Courts of Appeal and the Prosecutorial Offices attached to them, on one hand, and the Military Court of Appeal and the Military Prosecutorial Office attached to it, on the other hand, share the same structure.

First off, all of the civil Courts of Appeal, as well as the Military Court of Appeal, have juridical personality bestowed upon them by law. In the case of the civil Courts of Appeal, the first paragraph of Article 35 of Law no. 304/2004 regarding the judicial system states that the Courts of Appeal have juridical personality. This is also true in the case of the Military Court of Appeal, according to the first paragraph of Article 61 of the same Law.

Also, according to the third paragraph of Article 89 of the same Law, the Prosecutorial Offices attached to the Courts of Appeal have juridical personality. This is false in the case of the Prosecutorial Office attached to the Military Court of Appeal as it has the legal status of a military unit, according to the third paragraph

of Article 98 of the same Law. And a military unit does not have juridical personality bestowed upon it by law[30]. The fact that the Prosecutorial Office attached to the Military Court of Appeal does not have juridical personality like the Prosecutorial Offices attached to the civil Courts of Appeal do does not mean that they do not share the same structure. As we will from now on show, the Prosecutorial Office attached to the Military Court of Appeal can still be easily considered a Prosecutorial Office attached to a Court of Appeal, and its leading body can still promote a Review in the interest of the law according to Article 414^2 of the Code of Criminal Procedure.

Second off, according to Article 49 of Law no. 304/2004 regarding the judicial system, each court of law in Romania has a leading body comprised of an odd number of judges. The leading bodies of the Courts of Appeal are made out of the President of the Court of Appeal[31] and a number of six judges, elected for a term of three years by the general assembly of the judges. Article 61 of the same normative act, in its first paragraph, states that a President of the Court is in charge of the Military Court of Appeal, as was mentioned before, in the case of the civil Courts of Appeal. It also states that Article 49 applies to the Military Court of Appeal as well, thus maintaining the leading body structure in the case of the Military Court of Appeal, but with a twist. It changes its internal structure, as it is comprised of the President of the Court and only two judges.

The third paragraph of the same Article 49 of Law no. 304/2004 regarding the judicial system we referred to earlier states that "the Decisions of the leading body of the court are issued with the vote of the majority of its members". This is a very important regulation and its consequences transcend the issue we are currently discussing, whether the Military Court of Appeal is a Court of Appeal in the sense of its ability to promote a Review in the interest of the law. This legal statement establishes the fact that the leading body of a court of law can issues Decisions, in other words can take legal courses of action, with the vote of the majority of its members, i.e. *absolute majority*. So when we speak about the ability of the leading body of a Court of Appeal to promote a Review in the interest of the law, according to the legal competence handed to it by Articles 329 of the Code of Civil Procedure and 414^2 of the Code of Criminal Procedure, we must note that this ability can be legally exercised only by the issuing of a Decision in this sense, a Decision to promote a Review in the interest of the law.

Except for two differences that will be stated below, all of the discussions regarding Article 49 of Law no. 304/2004 regarding the judicial system are also applicable, and the same conclusions can be drawn from them, in the case of the Prosecutorial Offices attached to the Courts of Appeal and the Military Court of Appeal, respectively. This is because Article 96 of the same normative act, establishing the existence and structure of the leading bodies of the Prosecutorial Offices, and making no distinction between Prosecutorial Offices and Military Prosecutorial Offices, states that the before mentioned provisions of Article 49 are also applicable in the case of the Prosecutorial Offices.

The first difference is that, according to Article 92 of the same normative act, a Prosecutor General is in charge of the Prosecutorial Offices attached to the Courts of Appeal, and not a President, as before. Because of the fact that the second paragraph of Article 99 of the same law states that a Military Prosecutor General is in charge of the Military Court of Appeal, we can safely say that all of the previous discussions and all of the drawn conclusions are still in effect, in the case of the Prosecutorial Offices attached to the Courts of Appeal and the Military Court of Appeal, respectively.

The second difference is that only Article 414^2 of the Code of Criminal Procedure offers the leading bodies of the before mentioned Prosecutorial Offices the competence to promote a Review in the interest of the law. Thus, in this case, a Review in the interest of the law could only be promoted in respect to criminal or criminal procedure laws.

To conclude, given the fact that this third and final structural point of view also supports our initial statement, we can safely state that, in our opinion, the leading bodies of the Military Court of Appeal and the Military Prosecutorial Office attached to it are able to promote Reviews in the interest of the law, as they are a Court of Appeal and a Prosecutorial Office attached to it, in the sense of Articles 329 of the Code of Civil Procedure and 414^2 of the Code of Criminal Procedure.

Finally, even though the laws regulates and refers to the Military and Civil Courts and Prosecutorial Offices attached to them separately, given the reasons previously shown over the course of the current analysis, we strongly believe that they are extremely similar, in their juridical nature and, thus, applicable juridical regime.

The first paragraph of Article 414^2 of the Code of Criminal Procedure also states that the entities that have the competence to promote a Review in the interest of the law in criminal matter "*are bound*, in order to ensure unity in the interpretation and application of the criminal and criminal procedure laws throughout the entire territory of Romania, to demand that the High Court of Cassation and of Justice hear and decide upon legal issues that have received different interpretations by the courts." As we can see, the rest of the paragraph is in two ways different from the similar regulation found in Article 329 of the Code of Civil Procedure.

The first difference is that the entities, in the case of the Code of Criminal Procedure, "*are bound*" to promote a Review in the interest of the law whenever the need to ensure unity in the interpretation and application of the criminal and criminal procedure laws throughout the entire territory of Romania exists, because of legal issues that have received different interpretations by the courts, whereas in the case of the Code of Civil Procedure, they "*have the right*" to promote a Review in the interest of the law whenever the need to ensure unity in the interpretation and application of the law throughout the entire territory of Romania exists, because of legal issues that have received different interpretations by the courts. We explained why the need for such a difference in the regulation found in the Code of Criminal Procedure versus the Code of Civil Procedure exists when we analyzed the corresponding

regulation of the Carol II Code of Criminal Procedure. Another point that we would like to make in order to support our view that the regulation found in the Code of Criminal Procedure should, in this way, be different from the one found in the Code of Civil Procedure, is in regard to customary law. Our juridical literature supports the idea that, at least as far as civil law is concerned, the legal custom is a possible source of law, but mostly because the law empowers it to be a source of law[32]. According to the second paragraph of Article 970 of the Romanian Civil Code, contracts or legal agreements between parties are to be interpreted by the judge not only be means of their specific content, but also by means of the legal customs in effect in the territory it was perfected. In the field of criminal law, legal custom cannot create law, but merely be used to suppress the application or aid in the interpretation of the law[33]. This is why, in the civil law, it is natural that different interpretations of the same legal issues exist throughout the territory of Romania because of differences of legal custom, while in criminal law such differences cannot be justified. This is why the Code of Civil Procedure allows the entities to decide whether they promote a Review in the interest of the law, whether such promotion is truly necessary and justified, while the Code of Criminal Procedure obliges the entities to promote the Review whenever dissenting interpretations of the same legal issue occur. This is also why the need for such a difference in the regulation found in the Code of Criminal Procedure versus the Code of Civil Procedure exists.

The second difference is that Article 329 of the Code of Civil Procedure speaks about the need to ensure unity in the interpretation and application *of the law* throughout the entire territory of Romania, while Article 414^2 of the Code of Criminal Procedure speaks about the need to ensure unity in the interpretation and application of the criminal and criminal procedure laws throughout the entire territory of Romania.

The regulation contained by the Code of Civil Procedure is the general law, or *lex generalis*, in this case. Because it speaks *of the law* in general, it applies not only in the case of civil and civil procedure laws, but in the case of each and every branch of law that contains regulations which are not incompatible with such a provision. Such branches of law include Commercial Law, Family Law or even branches of Public Law such as Administrative Law. In the case of Administrative Law, for example, a specific legal provision, the first paragraph of Article 28 of Law no. 554/2004 regarding contentious administrative matters[34], practically the general law regarding the procedure applicable to contentious administrative matters in Romania, states that the Law's provisions are to be completed by and applied side by side with the compatible provisions of the Code of Civil Procedure. Article 329 of the Code of Civil Procedure falls in this category of compatible provisions.

On the other hand, the regulation contained by the Code of Criminal Procedure is special law, or *lex specialis*, versus the previous one. This means that it is to be strictly applied in the case of criminal and criminal procedure laws, according also to the *specialia generalibus derogant* legal principle.

The consequences of this second difference are that, depending on the branch of law, only one of the two regulations of the legal concept of Review in the interest of the law will be applicable. And the regulation found in the Code of Civil Procedure is, as highlighted by the present section of our work, somewhat different than the one found in the Code of Criminal Procedure, so there will be a difference in the legal regime that is applicable to the legal concept of Review in the interest of the law, again, depending on the branch of law.

According to the second paragraph of Article 414^2 of the Code of Criminal Procedure, the Joint Sections of the High Court of Cassation and of Justice have the competence to issue Decisions in the interest of the law, following the promoting of a Review in the interest of the law by the entities mentioned in the first paragraph of the same Article. The difference from the regulation found in the Code of Civil Procedure comes with the highlighted part of the following statement of the same second paragraph: "The Decisions are to be published in Part I of the Official Gazette of Romania, *as well as the website of the High Court of Cassation and of Justice. The Ministry of Justice will also notify the courts of these Decisions*." Because we are in the field of criminal and criminal procedure laws, it is imperative that the law be strictly interpreted, and also receive a unitary interpretation and application throughout the entire territory of Romania, for reasons that were mentioned previous in our work. In order to ensure that the courts were aware of each and every Decision issued as a consequence of the promoting of a Review in the interest of the law in the field of criminal and criminal procedure laws, the degree of publicity that these Decisions receive was augmented versus that of the Decisions issued according to Article 329 of the Code of Civil Procedure. This was accomplished by the creation of the legal duty that the Decisions are to be also published online, via the website of the High Court of Cassation and of Justice. Also, the Ministry of Justice was given the task of notifying the courts of these Decisions.

Because of the fact that the content of the third paragraph of Article 414^2 of the Code of Criminal Procedure is identical to that of the third paragraph of Article 329 of the Code of Civil Procedure, unity in the regulation of the legal consequences of the issuing of a Decision in the interest of the law as a consequence of the promoting of a Review in the interest of the law according to any of the two Articles is achieved. These paragraphs state that "The Decisions are issued in the sole interest of the law, do not affect any of the examined court decisions, and neither do they affect the parties involved in those trials. The interpretation of the legal issues addressed is mandatory for the courts." If we break down this statement, additional points that support, or, at least do not legally invalidate our belief that these Decisions are interpretative law, can be spotted.

First off, the Decisions are said to be issued in the sole interest of the law. And which is the main interest of the law in which solely they are issued? Well, that of being interpreted in a correct and unitary manner. And the only means, both constitutional as well as legal, in order to ensure this in respect to also compatibility with their applying by the courts, is that of the Decisions in the interest of the law

being considered interpretative laws. This is also the main reason of the choice of terminology regarding the institutions. The phrase "in the interest of the law" perfectly exhibits that it is in the interest of the law that its interpreting is done in a correct and unitary manner, in accordance to the will of the lawmaker. This can be best achieved by means of interpretative laws[35] and can be in fact achieved by means of the Decisions in the interest of the law issued following the promoting of a Review in the interest of the law, besides interpretative laws issued by the Romanian Parliament itself. Thus, we hold that this fact alone can be easily viewed as an argument supporting our view that the Decisions in the interest of the law are, in fact, interpretative laws.

Second off, the Decisions do not affect any of the examined court decisions, and neither do they affect the parties involved in those trials. If this aspect of the regulation of the institutions isn't supportive of our theory, we do not know what is. Thus, implicitly, the institutions reveal that their structure is not that of a decision issued in the legal exercise of an appeal, with its purpose being exactly that of being a procedural remedy, affecting the examined court decisions and the parties involved in those trials, but that of interpretative laws. Also, the prohibition of the retroactive applying of the law is clearly exhibited, and we state at this point that all of the relevant doctrinal and jurisprudential statements regarding the applying of law over time in general and that of interpretative law in particular[36], are fully applicable in the matter of the Decisions in the interest of the law issued by the Joint Sections of the High Court of Cassation and of Justice[37].

Finally, the interpretation of the legal issues addressed by the Decisions is mandatory for the courts. As the judges are subject to only the law, according to the third paragraph of Article 124 of the Constitution, if we were to consider that, contrary to our theory, the Decisions would be similar in nature and, thus, juridical regime, to court decisions, rather than interpretative laws, then issues of both unconstitutionality, in respect to the Constitution, as well as illegality, in respect to the principles set forth by the regulations in the matter of the organizing and functioning of the judicial system, would be incident in the matter. Thus, by means of our view, these latter problems would be overcome.

But as was previously stated, we will return to this topic and expand upon our view of these Decisions as actual interpretative law in Section C of our work.

C. A look at the dispute regarding the constitutionality of the final part of the previously analyzed third paragraph - "The interpretation of the legal issues addressed is mandatory for the courts.". Is there a way to completely overcome this issue?

C. a. Preamble

This legal provision, instituting the fact that the interpretation of the legal issues addressed by the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, issued as a consequence of the

promoting of a Review in the interest of the law by the entities with the legal competence to do so, in both civil and criminal matter, is mandatory for the courts, has received some attention in our national juridical literature[38]. This attention is mostly criticizing in nature. The Constitutional Court of Romania has confirmed on numerous occasions, by means of its generally binding Decisions, that this provision is in accordance with the text of the Constitution of Romania. The courts do not question the legal fact that the interpretation of the legal issues addressed by means of Decisions in the interest of the law is mandatory for them and act accordingly, in their judicial activity. But the need for a solid theoretical argument in favor of the constitutionality of the final part of the previously analyzed third paragraph, also able to solve some other issues and to fill some gaps of the legislation regarding the legal concepts of Review in the interest of the law and Decision in the interest of the law, continues to exist.

We believe that the best way to approach this complex issue and offer a well-argued, pertinent solution that would clarify the constitutionality of the provision, and also solve other problems related to the before mentioned legal concepts, is by means of a structured analysis of the juridical literature, as well as the generally binding Decisions of the Constitutional Court of Romania, concerning this very issue. Wherever necessary, we will make our slightly different standings or perspectives upon the issues addressed by the authors or the Constitutional Court known, or we might even resort to constructive criticism, so that in the end, we will be able to make a strongly backed up statement of our theory, according to which the Decisions issued by the Joint Sections of the High Court of Cassation and of Justice as a result of the promoting of a Review in the interest of the law by the entities with the legal competence to do so, are actually interpretative law.

But first of all, we wish to present our theory and the conclusion we believe can easily be drawn from it, that Decisions in the interest of the law are interpretative law, in order for the reader to understand what we intend to prove by the end of this current Section C of our work.

According to the third paragraph of Article 124 of the Constitution of Romania, "Judges shall be independent and subject only to the law.". Judges are, therefore, subject only to the law, no matter which public authority has the competence to issue it. This provision does not forbid the issuing of interpretative laws by the Joint Sections of the High Court of Cassation and of Justice, moreover establishing that if the Decisions in the interest of the law are, in fact, interpretative laws, the judges shall be subject to them also.

Furthermore, the first two paragraphs of the same Article state that "Justice shall be rendered in the name of the law." and that "Justice shall be one, impartial, and equal for all.", respectively.

In the case of the first provision, we must observe that Justice is not to be rendered in the name of and according to other court decisions, be they decisions of Tribunals, Courts of Appeal or even issued by some instance of the High Court of

Cassation and of Justice, as courts with competence of control of lower courts. It shall only be rendered in the name of the law[39], whoever may issue it. Thus, the only way that constitutional compatibility regarding this provision can be achieved is by means of Decisions in the interest of the law being, in fact, interpretative laws.

In the case of the second provision, other criteria are set to be obeyed as such by Justice. It shall be one, impartial, and equal for all. Decisions are not supposed to be one for all, due to their inherent nature, that of referring to and affecting only the involved parties, at least mainly, or in principle[40]. They are indeed impartial, but again, only regarding the involved parties, thus do not posses that certain *erga omnes* impartiality that is characteristic to laws only. And also, again, because of the variety in circumstances particular to each and every case heard before the courts, one cannot possibly, having also in mind the previously-mentioned remarks, state that the issuing of court decisions by obeying these strict requirements is enough in order to ensure unity in the interpreting and in the applying of the law, and by consequence, to ensure that Justice is rendered in the way it should be according to the sum of the applicable constitutional provisions in the matter.

Thus, in order for the High Court of Cassation and of Justice to fulfill its role[41] as primary and only expressly constitutional "render of Justice", as well as its dual role[42] of main[43] provider of "a unitary interpretation and implementation of the law by the other courts of law, according to its competence", the regulation of the institutions of Review in the interest of the law as well as Decision in the interest of the law, the latter being interpretative law, appears natural, and is moreover demanded by the interpretation of the before-mentioned constitutional *principia* provisions[44]. Thus, even if we formally name them and consider them to be "Decisions", in essence they are undoubtedly interpretative laws.

At this point, we are moving on to another provisional *trio*, that of the third paragraph of Article 124, and the second and third paragraphs of Article 126 of the Constitution.

First off, according to the third paragraph of Article 124, the only constitutionally-justifiable juridical nature of the Decisions in the interest of the law is that of laws, solely to which the judges are subject to, and, moreover, interpretative ones.

Second off, we must analyze the remaining couple of provisions, out of the previously-mentioned *trio*. According to the third paragraph of Article 126 of the Constitution, "The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence.", and according to the second paragraph of the same Article, "The competence of the courts of law and the judging procedure are only stipulated by law.". Also having in mind the series of before-mentioned arguments in support of our theory and the constitutional *ratio* of existence and prescribed juridical nature of the Decisions, we strongly believe that the phrase "according to its competence", corroborated with the entire second paragraph of the Article represent not only the

constitutional means of doing so, but moreover a constitutional imperative that the Parliament should set the competence of the High Court of Cassation and of Justice in exactly such a way as for it to be able to uphold its own constitutional role of rendering Justice, in the manner that the Constitution prescribes that the process take place. As for the allowed means of doing so, in this case we can notice that, in fact, the Constitution implicitly allows the Parliament to issue an enabling law, as was expressly the case of the procedure regulating the issuing of ordinances by the Government[45], enabling the High Court of Cassation and of Justice to issue laws of interpretative nature, in whichever way it may choose fit as effective, in accordance to the applicable constitutional imperatives.

First of all, the laws can only be of interpretative nature because the role of the High Court is solely linked to the interpretation of the law and the rendering of Justice in the name of the law, and not that of creating new normative laws, thus rendering Justice not only in the name of the before-issued normative laws framework, but unconstitutionally rendering Justice in the name of the Constitution as sole limit. With the latter clearly not representative of the will and principles deriving from the Constitution (including that of "separation of powers"), and also being infringing of the Constitution-wise expressly-set normative lawmaker roles of the Parliament as main, and the Government as secondary, subsidiary.

Secondly, the "whichever way chose fit as effective, in accordance to the applicable constitutional imperatives", and, actually dictated by them, was that of creating the institutions of Review in the interest of the law and Decision in the interest of the law, both generally, by means of introducing them within the framework set by Law no. 304/2004 regarding the judicial system, as well as separately, in civil matter by the enabling law creating or modifying Article 329 of the Code of Civil Procedure, while in criminal matter by the enabling law creating or modifying Article 414^2 of the Code of Criminal Procedure. And we must remind our critics that one is not to question the will of the lawmaker as long as it is expressed in strict accordance to the provisions of the Constitution and as a means of upholding constitutional provisions in the best possible way, which is clearly the case here. As for the fact that the competence of issuing interpretative laws is handed to the Joint Sections of the High Court of Cassation and of Justice, the most comprehensive and representative gathering possible, comprised of all the justices of the Court. Thus, by allowing the Joint Section to issue the Decisions, the Parliament allows the High Court itself to issue them, in what is the best procedural way of upholding the standards and requirements set forth by the Constitution, in the matter of the role and achieving of it of the High Court of cassation and of Justice.

If one were to criticize our theory up to this point by referring to the provision of the first paragraph of Article 61 of the Constitution, we must dismiss such behavior by reminding them of the Government's role of secondary, subsidiary legislator, deriving from the latter's ability of issuing ordinances and emergency

ordinances. We maintain the same in the event of criticism as to the infringement of the principle of "separation and balance of powers – legislative, executive and judicial – within the framework of constitutional democracy", expressly upheld by the fourth paragraph of Article 1 of the Constitution.

Still, criticism may arise as to the fact that exceptions are to be strictly interpreted, and, thus, one may argue that the Constitution would have to contain an expressly-stated exception in order for the strict interpretation to be able to lead us to our conclusion. And as the Constitution does not expressly contain such a provision, our theory could not be regarded as valid, with the consequence of the High Court of Cassation and of Justice apparently being unable to issue interpretative laws.

But, as we showed earlier, one could not possibly state contrary to the fact that the Constitution holds the Parliament competent to hand the ability of issuing interpretative laws to the High Court of Cassation and of Justice, in fulfilling its ability/requirement set by the third paragraph of Article 126 of the Constitution[46], by means of issuing an enabling law, as was the case according to the first three paragraphs of Article 115 in respect to the Government and the latter's ability of issuing ordinances.

Because of the fact that this whole discussion is textually-placed following the provisions of the first three paragraphs of Article 115, it may appear that another exception from the rule of the Parliament being sole lawmaker, or an exception from the only apparent expressly-stated exception from the before-mentioned rule, is born. In this case, we must add that it is not an implicit exception though. And this because if it were the case of an implicit exception, the Constitution would directly allow, by the process of us interpreting its provisions, that the High Court of Cassation and of Justice issue interpretative laws. In our case though, the Constitution only allows the issuing of an enabling law in the matter by the Parliament, enabling the High Court to issue the interpretative law Decisions. The enabling laws are, in this case, Article 329 of the Code of Civil Procedure and Article 414^2 of the Code of Criminal Procedure. Thus, because of all the before-mentioned arguments, we believe that the juridical situation is not to be considered as an unacceptable implicit exception, but that of an expressly-stated provision allowing for interpretation, which is totally different, and acceptable. As such, our theory stands. In addition, one cannot but acknowledge the fact that be they "of strict interpretation", exceptions are still "of interpretation" nevertheless. And the interpretation, even strictly conducted, is not to be restricted by literal-meaning textual boundaries, but moreover such a restriction would be against the very reason for which the process of the interpreting of juridical norms is allowed in the first place, with no regard as to whether the norms are of constitutional, legal, or administrative nature. Thus, by means of a strict interpretation, we maintain our conclusion, that the High Court of Cassation and of Justice acts as lawmaker whenever issuing interpretative laws in the form of Decisions in the interest of the law.

A final statement we would like to make at this point is that by enabling the Joint Sections to issue interpretative laws, the Parliament does not limit its own ability which is preserved, which is that of itself issuing interpretative laws. Thus, the transfer of competence is a mere creating of a competence duality, a competence doubling if you will, in the matter of issuing of interpretative laws.

At last, we would like to conclude this current subsection of our study by reiterating our firm belief that our theory is pertinent and has a strong theoretical basis that allows for the explaining of the compatibility of the functioning mechanism of the institutions of Review in the interest of the law and Decision in the interest of the law with the before-mentioned constitutional principles in respect to the correct upholding of which controversy still lurks in the matter. Thus, we hold that the regulation of the institutions, both in civil and in criminal matter, is undoubtedly constitutional, also in the sense of Decisions in the interest of the law actually being interpretative laws.

C. b. Systematic walkthrough of all the relevant constitutional provisions pertaining to the issue at hand

The controversy over whether the final part of the previously analyzed third paragraph is constitutional or not exists because of alleged incompatibility with several provisions of the Constitution of Romania. As we present these provisions, we will systematically show that the fact that the Decisions in the interest of the law are interpretative law is fully compatible with them.

The fourth paragraph of the first Article of the Constitution of Romania, stating that "The State shall be organized based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of constitutional democracy.", is taught to forbid the issuing of laws, be they only interpretative in nature, by the Joint Sections of the High Court of Cassation and of Justice, the highest court of law of the judiciary, because otherwise the principle of the separation and balance of powers would be violated. The first paragraph of Article 115 of the Constitution of Romania states that "Parliament may pass a special law enabling the Government to issue ordinances in fields outside the scope of organic laws.", and the fourth and fifth paragraphs of the same Article allow the Government, in the absence of a law passed by Parliament enabling it to do so, to even adopt emergency ordinances in fields inside the scope of organic laws, that come into force after they have been submitted for debate in an emergency procedure to the Chamber having the competence to be notified, and after they have been published in the Official Gazette of Romania. These provisions allow the Government, public authority pertaining to the executive power, to issue ordinances with the force of law. In other words, to act as a holder of legislative power. Practically, to issue laws, because, even though formally they are called ordinances and are issued by a public authority pertaining to the executive power essentially, from a material standpoint they have the force of

law, they are laws. But this interference between the executive and legislative powers does not violate the principle of the separation of powers because it happens „within the framework of constitutional democracy", it is permitted by the Constitution of Romania. Furthermore, it actually helps the balance of powers within the state. Thus, because the existence of such a provision does not violate the principle of the separation and balance of powers, we believe the same to be true in the case of the ability of the Joint Sections of the High Court of Cassation and of Justice to issue interpretative laws, formally Decisions in the interest of the law. Because of the fact that, as we will further demonstrate, this also happens „within the framework of constitutional democracy", the Constitution of Romania allowing the issuing of interpretative laws by a court of law, pertaining to the judicial power of state essentially, in an indirect manner. This furthermore helps the balance of powers within the state also. We can therefore conclude that to consider that the Decisions in the interest of the law are interpretative laws is in accordance with the presently discussed provision of the Constitution of Romania.

Next, we will refer to the first paragraph of Article 16 of the Constitution of Romania, having been used on numerous occasions as a means of justifying the constitutionality of the legal provision according to which the interpretation of the legal issues addressed by the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, issued as a consequence of the promoting of a Review in the interest of the law by the entities with the legal competence to do so, in both civil and criminal matter, is mandatory for the courts. This usage has been criticized by our juridical literature[47], as it was stated that the upholding of the principle of equality, without any privilege or discrimination, of all the citizens before the law, expressly declared by the first paragraph of Article 16 of the Constitution of Romania cannot be founded on the infringement of the principle of the independence of the judges and their being subject only to the law, stated by the third paragraph of Article 124 of the Constitution of Romania. If we admit that the Decisions in the interest of the law are interpretative law, because of the previously stated reasoning, than the second principle is no longer infringed, moreover, the first one is stronger enforced, because of the fact that one interpretation of the legal issues addressed by the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, results in equality of all citizens before the one interpretation the law has received, by means of an imperative interpretative law, in the end the equality of all citizens before the law being achieved.

The same author also states that by declaring that the provision of the third paragraph of Article 329 of the Code of Civil Procedure and, implicitly, that of the third paragraph of Article 414^2 of the Code of Criminal Procedure[48], are constitutional, thus the fact that the interpretation of the legal issues addressed by the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, issued as a consequence of the promoting of a Review in the interest of the law

by the entities with the legal competence to do so, in both civil and criminal matter, is mandatory for the courts is in accordance with the text of the Constitution of Romania, and, because in this way, the equality of all citizens before the law and public authorities, without any privilege or discrimination, would be ensured, the Constitutional Court has sacrificed the principle of the independence of the judges and their being subject only to the law. As we showed before, this need not be the case if we admit that the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, actually issue interpretative law. But we will thoroughly analyze the Decisions of the Constitutional Court regarding this issue at a later time, after we finish with the current presentation of constitutional provisions.

Another statement of the same author is that the only way to correct the errors in the interpretation and application of the law by the courts of law and ensure that the law is interpreted and applied in a unitary manner, without any privilege or discrimination, is via the power of control over the decisions of lower courts that the courts situated higher in the hierarchy of the judiciary posses. This is because the interpretation of the legal issues addressed by the Joint Sections of the High Court of Cassation and of Justice, by means of a Decision in the interest of the law, do not affect any of the examined court decisions, and neither do they affect the parties involved in those trials, but are only a means of making sure that the future interpretation and application of the law by the courts is done in a unitary manner. Thus the Decisions in the interest of the law play but a secondary part in ensuring the equality of all citizens before the law by means of the existence of unity in the interpretation and application of the law, as they can only guide the following practice of the courts in regard to a legal issue. We only partially agree. It is true that only by means of the control over the decisions of lower courts exercised by the courts situated higher in the hierarchy of the judiciary, can unity in the interpretation and application of the law be achieved in regard to any of the examined court decisions or parties involved in those trials. But the Decisions in the interest of the law, being interpretative law, aren't even supposed to apply to these preexisting situations, because of the existence of the constitutional principle according to which the law shall only act for the future, expressly stated by the second paragraph of Article 15 of the Constitution of Romania[49]. So, in the case of the examined court decisions, the only solution is indeed control over them exercised by courts higher in the hierarchy of the judiciary, and for the future unity in the interpretation and application of the law will surely be achieved because of the existence of a Decision in the interest of the law, of an interpretative law. Thus, we do not agree with the author's opinion, according to which these Decisions in the interest of the law play but a secondary part, are mere guidance solutions, relative to the task of ensuring unity in the interpretation and application of the law throughout the entire territory of Romania. In addition, we must acknowledge that from a quantitative standpoint, in order to ensure that unity is achieved, it is far more important that the potentially unlimited mass of future

court decisions are all issued based on the same interpretation of the law, than the finite dissenting opinions that led to the issuing of the Decision in the interest of the law in the first place.

This issue takes us on to a very interesting discussion. The second paragraph of Article 15 of the Constitution of Romania actually states that "The law shall only act for the future, except for the more favorable criminal or administrative law.". Because the Decisions in the interest of the law are interpretative laws, they have to obey this constitutional principle. The third paragraph of both Article 329 of the Code of Civil Procedure and Article 414^2 of the Code of Criminal Procedure (laws by means of which the Parliament created the ability, the competence for the Joint Sections of the High Court of Cassation and of Justice to issue interpretative laws, formally Decisions in the interest of the law) states that the Decisions in the interest of the law do not affect any of the examined court decisions, and neither do they affect the parties involved in those trials. The second paragraph of both Articles states that the Decisions in the interest of the law are to be published in Part I of the Official Gazette of Romania. We believe that these interpretative laws become applicable according to the provision of Article 78 of the Constitution of Romania, according to which "The law shall … come into force 3 days after its publication date, or on a subsequent date stipulated in its text.", as they are laws, after all. In respect to this constitutional imperative, set in order to ensure that the principle of predictability of the law is upheld, we deem the before-mentioned legal provisions unconstitutional.

In another statement, the author recognizes that the national law system's source of law is unique and is in fact the law. Also, he states the fact that the interpretation of law can only be validly done by means of interpretative law. Without any reference made to any legal text that would allow for a valid foundation for the further statement of a solid, well documented conclusion, but merely by means of a footnote reference[50], he almost dictates that the courts, be they at the lower or top end of the judicial system hierarchy, "have neither the role or the competence to create law, but only that to apply law in given particular judicial cases". He concludes that the *principia* solutions of the supreme court cannot have an obligatory, generally-binding law-like characteristic[51]. We disagree with these affirmations, because as we have partially already showed, and will completely hereafter demonstrate, the reality is that the Decisions in the interest of the law are actually interpretative laws, therefore rendering the before-mentioned conclusions rather redundant (the first statement of the author) and obsolete (the second one).

Our thesis, that the Decisions in the interest of the law are actually interpretative laws, might be challenged by some, by referring to the first paragraph of Article 61 of the Constitution of Romania, which states that "The Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country.".

A first glimpse would probably lead one to the superficial belief that the Parliament is indeed, as the text suggests, the one and only ("the sole") legislative authority of Romania. When in fact this is false, as the Government also act as and is in fact legislator, whenever it issues ordinances or emergency ordinances. This fact derives from the process of interpretation of Article 115 of the Constitution of Romania.

Another argument that would justify the use of the concept of "sole legislative authority of the country", when, in fact, it isn't, by the before-mentioned first paragraph of Article 61 of the Constitution is that, within laws of any nature (including constitutional ones), the technique of drafting implies creating rules, principles, which can afterwards be amended by means of exceptions from the rules and principles set before. Thus, we believe that the first paragraph of Article 61 actually states a principle, a general rule, and is not to be interpreted as limiting or strictly forbidding any exceptions from it. Therefore, the articles that follow could create exceptions, a relevant example of this being Article 115. One final remark regarding Article 115 – it does not create the exception from the before-mentioned rule explicitly, in an express textual manner, but by means of a textual framework that, subject to a thorough analysis, subject to an interpretation, leads to the conclusion of the existence of the exception.

We will show, a little further in the development of our paper, that also by means of interpretation of several articles within the first section ("Courts of law") of Chapter VI of the Constitution, entitled "Judicial authority" (these interpretations are strict, because exceptions are of strict interpretation, but still interpretation nonetheless, and the process of interpretation is also used "around" the actual strict interpretation of exceptions, in order to achieve the actual concluding that there is an exception to be strictly interpreted in the first place), we can reach the conclusion that the High Court of Cassation and of Justice acting as and actually being a legislator of interpretative laws whenever issuing Decisions in the interest of the law can represent a valid, and completely well sustained and possible from a juridical analysis point of view hypothesis. Also, the relevant (to our current explanation) articles of the first section of Chapter VI of the Constitution, numbered 124 to 126, are, as was Article 115, positioned after the first paragraph of Article 61, thus being able to create an exception from the rule that the latter set forth. Thus, we believe it is safe to say that the High Court of Cassation and of Justice also represents an exception from the before-mentioned principle, whenever issuing Decisions in the interest of the law.

In order to conclude the analysis at hand concerning the topic of this paper, that of the first paragraph of Article 61, it is safe to say that in fact this constitutional norm does not create an insurmountable obstacle in front of the advance of our theory. Moreover, it actually aides us in further demonstrating our point of view that Decisions in the interest of the law represent interpretative laws.

Next, we have to refer to the content of Article 67 of the Constitution, entitled "Acts of Parliament …", which states that "the Chamber of Deputies and the Senate shall pass laws …". The existence of this constitutional norm does not command that only the Parliament is able to pass laws, and that the High Court of Cassation and of Justice cannot, with the possibility of the latter being an exception from the

rule of Parliament – sole emitter of laws. Even if it would set a formal boundary, in the sense that only the Parliament is to be able to issue laws, called laws, so laws both in a material and formal sense, the Government and High Court of Cassation and of Justice are clearly not bound in such a way, as their ordinances, emergency ordinances and Decisions in the interest of the law, respectively, are and we will further demonstrate that indeed are laws from a material standpoint, even though from a formal standpoint, they are not endowed with the title of laws.

The next article we believe is extremely relevant towards proving our point is Article 73 of the Constitution, on the "Classes of laws". This constitutional text also opens up an interesting discussion if we admit that the Decisions in the interest of the law are actually interpretative laws, that of the class of laws to which they then adhere to. In other words, then, are they ordinary, organic, or constitutional in nature?

First off, the first paragraph of this Article states that "Parliament passes constitutional, organic, and ordinary laws.". As stated before, in the paragraph regarding Article 67 of the Constitution, this does not automatically imply that laws, and in the context of our current analysis, interpretative laws, cannot be passed by other bodies, such as the Government or the Joint Sections of the High Court of Cassation and of Justice. And also, again, even if one would argue that formally, laws can only be a result of the will of Parliament, as the Government and Joint Sections issue other types of legal norms, in a material, fundamental sense, of the power of these norms, they remain laws in essence, undoubtedly.

Secondly, an analysis of the nature and juridical force of the interpretative laws that are the Decisions in the interest of the law is extremely important, vital actually, because it raises so many practical issues, that we will further address.

Are they constitutional in nature? Definitely no. This is because there are only three types of constitutional norms, two of them primary, and one secondary.

The two primary ones are first and foremost, the ones take make up the Constitution itself, and, second, according to the second paragraph of Article 73, the constitutional laws[52], being the ones pertaining to the revision of the Constitution.

The secondary source of constitutional norms, norms of both secondary nature, as well as secondary power, as they are merely interpretative norms, and not actual normative ones, is represented by the Decisions of the Constitutional Court. And according to both the first paragraph of Article 142 of the Constitution, restated by the first paragraph of Article 1 of the Law no. 47/1992 regarding the organizing and functioning of the Constitutional Court[53], as well as to the second paragraph of the before-mentioned Article 1, "The Constitutional Court is the sole authority of constitutional jurisdiction in Romania.". Thus, the High Court of Cassation and of Justice could not possibly interfere in the matter of interpreting constitutional provisions, which is of the sole competence of the judges of the Constitutional Court, and not one that could be shared with the justices of the High Court of Cassation and of Justice, gathered in Joint Sections.

Because of all the before-stated facts, we believe that Decisions in the interest of the law could not, under any circumstances, be endowed with constitutional nature.

We believe that apart from this limitation, the Decisions, as interpretative laws, may be of both organic, as well as ordinary nature. And this difference in nature will undoubtedly derive from the nature of the laws being interpreted by the Decisions, according to the "*accesorium sequitur principale*" legal principle. Such a variable nature is permitted also because of the fact that out of the *trio* of enabling laws which allow for the issuing of the Decisions in the interest of the law, Law no. 304/2004 regarding the judicial system possesses organic nature. Thus, in the end, an organic law of enabling allows for the issuing of organic interpretative laws by the Joint Sections of the High Court of Cassation and of Justice, in the event that the law undergoing interpretation by means of the promoting of a Review in the interest of the law would be one of organic nature.

As a final statement regarding the provisions of Article 76 of the Constitution, we must highlight that the quorums set by this Article are only applicable in the case of laws issued by the Parliament. In the case of those issued by the Joint Sections, the two separate quorums, that of attendance and that of vote, are to be fulfilled in accordance to the provisions of organic Law no. 304/2004 regarding the judicial system, in order for the issuing to take place in a legal manner.

A whole new set of issues arise in the matter at a mere glance towards the provisions that make up Article 77 of the Constitution, entitled "Promulgation of the law". This text is only partially applicable in the case of the Decisions in the interest of the law, as we will see further on.

This text applies to the Decisions as it is a general rule of constitutional law in the matter of the valid genesis of laws. The fact that Government ordinances are exempt from its application derives from the spirit of the first three paragraphs of Article 115 of the Constitution, by which it still applies though to the Parliament's special laws of enabling or to the Parliament's approvals deemed necessary by the special laws of enabling. Government emergency ordinances are also exempt from the procedure of promulgation, as their exceptional procedure of coming into force is the one that the last two paragraphs of Article 115 dictate. As in the case of the Decisions in the interest of the law no exception can be spotted, nor from any of the provisions of the Constitution literally, nor from their interpretation, we must conclude that the general rule of constitutional law applies to them, with a particularity though.

According to the first paragraph of the constitutional norm, "A law shall be submitted for promulgation to the President of Romania. Promulgation shall be given within twenty days after receipt of the law.". Decisions in the interest of the law, being interpretative laws, have to obey the constitutional norms that set up the procedure of law issuing and enforcement. Thus, we believe that the Decisions in the interest of the law must also be submitted for promulgation to the President of Romania, and that their promulgation must also be given within the twenty day period following the receipt of the Decision.

The second paragraph of Article 77 is a text that only applies to laws issued by the Parliament. It states that "Before promulgation, the President of Romania may

return the law to Parliament for reconsideration, and he may do so only once.". We believe that it should be interpreted, having in mind the coordinates of the spirit of the constitutional norm, as well as the general law principle of symmetry, in a sense that it only applies to laws issued by the Parliament, as the President may return the law to the issuer, explicitly stated "to Parliament" in this case, and not also to the Joint Sections of the High Court of Cassation and of Justice. Thus, because it creates an exception by only mentioning the possibility of a hypothetical return to the Parliament, we state that this is the particularity of the regulation in the case of the Decisions in the interest of the law that we mentioned earlier.

The third and final paragraph of this Article 77 also makes for an interesting analysis. It states that "In case the President has requested that the law be reconsidered or a review has been asked for as to its conformity with the Constitution, promulgation shall be made within ten days from receiving the law passed after its reconsideration, or the decision of the Constitutional Court confirming its constitutionality.". As the Decisions in the interest of the law are actually interpretative laws, and no exception to the application of this particular norm in their case can be derived from the interpretation of any constitutional provision, this particular provision allows for a few remarks.

The first, regarding the President's ability to request that the law be reconsidered. As we demonstrated earlier, the provision of the second paragraph already created an exception, in that the President is unable to request that the interpretative law be reconsidered by the Joint Sections of the High Court of Cassation and of Justice. Thus, even though in this case the constitutional norm might seem more permissive, in the sense that it seems to refer to the President being able to request that laws in general, be they issued by the Parliament or the Joint Sections, be reconsidered, actually it is subject to the limitation set forth before, by the previous second paragraph. Thus, the object of the first remark is actually only applicable in the case of laws issued by the Parliament, as we maintain our view that the President does not hold the power to return the interpretative law to the Joint Sections for reconsideration.

The second remark we would like to make is in respect to the control of Constitutionality that it allows for. We firmly state that it is one of the most important consequences of the fact that Decisions in the interest of the law are interpretative laws, in that they must be in line with, they must fully be in accordance with the provisions of the Constitution. The possibility of the control of Constitutionality over the interpretative laws issued by the Joint Sections is as much needed as it obviously exists. This easily derives from the fact that, according to the first paragraph of Article 142 of the Constitution, "The Constitutional Court is the guarantor of the supremacy of the Constitution."[54]. Thus, the authority of the Constitutional Court, in order for it to be able to actually, effectively and fully stand up to the challenge of its constitutional role, must be and indeed is allowed to also censor the unconstitutional

Decisions in the interest of the law, the unconstitutionality which derives from the way that the Joint Sections interpret the law. The Joint Sections cannot act as an implicit Constitutional Court when issuing their Decisions, and a statement of a Papal-type of infallibility regarding the constitutionality of the Decisions they issue would be simply hilarious. Thus, our thesis that the Decisions in the interest of the law are actually interpretative laws would restore a lack of balance as to the achieving the constitutional desiderate of prime importance of maintaining the supremacy of the Constitution above all other internal regulations, in the sense that it fills a void in the constitutional mechanism that was created as a way of the before-mentioned ideal desiderate becoming practice, becoming factual, tangible reality. One might also state that by the constitutional establishment of this particular hierarchical control, a certain sense of subordination exists between the Constitutional Court and the High Court of Cassation and of Justice, which, although of a different nature, completes the hierarchy of the national courts that make up the judicial system. Thus, we hold that the provisions of letters a) and d) of Article 146 of the Constitution are fully applicable in the case of the Decisions in the interest of the law as well. At this point, we will also highlight that the provisions of the first and fourth paragraphs of Article 147 of the Constitution are also fully applicable in this case as well, but under reserve of compatibility. Thus, the particularity of these latter constitutional provisions in the case of the Decisions in the interest of the law is that they do not allow that the Joint Sections bring the unconstitutional interpreting of the law in line with the provisions of the Constitution. So, the unconstitutional Decisions in the interest of the law "shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court", while "For this limited length of time the provisions found to be unconstitutional shall be suspended de jure.". In the end, both a *de jure*, as well as a *de facto* immediate ceasing of the legal effects of the Decisions in the interest of the law deemed unconstitutional will take place.

As a final remark, we must state that the provisions of this third paragraph of Article 77, apart from the previous remarks bestowing a nuance upon them, remain fully applicable in the case of the Decisions in the interest of the law.

Another very important provision regarding the Decisions in the interest of the law is that of Article 78 of the Constitution, entitled "The coming into force of the law". According to this constitutional norm, "The law shall be published in the Official Gazette of Romania and comes into force three days after its publication date, or on a subsequent date stipulated in its text.". As the Decisions in the interest of the law do not currently allow for the upholding of the constitutional principles of the security of persons and of the previsibility of laws, we maintain our also before-mentioned conclusion that in respect to this constitutional provision, the legal norms regulating the legal concepts of Review in the interest of the law and Decision in the interest of the law are unconstitutional. We believe that, *de lege ferenda*, the

Decisions should only come into force, according to their legal regulations as well, by respecting the constitutional imperative of Article 78.

C. c. Systematic walkthrough (or, better yet, criticism) of major doctrinarian studies, relevant to the context of our current analysis

As a short conclusion of our thorough research work upon which this study is partly based, we feel that it is safe to state that we have not found one single acknowledgement of the fact that the Decisions in the interest of the law are, actually, interpretative laws.

The Decisions are currently recognized as endowed with a "mandatory for the courts" nature, by the Codes of Civil and Criminal Procedure, as well as the bulk of our national jurisprudence. Some of the studies concerning the issue at hand are in favor of such recognition, based on unconvincing arguments that the Decisions are a hybrid concept: in part court decision, and in part an uncommon, an atypical source of law. Others mainly criticize the mandatory nature of the Decisions, mostly because of the belief of their authors that such a nature is not compatible with the Romanian constitutional framework.

Because of the vastness of the material that we would like to expose the flaws of, and, thus, that of the systematic criticism, we do not wish to burden the reader by including the walkthrough in this current section of our study. We feel that such a comprehensive analysis should develop, if at all, into a distinct study.

C. d. Analysis of the relevant jurisprudence that the Constitutional Court has established pertaining to the topic at hand

In this part of our present endeavor, we will, in a chronological manner, highlight all the relevant principles and issues that the Constitutional Court addressed in its issuing of Decisions over the course of more than twelve years, and, obviously, that are of interest to our current study.

The final remark that we believe must be made in this preamble to the object of the current section of our work is that the Constitutional Court has rejected all of the unconstitutionality objections regarding the legal provisions regulating the institutions of the Review in the interest of the law and the Decisions in the interest of the law. We also support their constitutionality, but with a twist, if you will. Our line of argument, our argumentation in this case, should be quite intriguing to the reader, especially given the fact that it is subordinated to our unique view that the Decisions in the interest of the law are, in fact, interpretative laws.

Constitutional Court Decision no. 58 of the 26th of March 1997[55] is the first that raises some interesting issues in respect to the topic at hand. Even though only tangentially applicable in the case of the Decisions in the interest of the law, still it exhibits some *principia* statements that greatly interest us.

As we stated before, it does not regard Decisions in the interest of the law *per se*. It was raised in respect to the fact that "the independence and subjection of the judges solely to the law refers both to the judicial authority in general, as well as to each and every individual judge that is part of the panel". Also, it was argued that the Joint Sections of the Supreme Court of Justice have sparked a mass phenomenon of change in the decisions that the lower courts were to issue from then on. And this because even though some of the panels of judges might have had a different opinion regarding the issue brought to judgment before them, it was obligatory for them to follow the opinion chosen as "the right one" by the Joint Sections.

The Government's opinion regarding the issue object of the Constitutional Court's Decision was that the latter should dismiss the objection, because of the fact that, according to the Constitution, "justice is upheld by the Supreme Court of Justice and the other courts of law, established by law, and the competence and procedure of judgment are established by law". Also, it argued that the law sets the competence of the Supreme Court of Justice, in the form of the Joint Sections, in rendering judgment to the requests concerning the change of jurisprudence, and also that in this way, the law creates the premise for the correct applying of the law, upholding of justice, as well as achieving unity in the practice of the courts.

The Supreme Court of Justice advocated that the regulation was necessary in that "often in the practice of applying the laws, irreconcilable opinions and even decisions are issued, thus the need for ensuring jurisprudential unity arises. This unity is to be achieved through the will of the judges, within the boundaries set forth by the law. This does not constitute an infringement in the activity of the judges, which issue their decisions based on their intimate conviction, but are bound constitutionally to correctly apply the law". We choose to use this statement of the Supreme Court of Justice to further build our case in that Decisions in the interest of the law are interpretative laws.

The reasoning of the Constitutional Court further on allows for our commentary upon it. In a first *principia* statement, it holds that if the Decisions of the Joint Sections were generally binding for all the courts to follow, they would undoubtedly represent a veritable source of law and this would in turn mean that, beyond what the Constitution allows, the judgment would be subject not only to the law, but also to the Decision of the Joint Sections. We mostly agree with this statement in the line of reasoning. The only problem is that it has to be viewed with a nuance, having in mind the current applicable normative framework. Currently, the Decisions are generally binding for all the courts to follow, thus, they undoubtedly represent a veritable source of law, and, as the Constitution allows, because they are interpretative laws, the judgment, even though formally also subject to the "official interpretation" of the Decisions of the Joint Sections, is still only subject to the law. By the process of interpretation, applied to the statement of the Constitutional Court, we must also conclude, also in our favor, that no other way of justifying the generally binding for

the lower courts nature of the Decisions in the interest of the law, or no other way so that full constitutional compatibility is achieved, anyway, but that of the Decisions representing sources of law in the form of interpretative laws.

Also supportive of our theoretical construction, the Constitutional Court further states that the provisions of the first paragraph of Article 125 of the Constitution at that time, holding that "justice is done by the Supreme Court of Justice and the other courts of law established by law", similar to its current revised counterpart, as well as the rest of the article, holding that both the competence, as well as the procedure of judgment are established by law, are constitutional, in that they correspond to the need for ensuring unity of jurisprudence, allowing the Supreme Court of Justice to effectively follow that the law is applied in a correct and unitary manner. The Constitutional Court also states that this obligation of the Supreme Court of Justice does not infringe the text of the Constitution in any way, but moreover allows for ensuring, through unity in the practice of the courts of law, that constitutional equality of the citizens before the law and before justice exists.

In a final relevant statement, the Court holds that "unifying the jurisprudence is the sole work of the will of the judges that decide upon the correct applying of the law together, and that adopting the Decisions by the majority of votes of the judges of the Joint Sections is absolutely normal, having in mind that we are talking about the change of jurisprudence established in the same manner". It is important to note that this statement partially solves, as well as partially enhances a dilemma over one of the most important practical consequences of our theory, that of the succession of Decisions in the interest of the law actually being a succession of interpretative laws. The Constitutional Court establishes the principle of symmetry in the matter, both as to the coming into force and losing force, as well as to the majorities required. It partially enhances one of the most important dilemmas in that it uses the term "majority", which is a relative term, and, depending on the type of interpretative law, be it organic or ordinary law, different majorities are required. But the statement of the Court is extremely helpful in proving our case nonetheless.

The Court then finally concludes that the judges always base their decisions on their intimate conviction, but are also constitutionally bound to follow the law. Thus, while being required to follow the law, they still base their decisions on their intimate conviction. Thus, if we were to agree that the Decisions in the interest of the law are interpretative laws, the judges would follow the law ultimately, and, by also basing their decisions on their intimate conviction, neither the text nor the spirit of the Constitution would be infringed. Thus, the Constitutional Court ultimately supports our view that by following the "official legal interpretation" of the Decisions in the interest of the law, the judges ultimately follow the law, which is a constitutional obligation they are subject to, and which does not impair them to still be true to their intimate conviction in issuing their decisions. Thus, this conclusion works in favor of our theory as well.

A second relevant Constitutional Court Decision[56] provides that the principle of the judge being subject only to the law, according to the third paragraph of Article 124 of the Constitution in its current revised form, "does not and cannot be understood as allowing for a different or even contradictory practice in the applying of the same legal provision, based on the subjectivism that different judges exhibit when they interpret the law. A view favorable of this could only lead to the establishing, founded on the independence of judges itself, of a practice that could in turn represent an infringement of the law, which is inadmissible, because of the fact that, as there is one law, so should be only one applying of it, thus, the intimate conviction of the judge could not possibly justify such a consequence". The Constitutional Court thus once again is in support of the idea of the need to ensure unity in the applying of the law, reiterates the principle of the judge being subject only to the law. By means of interpretation, we must conclude that the Constitutional Court is in favor of Decisions in the interest of the law being considered interpretative laws. We believe that this conclusion is in fact "the missing piece of the puzzle" that is the reasoning of the Constitutional Court. Moreover, the Court further states that the constitutional norm was not drafted in the way that it expressly allows for the judge to also be subject to an inner intimate conviction because that could have created an important premise that could in turn lead to the abusive applying of the law. The Court further shows that "only a unitary judicial practice reflects the requirements set forth by the constitutional principle of the judge being solely subject to the law". Because the Decisions of the Joint Sections are a form of intimate conviction potentially of the entire staff of the High Court of Cassation and of Justice[57], because the Court considers that the principle of the judge being solely subject to the law and not for a moment to his intimate conviction, and, in respect to this, we should add that no exception should be made from this principle, in the sense that being subject to the intimate conviction of the highest-ranking judges would be acceptable, and finally because of the fact that in theory, the intimate conviction to which the Joint Sections would, if we would consider the Decisions mere court rulings, base their interpretation of the law that would then be obligatory for the lower courts could also lead to abuse in the applying of the law, we strongly believe that the only way to overcome this issue of subjectivism, and also uphold the principles set forth by the Constitution and by the Constitutional Court, is to consider that the Decisions in the interest of the law are in fact interpretative laws. This would even allow for a certain degree of subjectivism, as the process of issuing laws is not bound by the limitations that exist in the matter of the issuing of court decisions by judges.

In the concluding part of the Decision, the Court once again holds that the need for ensuring that the law is interpreted and applied unitarily and that the stability of the jurisprudence is achieved dictates that in the end, the Constitution itself craves for institutions such as the Review in the interest of the law or the Decisions in the interest of the law. Thus, we believe that the only way in order to

achieve full constitutional compatibility, allowed for by the principles set forth by both the Constitution, as well as the Constitutional Court, is to agree upon the fact that the Decisions in the interest of the law are in fact interpretative laws.

The Decision[58] we are about to begin analyzing addresses some fundamental constitutionality issues in the matter that is of interest to this current study. We believe that its spirit is definitely supportive of our theory.

We must briefly highlight some of the legal opinions that were presented to the Court, in order for it to have them in mind when issuing its Decision.

The author of the unconstitutionality objection first states that the Review in the interest of the law is representative of the concept of *form without content*. This is because an interest of the law cannot be justified in any way in this case, because only persons may have interests. We cannot agree, because the law also has at least one interest, that is actually primary to any other interest one might argue the law possesses. This interest is that of its correct understanding and, in turn, its correct applying. And as we build our theory that the Decisions in the interest of the law are actually interpretative laws, we believe that an important consequence of this theory is that in fact it offers content to this concept, thus the exact opposite of what the author argues in this case is finally obtained. This is because the best and only way of this interest of the law to gain resolve is by way of interpretation by law, ensuring unity of interpretation in the highest degree.

Another remark of the author that we consider relevant to comment upon is that by invoking the previously analyzed Constitutional Court Decision no. 58 of the 26th of March 1997, he concludes falsely that the Court has stated that the Decisions of the Joint Sections of the Supreme Court of Justice do not constitute a source of law. Our belief, rooted in the reasoning upon this topic that we exhibited previously in the course of the analysis, is in quite the way of the Constitutional Court having stated the exact opposite, that the Decisions must be sources of law in order for their generally binding towards the lower courts nature to be constitutional. Also, because in the current context, the Decisions are undoubtedly generally binding for the lower courts, this lack of doubt deriving from the very legal norms that regulate the institution, this remark does not maintain its relevance.

A final relevant remark of the author is that apparently the final paragraph of Article 329 of the Code of Civil Procedure is unconstitutional, in that it imposes a transfer of legislative competence, in the form of the ability to issue interpretative laws, from the Parliament to the Joint Sections. As we have previously maintained, it is quite the other way around, the Constitution being the one that allows for such a transfer to take place, and the provision of the Code of Civil Procedure simply being the implicitly-issued enabling law.

We must also add that the arguments brought forth by the President of The Chamber of Deputies and by the Government are also supportive of our thesis.

The Constitutional Court first off finds that "Because their object is not that of creating normative law, but rather that of promoting the correct interpreting of juridical norms that are in force, one cannot consider that the issuing of Decisions of the Joint Sections of the Supreme Court would represent an attribute that is part of the field of law-making, because in the latter case, the legal text would be unconstitutional in respect to the provisions of the first paragraph of art. 58 of the Constitution". This is supportive, or at least not dismissive of our theory in two ways. One is that the reasoning of the Constitutional Court is flawed, in that it forgets that in order to belong to the realm of law-making, the issuing can also be of interpretative laws, and not only normative laws. Thus, if the Decisions are interpretative laws, which they are, they would not fall under the present criticism of the Court. The other way is that in respect to the unconstitutionality remark, by adding that the Constitution has since underwent revision, and because of the arguments we stated in our *stricto sensu* theory presentation, the current Constitution allows for a transfer of law-making competence from the Parliament to the Joint Sections, in the field of interpretative laws.

The Court then states that the lawmaker, in issuing the criticized norm, had no intention in allowing the supreme court to become a substitute of the Parliament, the only power in the state having the power to issue laws. Our objection in this case is twofold. Firstly, because since then, the Constitution underwent revision, so now it is impossible to consider the Parliament as *the only* lawmaking authority of the state of Romania. Secondly, in the case of the Decisions in the interest of the law, the High Court of Cassation and of Justice does not become a substitute of the Parliament, but also possesses, at the same time that the Parliament still does, the ability, the competence to issue interpretative laws.

The Court then compares the interpretation of the law achieved by means of the issuing of Decisions in the interest of the law to that by means of issuing ordinary, lower court decisions. An interesting topic of discussion, it does not, however, exclude the possibility of the Decisions of the Joint Sections being in fact interpretative laws. The Court then concludes that the Decisions are "not *extra lege* and, moreover, cannot be *contra legem*". As interpretative laws, they certainly are not *extra lege*, as they are restricted to the boundaries set by the original law that they interpret, in the spirit of the original law being in fact the "true" will of the original lawmaker. Because of the same limitation, they cannot possibly be *contra legem*. But they are still laws in the end, with the consequence of a certain extremely limited amount of inherent subjectivism, as to the choice of interpretation within the previously-mentioned boundaries, being undoubtedly present in their issuing. Thus, the issuing of the Decisions can be easily compared to the issuing of laws, and they respect the limitations prescribed in principle by the Constitutional Court. Thus, we can safely say that their being interpretative laws fully complies with the prerequisites set by the current statement of the Constitutional Court Decision.

The Court the proceeds in stating that "they cannot be viewed as sources of law, in the ordinary sense of the concept". We tend to disagree, as the ordinary sense of the concept is both permissive, as well as not unanimously agreed upon. The court, in its arguments in favor of this incorrect view, then goes to characterize the effects of the Decisions in the interest of the law, which actually are identical to those of interpretative laws, as far as the issues of their "over time applying" are concerned.

Then, the Court states that the Decisions are a means of ensuring that the constitutional principle of the equality of citizens before the law and the public authorities, including the judicial authority, is upheld. True, but we must first off notice that the principle is that of equality before the law, and not before court decisions. Secondly, it is true that in this case, the equality of citizens before the judicial authority finds expression at its best. Thus, this represents another statement that supports our theory. In the same context, the Court then chooses to also maintain upon that which it has previously stated in the matter.

In a following relevant Decision[59], the Constitutional Court reiterates its support as to the constitutionality of the institutions of the Review in the interest of the law and of the Decisions in the interest of the law, thus if not expressly supporting our theory, at least not dismissing it either.

Another Decision[60] is also worth mentioning and undergoing analysis within our current study.

The author of the unconstitutionality objection believes that because the procedure before the Joint Sections is not contradictory, the third paragraph of Article 126 of the Constitution is infringed. We are of a different opinion. As they issue laws, they are subject to the same requirements set to the lawmaker in the process of issuing laws, rather than being subject to the requirement of contradictory procedure set to the courts in their decision-issuing activity. Thus, by viewing the Decisions as interpretative laws, both their generally binding nature, as well as their constitutionality can be easily discerned.

In another remark of the author, another issue is raised – that of the impossibility of the Joint Sections in changing the interpretation of laws contained in issued Decisions in the interest of the law, while in the cases of the European Court of Human Rights and that of the Court of Justice of the European Communities, such a possibility exists in respect to their own jurisprudence. We firmly state that one of the greatest practical consequences of our theory is that, by recognizing the interpretative law nature of the Decisions, it makes them subject to the entire theory of and practical approach to the applying of the law over time, as well as the succession of laws over time. Thus, this piece of criticism is also overcome.

Finally, the author speaks of the interdiction set by the European Court of Human Rights, in that the independence of the judges means independence from the Executive power of the state, the judges being however bound by the exercise of the legal procedural means of appealing their decisions. As this is not such a legal

procedural way, the author believes that the institutions are unconstitutional. But because our theory holds that they are interpretative *law*, this would be in accordance with the European Court of Human Rights interdiction, as well as the text of the third paragraph of Article 124 of the Constitution, in that the judges would be rightfully subject to the law in their otherwise independent state.

The Government's point of view concerning the present unconstitutionality objection is clearly supportive of our theory, in that it states that "In fact, the High Court of Cassation and of Justice does nothing else than translating the intent of the lawmaker, which is mandatory for the courts, in virtue of the constitutional principle of the «Judges being independent and subject only to the law.»". True, but we feel that it requires a minor explanation. The translation that the Government speaks about results in the Decisions actually being interpretative laws.

In the current context, we feel that it is necessary to also state that the People's Advocate point of view is in favor of our theory as well.

In a first statement, the Court omits to recognize that the institutions were not created by the lawmaker out of thin air and without any sort of constitutional basis. On the contrary, as we have already showed in the beginning of the present study, while explaining our theory, they were created by the lawmaker in full compliance with the constitutional provisions, as the expression of his constitutional right to issue a law of enabling, thus allowing the Joint Sections to issue interpretative laws in the form of Decisions in the interest of the law.

In the same context, the Court then chooses to also maintain upon some issues which it has previously stated upon in the matter.

We will now continue our analysis with that of Decision no. 1014 of the 8th of November 2007[61]. It brings a series of new arguments to the table, in an attempt to prove the unconstitutionality of the provisions regulating the institutions undergoing analysis over the course of our present study.

The author of the objection maintains that "the Decisions ... in the interest of the law ... are new regulations through which additions can be made to alter the law or detours from the will of the lawmaker could arise". Also, the power that is the root of their issuing is considered discretionary, unbound by an approval from the Parliament. Finally, the author invokes the Constitution, in that it "expressly, exclusively states that solely the law constitutes the normative act that is binding for the courts of law, the judges being subject to «only the law», justice having to be rendered only «in the name of the law», and not in that of the decisions of another court outside the procedural frame of deciding upon an appeal in the case brought before the court, decisions that are generally binding interpretative norms".

We would like to respond to these statements in a critical manner. First off, the Decisions are not *new* norms, in the sense that they may alter the law or initiate detours from the original will of the lawmaker. They are merely interpretative laws which interpret the original will of the lawmaker, within obvious boundaries that we

have already marked. Also, the possibility of the original lawmaker, the Parliament or Government, however the case may be, to intervene and modify, alter the very interpretation that the Joint Sections lawmaker issued by means of a Decision still exists, and it is not impaired in any way. The sole problem that could arise lies in the potential unconstitutionality of the interpretative laws which are the Decisions. In this case, the guardian for the supremacy of the Constitution, the Constitutional Court, must censor the unconstitutional Decisions, rendering them obsolete. Finally, the author holds that the interpreting of the issues addressed by the Joint Sections exhibits attributes that would be enough to qualify it as discretionary. But we ask ourselves how such a power may be discretionary, as the issuing of the Decisions is subject to the consent of a majority of the highest-ranking judges within the judicial authority who, at least ideally, represent some of the most qualified legal experts in the country.

We would also like to add nuance to an issue that we consider did not receive proper attention from the Constitutional Court's constitutional compatibility analysis. The Court stated that Art. 129 of the Constitution, entitled "Use of appeal", according to which "Against decisions of the court, the parties concerned and the Public Ministry may exercise ways of appeal, in accordance with the law." is not infringed in this case, "as this constitutional norm mustn't be understood as guaranteeing access to all means of appeal [and, certainly not on every level, as the ways of appeal must end at a certain point anyway, in order for justice to be effective and be able to be done – o. n. *A. S.*], but is merely a precise regulation as to the actual ways in accordance with which the ways to appeal will be exercised". We believe that the problem is that this constitutional provision is totally inapplicable in the context of the Decisions, as two ways to appeal them certainly exist. One of these being the initiating of another process of issuing a Decision in the interest of the law, and, upon new arguments brought before the Joint Sections by the initiators, a different interpretation may be contained in a new Decision that would replace the old one. The second would be the initiating of the ordinary lawmaking process, by which a law of interpretation could result, overturning the interpretation that the Joint Sections agreed upon by the issuing of a Decision in the interest of the law. Thus both the Constitution as well as the law regulating the institutions, also because of the fact that the Decisions being laws and not court decisions, they do not possess *res judicata*, allow for a new Decision to be issued in the same matter, resulting in a new interpretation given to legal issues. Also, the Constitution, by allowing that the Parliament issue laws with the sole boundary of their constitutionality, allows for the result of new laws of interpretation, that could overturn interpretations decided upon by the Joint Sections.

In the same context, the Court then chooses to also maintain upon some issues which it has previously stated upon in the matter.

Because of all the previously stated elements, we believe that, at this point, it is still very safe to state that the Decisions in the interest of the law are, in fact, interpretative laws.

The final Decision that we would like to submit to your attention bears the number 895, and was issued on the 10th of July 2008[62]. It is also compelling in making our case that Decisions in the interest of the law are, in fact, interpretative laws.

We would like to begin with a couple of remarks in respect to the opinion that the Civil and Intellectual Property law Section of the High Court of Cassation and of Justice has expressed, in its belief that the objection is unfounded. It stated that one cannot consider the issuing of the Decisions by the Joint Sections represents a prerogative that is of lawmaking type. We believe it is false in it not considering the Decisions laws, and would like to point out that the concept of lawmaking includes that of interpretative law-making, and we cannot find one reason that would bring any doubt on the fact that it is possible for the Decisions in the interest of the law to be considered interpretative laws, from this perspective. Secondly, it states that the institutions do not infringe the independence of the judge. True, but exactly because the Decisions are in fact laws, and thus the judge remains subject to only the law. Thus, in the end, with a couple of nuances, the arguments of the Section of the High Court obviously support our theory.

The Court then reiterates on what it has already decided upon in the previously-presented Decision, in that "Their purpose being that of promoting a correct interpreting of the in force legal provisions, and not that of creating new norms, one cannot consider that the decisions issued by the Joint Sections of the High Court of Cassation and of Justice would represent, in the event of such reviews, an attribute strictly pertaining to the area of lawmaking, in which case the mentioned legal provisions [those regulating the institutions undergoing analysis over the course of this current study – o. n. *A. S.*] would infringe the text of Art. 61 of the Constitution".

The use of the phrase "creating new norms" is exhibitive of a certain confusion of the Court regarding the subtle difference between interpretative law and "normative" law. Thus, by means of Decisions in the interest of the law, law is merely interpreted, as opposed to created. Having this in mind, we must conclude that, as interpretative laws, the Decisions obey the before-set restriction.

Even if we were to consider that the prohibition also applies to interpretative norms, a new problem arises. As if we were to consider that the Decisions cannot possibly be interpretative laws, then there would be no legal foundation or constitutional *ratio* to justify their generally binding nature for the lower courts. By contrast, if we recognize their interpretative law nature, these theoretical obstacles become overcome.

As a final argument, we must state that the Court also forgets that the Government also has the constitutional competence to issue laws, and not only interpretative ones, for that matter. As the Government can also be considered and act as a lawmaker, the categorical statement of the Court regarding the Parliament being

the sole lawmaker, according to the first paragraph of Article 61 of the Constitution, is definitely not safe from severe criticism.

At last, the Court correctly held that the Decisions do not impair the ability of the lower courts to judge cases in an impartial way, independent of any extraneous influences. Thus, it concluded that Article 124 of the Constitution is not infringed.

At this point, we have concluded our analysis of the relevant jurisprudence that the Constitutional Court has established pertaining to the topic at hand. We will close this current section of our study with two remarks. Firstly, we propose that, *de lege ferenda*, the Constitutional Court firmly adopt the only reasonable position regarding the issue at hand, and expressly state, by means of a generally binding Decision, that the Decisions in the interest of the law are, in both theory and fact, thus formally as well, interpretative laws. And this by means of solving the unconstitutionality objections of the future, raised in the matter by the critics of the legal provisions regulating the institutions, thus refreshing its own jurisprudence regarding the topic at hand which, although rich number-wise, sadly lacks substance and is quite monotonously repetitive. Secondly, we must state that we are truly contempt in that our theory is sustained by the before-analyzed Constitutional Court Decisions, even though only implicitly and by means of interpretation, as we have showed over the course of this current section of our study.

C. e. Preliminary conclusion

As we showed over the course of the current section of our study, the only way to justify the constitutionality of the "mandatory for the courts" nature of the Decisions in the interest of the law is to acknowledge the fact that these Decisions are, actually, interpretative laws. We demonstrated that the Constitution does not only allow such an interpretation, but furthermore dictates the validity of it.

However, by thoroughly studying our national legal literature, as well as the jurisprudence established pertaining to the issue at hand by the Constitutional Court, we were able to notice that the constitutionality of the provisions regulating the legal concepts of Review in the interest of the law and Decision in the interest of the law is both ardently defended, especially by the Constitutional Court, as well as sometimes harshly criticized. We believe that establishing a quantitative ratio between these opposing points of view is not of prime importance, though. What we felt was indeed needed was a strong theoretical foundation, that could on one hand properly justify the mandatory nature of the Decisions, and on the other hand allow for an equally justifiable dismissing of the harsh criticism that these legal concepts have sustained since they came into existence. This section of our study is the materialization of the before-mentioned strong theoretical foundation.

Thus, the Constitution not only allows for, but actually dictates that the Parliament, by means of an enabling law, should offer the Joint Sections of the High Court of Cassation and of Justice the possibility to fulfill their constitutional role,

in the form of allowing them to issue interpretative laws. But as we have previously shown, the accepting of the fact that the Decisions are, actually, interpretative laws, at the same time raises a whole new set of issues. We addressed and solved them as soon as they emerged.

Finally, we feel safe to say that this current section of our study is in itself a theoretical study, grounded in constitutional law and jurisprudence, and, even more importantly, one having great practical significance as well.

D. Concluding remarks

Unity in the interpreting of the law by the courts is a necessity that derives from the need for the upholding of the juridical security of all persons. The latter is, in turn, dependant of uniformity in the applying of the law, to which the people are entitled to. Achieving unity in the interpreting of the law and uniformity in the applying of it is a task that the Constitution ultimately entrusted interpretative laws with, as they are the most powerful source of unitary interpretation of legal provisions in Romania.

There is no question that the Parliament possesses the constitutional power to issue such interpretative laws. This ability derives from its role, that of lawmaker, in the fulfilling of which "The Parliament passes constitutional laws, organic laws and ordinary laws.", according to the first paragraph of Article 73 of the Constitution. But there is also no question that the Constitution dictates, through the provisions of its Article 126, that High Court of Cassation and of Justice, as the supreme administrator of Justice, is to "provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence", competence which is set by law. Finally, the legal and factual existence and jurisprudential widespread recognition of both the legal concepts of Review in the interest of the law and Decision in the interest of the law, as well as the latter's "mandatory for the courts" nature are self-evident as well. Because of all the before-mentioned facts, we felt it was needed to stress the fact that the legal concepts are not an anomaly, but actually represent the procedural framework within which the High Court of Cassation and of Justice fulfills its own constitutional task, by issuing interpretative laws as well. Our study amply explains both the foundation of our belief, as well as thoroughly analyses its practical consequences. All of our statements and findings will remain valid and equally applicable even in the event that the new Codes of Civil and Criminal Procedure will come into force, as they preserve both the "mandatory for the courts" nature of the Decisions in the interest of the law, as well as the potential for their unconstitutional "immediate" coming into force[63].

We began our study with a question, and we feel that the time has come for us to answer it, in order not to deem it as forever rhetorical in nature. So yes, for all the before-mentioned reasons, we strongly believe that they are!

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We dedicate this work, our first truly ample legal study, to those remarkable persons that we hold most dear for inspiring us to create, through their innovative vision, limitless passion and dedication to the field of Juridical Sciences: Lect. univ. dr. Mircea Dan Bob, Av. Doru Cătălin Boştină, Asist. univ. drd. Cosmin Flavius Costaş, Av. Cleopatra Drăghici, Ass. Prof. dr. iur. Gergely Karácsony, Av. dr. Mădălin Niculeasa, Asist. univ. drd. Daniel Niţu, Lect. univ. dr. Ovidiu Podaru and Conf. univ. dr. Ionel Reghini (the "panel of nine" is presented in ascending alphabetical succesion, sorted as such by the last name criterion). Thank you all very much, for everything...

[1] Republished in the Official Gazette of Romania no. 827 of the 13th of September 2005, as modified and completed to date

[2] Republished in the Official Gazette of Romania no. 767 of the 31st of October 2003, as it was modified and completed by the Law no. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania no. 758 of the 29th of October 2003

[3] CHAPTER VI of the Constitution of Romania (as amended and completed to date) is entitled "Judicial authority"

[4] Population at the Census of population and dwellings of March 18th, 2002, conducted by the National Institute of Statistics in Romania – http://www.insse.ro/cms/files/RPL2002INS/vol5/tables/t01.pdf

[5] Body of Civil Law

[6] See I. Reghini, Ş. Diaconescu, *Introducere în dreptul civil*, Vol. 1, Ed. "Sfera Juridică", Cluj-Napoca, 2004, p. 47-48

[7] Idem, p. 48

[8] Idem, p. 49

[9] Published in the Official Gazette of Romania no. 66 of the 19th of March 1936

[10] Or Prosecutor's Office

[11] The review courts mentioned by Articles 16 and 17.3 of the Carol II Code of Criminal Procedure are the Tribunals and, respectively, the Courts of Appeal

[12] For more details on the Lex stricta imperative, see F. Streteanu, *Drept penal. Partea generală*, Vol. 1, Ed. "Rosetti", Bucureşti, 2003, p. 56-74

[13] Published in the Brochure no. 0 of the 1st of December 1960

[14] Published in the Official Gazette of Romania no. 45 of the 24th of February 1948

[15] The Joint Sections of the Court of Cassation were back then, as those of the High Court of Cassation and of Justice are today, a gathering of all the justices of the Court, body that renders Decisions on a majority basis. Two separate quorums, one of attendance and one of vote, are to be fulfilled in order for the legal issuing of Decisions in the interest of the law to take place.

[16] Published in the Official Bulletin no. 169 of the 27th of December 1968

[17] These Guidance Decisions of the Supreme Tribunal, the highest court of the judiciary of Romania at that time - replacing the High Court of Cassation -, basically replaced the Decisions in the interest of the law

[18] Practically in the same structure as the Joint Sections of the High Court of Cassation

[19] Published in the Official Bulletin no. 65 of the 29th of October 1986

[20] It acted permanently, and not just on a session basis, as did the Great National Gathering

[21] Published in the Official Bulletin no. 169 of the 27th of December 1968

[22] Published in the Official Bulletin no. 20 of the 28th of February 1973

[23] Published in the Official Gazette of Romania no. 177 of the 26th of July 1993

[24] Published in the Official Gazette of Romania no. 147 of the 1st of July 1993

[25] Nevertheless, for a brief presentation of the post-1993 and up to the present succession of legal provisions in this field, see H. Diaconescu, *Discuții privind neconstituționalitatea instituirii caracterului obligatoriu pentru instanțele judecătorești al dezlegărilor date problemelor de drept prin Deciziile emise de Înalta Curte de Casație şi Justiție – Secțiile Unite în Recursul în interesul legii*, in "Dreptul" nr. 12/2006, p. 94, note 14

[26] Republished in the Official Gazette of Romania no. 45 of the 24th of February 1948, as modified and completed to date

[27] Published in the Official Gazette of Romania no. 78 of the 30th of April 1997, as modified and completed to date

[28] According to Article 141 of Law no. 304/2004 regarding the judicial system, "Whenever a legal reference to the Supreme Court of Justice exists in any of the applicable normative acts, it is considered to be in fact a reference to the High Court of Cassation and of Justice."

[29] For an example of such incidental aspects, see "The custom as a source of criminal law" in F. Streteanu, *op. cit.*, p. 110-114.

[30] See A. Florin, *Calitatea sau capacitatea procesuală a unităților militare*, in Revista consilierilor juridici din armată nr. 1/2004, Publicația militară Lex, Ed. Direcția Legislație şi Asistență Juridică, MApN, p. 55-58; Online at http://dlaj.mapn.ro/ro/lex/pdfrepository/lex_2004_1/anca.pdf

[31] The judge in charge of the Court of Appeal

[32] See I. Reghini, Ş. Diaconescu, *op. cit.*, p.43-47. For a somewhat different view on the topic, see I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, *Bazele dreptului civil. Volumul I. Teoria generală*, Ed. C.H. Beck, Bucureşti, 2008, p. 133-138.

[33] For more details on the topic, see "The custom as a source of criminal law" in F. Streteanu, *op. cit.*, p. 110-114, as well as the footnote-cited references there.

[34] Published in the Official Gazette of Romania no. 1154 of the 7th of December 2004, as modified and completed to date

[35] Rather than specific case-law, ordinary decisions issued by the courts of law

[36] According to the "*Specialia generalibus derogant*" principle, whenever an incompatibility arises, such as "the retroactive nature" of the interpretative laws as opposed to the without a doubt lack of such a nature of the other laws as a general rule, the special provisions will apply to the interpretative laws, instead of the general rule-like ones.

[37] For more details on the topic, see I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, *op. cit.*, p. 262-309. Also, for relevant constitutional jurisprudence on the topic, see Constitutional Court Decisions: no. 73 of the 6th of March 2001, published in both the Official Gazette of Romania no. 240 of the 11th of May 2001, as well as in *România. Curtea Constituțională. Decizii şi Hotărâri*, Ed. Regia Autonomă Monitorul Oficial, Bucureşti, 2001, p. 617-619; no. 303 of the 8th of November 2001, published in the Official Gazette of Romania no. 809 of the 17th of December 2001; no. 330 of the 27th of November 2001, published in both the Official Gazette of Romania no. 59 of the

28th of January 2002, as well as in *România. Curtea Constituţională. Decizii şi Hotărâri*, Ed. Regia Autonomă Monitorul Oficial, Bucureşti, 2002, p. 313-317; no. 188 of the 31st of March 2005, published in both the Official Gazette of Romania no. 584 of the 6th of July 2005, as well as in *România. Curtea Constituţională. Decizii şi Hotărâri.* * *, Ed. Regia Autonomă Monitorul Oficial, Bucureşti, 2005, p. 1543-1548.

[38] See H. Diaconescu, *op. cit.*, p.94

[39] See I. Deleanu, *Instituţii şi proceduri constituţionale: în dreptul român şi în dreptul comparat*, Ed. C.H. Beck, Bucureşti, 2006, p. 774

[40] The Decisions in the interest of the law are fundamentally different than regular, ordinary, common court decisions. By accepting our theory that they are actually interpretative laws, one could also see that it represents the only means of effectively explaining the *erga omnes* – primarily *inter pares* duality of the effects that the two before-mentioned types of "decisions" produce. For a better and more complete understanding of the issue at hand, apart from our current study, one should also refer to a series of other works, such as: I. Deleanu, V. Deleanu, *Hotărârea judecătorească*, Ed. Servo-Sat, Arad, 1998; I. Deleanu, *Opozabilitatea – consideraţii generale*, în "Dreptul" nr. 7/2001, p. 87-105; I. Deleanu, *Părţile şi Terţii. Relativitatea şi Opozabilitatea efectelor juridice*, Ed. Rosetti, Bucureşti, 2002; P. Vasilescu, *Relativitatea actului juridic civil. Repere pentru o nouă teorie generală a actului de drept privat*, Ed. Rosetti, Bucureşti, 2003.

[41] Set by the first paragraph of Article 126 of the Constitution. By corroborating the second paragraph of Article 2 and the first paragraph of Article 1 of Law no. 304/2004, we must notice the legal restatement of the before-mentioned primarily-constitutional role of the High Court of Cassation and of Justice.

[42] Dual in the sense of both constitutional, set by the third paragraph of Article 126 of the Constitution, as well as legal, set by the second paragraph of Article 18 of Law no. 304/2004 regarding the judicial system.

[43] See I. Deleanu, *Instituţii ... ,op. cit.*, p. 749

[44] We cannot help but also notice that in the end, even if it may seem as absurd, in the upholding of state justice, simple achieving unity in the interpreting of the law is more important than doing so in a just and equitable manner, so as at least the subjects know what to expect in the matter of their unjust treatment beforehand. This is exhibitive of a certain *per absurdum* premise, in which state justice could exist at all in the absence of a just and equitable manner of interpreting laws. But we felt such an explanation was needed, in order to accentuate upon the great importance of the constitutional role of the High Court of Cassation and of Justice.

[45] Regulated by the first three paragraphs of Article 115 of the Constitution, entitled "Legislative delegation"

[46] "The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, *according to its competence*. [o. h. – *A. S.*]", *competence set by law*, according to the first paragraph of the same Article, which does in turn represent an enabling law.

[47] See H. Diaconescu, *op. cit.*, p. 106

[48] Even though the number of both the article and of the paragraph the author mentions in his work has changed up to the present, the reasoning of the Constitutional Court regarding the issue at hand has remained the same. We will analyze the Decisions of the Constitutional Court referring to this issue in subsection c of the current Section of our work.

[49] First of all, interpretative laws are not retroactive. This is simply because they are not among the only exceptions set forth in the matter by the second paragraph of Article 15 of the Constitution, as "the more favorable criminal or administrative law". The interpretative laws are only "retroactive" in that they refer to, they offer legal interpretation to a law which was issued and which came into force in the past. But the legal interpretation is only binding from the moment of the coming into force of the interpretative law, and only *ex nunc*. Second of all, even if we were to accept, by *Reductio ad absurdum*, that the interpretative laws are retroactive in theory, we still have no choice but to notice that, in this particular case, we are in the presence of an organic law imperative which forbids their retroactive applying.

[50] To an article analyzing old regulations concerning the Supreme Tribunal's contribution towards the correct and unitary applying of the law – E. Nucescu, *Contribuţia Tribunalului Suprem la aplicarea corectă şi unitară a legilor în activitatea de judecată şi dezvoltarea dreptului socialist*, în "Revista română de drept privat" nr. 5/1971, p. 54

[51] See H. Diaconescu, *op. cit.*, p.106-107

[52] For example, Law no. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania no. 758 of the 29th of October 2003

[53] Republished in the Official Gazette of Romania no. 643 of the 16th of July 2004

[54] This role is restated in the first paragraph of Article 1 of the Law no. 47/1992 regarding the organizing and functioning of the Constitutional Court.

[55] Published in the Official Gazette of Romania no. 90 of the 26th of February 1998

[56] Constitutional Court Decision no. 528 of the 2nd of December 1997, published in both the Official Gazette of Romania no. 90 of the 26th of February 1998, as well as in *România. Curtea Constituţională. Decizii şi Hotărâri*, Ed. Regia Autonomă Monitorul Oficial, Bucureşti, 1998, p. 592-594. With each new Constitutional Court Decision, we will only highlight aspects that are new in respect to the previous Decisions, as we do not consider necessary to also bring forth issues that the Constitutional Court has analyzed and remarked upon before, and that we have also stated before.

[57] We state that only potentially because in fact, even though ideally all of the judges of the High Court of Cassation and of Justice would take part in issuing the Decisions in the interest of the law, this is rarely the case.

[58] Constitutional Court Decision no. 93 of the 11th of May 2000, published in both the Official Gazette of Romania no. 444 of the 8th of September 2000, as well as in *România. Curtea Constituţională. Decizii şi Hotărâri*, Ed. Regia Autonomă Monitorul Oficial, Bucureşti, 2000, p. 633-638

[59] Constitutional Court Decision no. 638 of the 3rd of October 2006, published in the Official Gazette of Romania no. 903 of the 7th of November 2006

[60] Constitutional Court Decision no. 907 of the 18th of October 2007, published in the Official Gazette of Romania no. 811 of the 28th of November 2007

[61] Published in the Official Gazette of Romania no. 816 of the 29th of November 2007

[62] Published in the Official Gazette of Romania no. 575 of the 30th of July 2008

[63] See Articles 499-502 of the Project of the new Code of Civil Procedure, as well as Articles 465-468 of the Project of the new Code of Criminal Procedure.