IMPLICATIONS OF THE RECOURSES IN THE INTERESTS OF LAW ON THE PROVISIONS OF LAW NO. 554/2004

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Abstract

Law no. 554 was adopted in 2004 and amended in 2007. In the meantime and during all this period, the Supreme Court adopted a lot of recourses for the interest of law and these decisions modified the law in a deeply manner. This study is dedicated to these recourses and the way they affected the law.

Keywords: *Law no. 554/2004, recourses for the interests of law, modifications, first degree, recourses.*

1. Introduction

This study aims the default modifications that not the lawmaker, but paradoxically, the judge, has brought to Law no. 554/2004. It should be noted that the decisions to be contemplated by the analysis of this study are recent and fall under the scope of the actual tendency of the High Court of Cassation and Justice to come up with explanations on any matter it is requested a settlement of matters of law.

The institution of the High Court of Cassation and Justice referral in order to rule a prior resolution for the settlement of certain matters of law is new[1], and together with the recourse in the interests of the law, the institution aims to provide an uniform legal practice and both civil procedural institutions are extremely welcome in the Romanian legal frame, in order to establish case law patterns which provide the person subject to the law a greater confidence in the act of justice.

The number of litigations caused by the local government is currently large among civil litigations. This is something normal if we take into account the fact that within the administrative law, understood as a branch of public law, the term of local government holds the central position and it is natural to be so. As shown in the doctrine, the administration is the most complex activity of the state; it is ever-present within the society, the people's life and this is why there is the constant concern of decision makers to make from the local government a force in the interests of the people[2].

Therefore, the material law essentially correlates with the procedural law in the settlement of the administrative litigations.

Practically, the aforementioned civil institutions outline the possibility of the High Court of Cassation and Justice to „clear" the obscurity of the law, so that the courts of law do not rule non-uniform judgments, the premise for the person who resorted to the law to ask „why did I lose the trial" while citizen X, who was in the same situation as me, won? The question is natural and frustrating and the act of justice lacks of finality in such situations.

The obscurity of the law also affected Law no. 554/2004 of the contentious administrative, and these civil procedural instruments appeared and corrected the interpretations of the courts of law.

By means of the proposed analysis, this study reviews four matters of law settled by the High Court of Cassation and Justice, by taking into account four articles of the aforementioned law, a matter which has never been subject to any doctrinal analysis up to this point.

The author of this study aims to analyze the practice of the High Court of Cassation and Justice in this field, by summarizing the decisions which were ruled and by emphasizing their importance.

It should be noted that the institution of the ruling of a prior resolution for the settlement of a matter of law is regulated, as provided above, in art. 519 – 521 of the Code of civil procedure. In summary, in order for the referral under art. 519 of the Code of civil procedure to be admitted, the following conditions must be fulfilled at the same time[3], namely:

the case where the matter of law is raised, is on the dockets of the court of last resort;

the referral concerns a matter of law, namely an issue regarding the interpretation of a legal regulation for which the settlement in principle is required;

the settlement of the case on the merits depends on the clarification of the respective matter of law;

the matter of law the clarification of which is required, is new;

the High Court of Cassation and Justice did not rule on the respective matter of law and it is not

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[1] The institution of the settlement of matters of law was introduced by means of the New Code of Civil Procedure, respectively articles 519 – 521.

[2] Elena Emilia Stefan, *Drept administrativ. Partea I* (Universul Juridic Publishing House, Bucharest, 2014), p. 8.

[3] G. Boroi, O. Spineanu-Matei, D.N. Theohari, G. Raducan, D.M. Gavris, A. Constanda, C. Negrila, V. Danaila, F.G. Pancescu si M. Eftimie, *Noul Cod de procedura civila. Comentariu pe articole. Vol. I. Art. 1-526* (Hamangiu Publishing House, 2013), 1008 – 1010.

contemplated by any pending recourse in the interests of the law[4] .

2. Prior resolutions for the settlement of the matters of law

2.1. Decision no. 10/2015

The first reviewed decision is Decision no. 10 of May 11th, 2015[5], ruled in Case no. 427/1/2015, by the Court Panel for the settlement of matters of law which took into consideration the referral filed by the Court of Appeal of Craiova — Division of the contentious administrative and fiscal, by Closure of December 11th, 2014, ruled in Case no. 7.752/101/2013, in order to rule a prior resolution on the interpretation of the provisions of art. 23[6] of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004).

The matter of law submitted to the High Court of Cassation and Justice was the following:

„The provisions of art. 23 of Law no. 554/2004 shall be interpreted in the sense that the court ruling whereby a regulatory administrative act was annulled, is applicable only to those individual administrative acts issued under the respective act, after the annulment resolution or is it also applicable to those which, although they were previously issued, on the date of final annulment resolution were appealed in cases pending on the dockets of the court of law?”

The point of view of the court panel that filed the referral was that the provisions of art. 23 of Law no. 554/2004 provide, unequivocally, that such court rulings are generally mandatory and produce effects in the future. These provisions are exempt from the principle of the relativity of the court rulings, providing that the court ruling on the annulment of a regulatory administrative act produce erga omnes effects as the regulatory administrative act which is executed produce the same effects in practice. This feature of the court ruling logically leads to the conclusion that the court ruling whereby a regulatory administrative act was annulled in full or in part, is applicable to all matters of law.

The *erga omnes* effects are produced only for the future, an aspect which results, with no doubt, from the provisions of art. 23 first thesis, final part of Law no. 554/2004. Therefore, the legal relationships and legal effects produced by the regulatory act during its execution, until the date of its irrevocable annulment, shall remain in force and shall produce legal effects.

In what concerns the words „they only produce effects in the future”, has to be construed as meaning that the invalidity of the regulatory administrative act, pronounced under an irrevocable court decision, does not produce retroactive natural effects, but only ex nunc effects, for the future, starting from the moment of its acknowledgement, by its publishing on the Official Journal of Romania, Part I, and for the issuance authority, as of the date of the final annulment resolution due to the fact, as a party to the proceedings whereby the resolution for the annulment of a regulatory administrative act was ruled, the issuance authority cannot rely on the failure of the resolution to be published in the Official Journal of Romania, Part I, as an argument for the substantiation of the dismissal to settle a petition.

Therefore, the invalidity of the regulatory administrative act cannot be opposed to the legal effects caused by the administrative acts issued prior to the mentioned time, but only to the legal effects caused by the administrative acts subsequently issued.

In what concerns the extension of the court ruling on the annulment of a regulatory administrative act similar to the effects of the motion to dismiss on grounds of unconstitutionality in what concerns pending cases (as it was noted by means of the decisions ruled by the Court of Appeal of Craiova attached to the referral), the referring court noted that the invalidity of the individual administrative act issued under a regulatory administrative act, in this case the taxation decision, must be analyzed on the time of its issuance (the invalidity grounds being previous or concomitant). The contrary solution would result in the invalidity of all individual administrative acts (in this case the taxation decisions) issued before the resolution on the annulment of the regulatory administrative act, a situation which would violate the legal certainty principle.

Therefore, in the opinion of the referring court, in consideration of the provisions of art. 23 of Law no. 554/2004, the annulment of a regulatory unilateral administrative act produces erga omnes effects only for the future, similar to the repeal or expiration, and the legal relationships and the legal effects produced by the regulatory administrative act during its execution and up to its final annulment, shall remain in force and shall produce legal effects. The High Court of Cassation and Justice decided that

[4] G. Boroi, *Noul Cod de procedura civila. Comentariu pe articole*, 998.

[5] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 458 of 2015.

[6] G.-V. Birsan si B. Georgescu, *Legea contenciosului administrativ nr. 554/2004 annotated* (Hamangiu Publishing House, 2nd edition, rev., Bucharest, 2008): „the action in contentious administrative having as scope the annulment of a regulatory administrative act annulled under a final and irrevocable court ruling, which was published in the Official Journal of Romania, Part I, or as the case may be, in the official journals of the counties or of Bucharest, lacks of object, as these court rulings are generally mandatory and they produce effects in the future (The High Court of Cassation and Justice, division of the contentious administrative and fiscal, dec. no. 2182 of May 29th, 2008, not published)”.

the provisions of art. 23 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, are construed in the sense that the irrevocable/final court resolution whereby a regulatory administrative act[7] was annulled in full or in part is effective on those individual administrative acts issued under the respective act and which, on the date of the annulment court resolution, are appealed in cases pending on the dockets of the courts of law.

2.2. Decision no. 11/2015

The second analyzed decision is Decision no. 11/2015[8], whereby a settlement in principle on the following matter of law is provided: „If the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and with the provisions of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and the prefecture, republished, as further amended and supplemented (Law no. 340/2004), and of art. 123 par. (5) of the Constitution, shall be construed in the sense that the prefect is acknowledged the right to appeal before the court of the contentious administrative, all the acts of the local government which he deems illegal or only the acts of the local government which fall under the scope of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004, respectively only administrative acts”.

In the reasoning of the point of view, the referring court referred the case law to the Court of Appeal of Bucharest, where the matter of law was settled differently, as shown below.

In an opinion, it was noted that art. 123 par. (5) of the Constitution is a general provision of principle, the role of which is to establish the public guardianship institution[9], without its text aiming the exact definition of the acts issued by the authorities of the local government which can be appealed before the contentious administrative, this delimitation being achieved by the „organic law”, according to the reference of the constitutional text.

The organic law is law no. 340/2004, a special regulation, an exception both from the provisions of Law no. 554/2004, and from the provisions of Law no. 215/2001, and which, by means of the provisions of art. 19 par. (1) letter e), limits to the administrative acts the scope of the acts which can be appealed before the contentious administrative.

Furthermore, art. 3 of Law no. 554/2004, which refers to the „acts issued by the authorities of the local government” and to the „contentious administrative court” shall be construed by reference to the definition of the activity of „contentious administrative” given by art. 2 par. (1) letter f) of Law no. 554/2004, which refers to the term of „administrative act” provided for by art. 2 par. (1) letter c), and not to the general term of „act”.

According to art. 1 par. (8) of Law no. 554/2004, the actions filed by the prefect before the contentious administrative are subject both to Law no. 554/2004, and to special law, including to Law no. 340/2004, which limits to the administrative acts the scope of the acts which can be appealed.

In another opinion, it was noted that art. 123 par. (5) of the Constitution deliberately refers to all the acts of the local government, and such an interpretation is supported by the general obligation incumbent including on the local government, provided for by art. 1 par. (5) of the Constitution, on the observance of the Constitution and of the law in all activities, regardless the nature of the legal relationships they are performed in.

Such an interpretation is also supported by the general role of the prefect established by art. 19 par. (1) letter a) of Law no. 340/2004, respectively the role to „ensure, within the county or, as the case may be, within Bucharest, the application and observance of the Constitution, laws, ordinances and resolutions of the Government, of the other regulatory acts, and of public order”. Another argument is that art. 115 par. (7) of Law no. 215/2001 refers, without distinguishing, to the „orders of the mayor”.

Therefore, the acts filed by the prefect by means of the contentious administrative shall be deemed admissible, regardless of the type of the acts issued by the mayor.

The High Court of Cassation and Justice decided that, for the interpretation of the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and prefecture, republished, as further amended and supplemented, and of art. 123 par. (5)

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[7] Dana Apostol Tofan, *Drept administrativ. Volumul II*, (All Beck Publishing House, Bucharest, 2004), p. 49: „*Therefore, in what concerns the termination of the legal effect, the administrative acts shall produce effect until their removal from force, which is regularly performed by the issuing body, by the hierarchically higher authority or by the courts of law, being about suspension, revocation or cancellation*” (A. Iorgovan, op. cit., 2002, p. 69).

[8] The courts of law for the settlement of matters of law, published in Official Journal, Part I no. 501 of 2015.

[9] Elena Emilia Stefan, *Drept administrativ*, p. 145: „*During interwar period, the public guardianship institution was expressly established by the law, the state granting a high importance to this form of administrative control (...) Law no. 554/2004 of the contentious administrative comes to detail the procedural elements of the public guardianship as follows: the prefect can appeal before the contentious administrative court the acts issued by the local government, if he deems them illegal*”.

of the Constitution, the prefect is acknowledged the right to appeal before the contentious administrative court, the administrative acts issued by the authorities of the local government[10], within the meaning of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

2.3 Decision no. 12/2015

The third decision which is subject to this analysis is Decision no. 12/2015[11] on the assessment of the referral filed by the Court of Appeal of Bucharest – Division VIII of the contentious administrative and fiscal, by Closure of November 24th, 2014, ruled in Case no. 30.461/3/2013, whereby a settlement in principle is provided on the following matter of law:

„If, under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest".

The matter of law subject to settlement, as formulated by the referring court, aims the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, under the terms of Law no. 215/2001 and of Law no. 554/2004.

The High Court of Cassation and Justice notes that the modifications occurred in case of the provisions of Law no. 215/2001, do not establish expressis verbis the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

The acknowledgment of such a right cannot be inferred by way of interpretation, as a consequence of the removal of the law text expressly providing the right of the mayor to refer to the prefect if he considered that the resolution issued by the local council was illegal.

In such conditions, according to the „*lex dixit quam voluit*" interpretation rule, it can be concluded that the lawmaker did not intend to acknowledge the right of the territorial and administrative division, by means of the mayor, to appeal before the contentious administrative court, the resolutions adopted by the local council or, as the case may be, by the General Council of Bucharest, since, if he had intended to acknowledge such a right of the mayor, he would have done it expressly.

The High Court of Cassation and Justice notes that the provisions of Decision of June 23rd 2003[12] of the High Court – United Divisions, keep their validity, meaning that „the acts issued by the local council and the mayor are independent, and none of these authorities can pursue directly a remedy at law against the other symmetric authority, the sole authority vested with such a power being the prefect". In this respect, we note that the provisions of art. 46, in art. 71 par. (1) and art. 27 par. (1) of Law no. 215/2001, in force on the date of the decision, are included in the content of art. 45 and art. 68 par. (1) of Law no. 215/2001, in force on the date of this decision, respectively in the content of the provisions of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter a) and e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004.

Notwithstanding, under art. 62 par. (1) of Law no. 215/2001 and art. 1 par. (8) of Law no. 554/2004, the mayor is acknowledged the right to file court actions and to represent the territorial and administrative division before the courts of law. However, in what concerns the lawfulness of the acts adopted by the local council, both the Constitution of Romania, and Law no. 340/2004 and Law no. 554/2004 establish the express competence of the prefect in the form of the public guardianship control[13].

To accept the theory according to which the territorial and administrative division, by means of its executive authority, namely the mayor, is entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, means that the mayor acquires the prerogative of the public guardianship control. Given that the public guardianship control is expressly and restrictedly

[10] Iuliana Riciu, *Procedura contenciosului administrativ* (Hamangiu Publishing House, Bucharest, 2009), p. 131 and the following.

[11] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 773 of 2015.

[12] Published in Official Journal no. 690 of October 2nd, 2003.

[13] Iuliana Riciu, *Procedura contenciosului administrativ*, p. 132: „*The public guardianship control is achieved by a higher hierarchical level authority and shall be exercised only by means of the contentious administrative court, which will rule on the lawfulness or opportunity of the control acts, but there are also opinions which note that this control relates only to lawfulness and not to opportunity. (...) It is important to note that the public guardianship body cannot annul an act deemed to be illegal which was issued or adopted by the body under guardianship, this power belonging only to the contentious administrative court, upon the referral of the body in charged with the public guardianship*".

provided within the constitutional level, by means of art. 123 par. (5) of the Constitution, and, within the organic law level, by means of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004, as a prerogative of the prefect, the court of law is not able, by way of interpretation of the provisions in force, to grant to certain competent public authorities something they were not granted by the lawmaker.

Whereas, within the current legislative frame, the lawmaker did not expressly acknowledge the right to file court actions, although when he wanted to acknowledge at the same time the right of several subjects of law to exercise similar or identical powers, he achieved this by introducing express provisions, the High Court of Cassation and Justice admitted the referral and established the following: under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the territorial and administrative division, by means of its executive authority, respectively the mayor, is not entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

2.4 Decision no. 13/2015

The last decision analyzed by this study is Decision no. 13/2015[14] on the appeal filed by the Board of the Court of Appeal of Constanta on the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and 95 of the Code of civil procedure, on the nature of and the jurisdiction[15] over the cases contemplating the claims whereby a general directorate of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006[16] on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights, republished, as further amended and supplemented.

In what concerns this recourse in the interests of the law, it is noted that the litigations covered by the referral fall under the scope of the contentious administrative, taking into account the capacity of public authorities of the parties, and their scope consists of the dismissal to settle a petition concerning a right provided by the law.

The legal nature of the correlative rights and obligations to finance the social assistance system is specific to the administrative law, due to the fact the application of the legal provisions claimed in the referral covers the organization and establishment of the powers of the local government bodies and the relations between these bodies.

According to the provisions of art. 32 letter c) and art. 37 of Law no. 47/2006[17] on social assistance national system (in force until December 22nd, 2011) the county councils establish and organize under their subordination, general directorates of social assistance with financial and technical responsibilities in order to support social services; the social assistance is mainly financed from funds allocated by the state budget or local budgets, and according to art. 40 par. (1) of the same law, the county budgets allocated funds for the financing of social services organized within the county and for the financing of social works established under the resolutions of the county councils and municipalities, of the towns and communes or under special law, as the case might be.

In relation to the provisions of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the legal nature of the relation referred to judgment obviously belongs to the administrative law, due to the fact the application of the legal provisions claimed by court actions cover the organization and fulfillment of the responsibilities of the local government bodies and the relations between these bodies – the powers of the local council and of the county council, on the one hand, and the financing of the general directorate of social assistance and child protection, on the other hand, all of them involving the local government body.

The source of the obligation of payment of the amounts representing the balance between the monthly average costs and the monthly living contribution incumbent on the social assistance services beneficiaries – persons with domiciles in other localities – is an administrative act[18].

[14] The panel with competence to judge the recourse in the interests of the law, published in Official Journal, Part I no. 690 of 2015.

[15] On the one hand, the first opinion considered that these litigations have a civil nature, and the jurisdiction belongs, depending on the value of the claim, to the court of law or to the tribunal, as common law courts. On the other hand, the second orientation of the case law considered that these cases are contentious administrative litigations, and the jurisdiction belongs in the first instance to the tribunals.

[16] Published in Official Journal, Part I no. 1 of 03/01/2008.

[17] Published in Official Journal, Part I no. 239 of 16/03/2006.

[18] Antonie Iorgovan, *Tratat de drept administrativ. Vol. II* (Editura All Beck, editia 4, Bucuresti, 2005), p. 25: „*administrative act is that main legal form of the activities of the local government bodies, which consists of an unilateral and express manifestation of will of granting, modifying or removing rights and obligations, in the fulfillment of public power, under the main lawfulness control of the courts of law*".

In the application of the regulations in the field of social assistance, the local government bodies shall be bound to establish under administrative act the contribution of the community to the financing of the activities for the protection of disadvantaged persons.

The content of the administrative law relations consists of the rights and obligations of the subjects of this relation, the peculiarity of which is that the exercise of the subjective rights is a legal obligation.

It should be stressed out that, according to art. 2 par. (2) of Order no. 468/2009 of the Chairman of the National Authority for Persons with Disabilities on the approval of the Instructions for the application of art. 54 par. (4) of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, the request of the leader of the general directorate of social assistance and child protection of the territorial and administrative division where the person with disabilities is domiciled, on the admission of the person in a public residential center of another county than the domicile county, is the administrative act whereby the settlement of the costs is performed.

Furthermore, the legal nature of the litigations having as scope the granting of social assistance benefits and the provision of social services – including those regulated by Law no. 448/2006, republished, as further amended and supplemented, and Law no. 272/2004, republished, as further amended and supplemented – obviously results from the provisions of art. 143 par. (1) of Law no. 292/2011 of social assistance.

According to this legal text, the administrative acts issued by the central and local public authorities on the granting of social assistance benefits and social services provision can be appealed before the contentious administrative, under the terms provided by Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

The High Court of Cassation and Justice admitted the recourse in the interests of the law filed by the Board of the Court of Appeal of Constanta and therefore established that, in the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and art. 95 of the Code of civil procedure, the litigations having as scope court actions whereby a general department of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights, republished, as further amended and supplemented, fall under the jurisdiction of the contentious administrative courts.

3 Conclusions

This study aimed to analyze four interpretations granted to certain texts of Law no. 554/2004 by the High Court of Cassation and Justice, on which the national courts raised either the issue of a non-uniform interpretation, or of the potential different interpretations of the law, which are yet unsettled by means of a recourse in the interests of the law.

The High Court of Cassation and Justice granted, by means of its interpretation, the clarity so much needed by the judge in the application of the law, having as final goal the confidence in the act of justice of the person subject to the law.

It should be noted that the New Code of Civil Procedure built such a mechanism enabling the access of the person subject to the law, to an uniform interpretation during the legal proceedings, without being necessary to wait the ruling of a final court decision.

The lawmaker made a great achievement for human justice, by guaranteeing to the persons resorting to the courts of law that they will benefit from all the procedural means to achieve a fair and equitable ruling.

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