

The jurisprudence. Formal law source

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Abstract

The importance of jurisprudential unification lies in the fact that the jurisprudential discrepancies existing in fields of general interest for society produce a state of uncertainty, which diminishes the public's trust in the judicial system.

In general, in the Romanian law system, jurisprudence (the juridical praxis), although it has been approached regarding the sources of law by Romanian scholars, they reached a common conclusion, in the sense that it is not a formal source of law.

As far as we are concerned, as we will show in the subsequent developments, we do not share the diffidence manifested by the authors, generally, with regard to seeing jurisprudence as not a source of law, with the nuances and parantheses required.

The modern trend was one of closeness and interconditioning between the two great law systems (the great Romano-Germanic system and the great common-law system), this is way we have to leave behind the prejudices and to see the fact that, in the Romanian judicial reality as well, jurisprudence has gained an increasingly significant role.

In the next years, we believe that jurisprudence, by shaping general law principles, will be recognized as a main source of law.

Keywords: *jurisprudence, law source, creator source of law, general law principles*

JEL Classification: K10

1. Preliminary determinations

The jurisprudence (the judicial praxis) is the joint of solutions comprised in judicial decisions.²

Some authors³ ascribe a narrower sense to the notion of jurisprudence, remaining only to cases similar to the once previously judged, and to the solutions given by the law courts in such cases, which makes the term of jurisprudence be mistaken for case law. Jurisprudence cannot be widely uniform. The judicial praxis becomes uniform when in similar cases are given similar solutions.

The importance of jurisprudential unification lies in the fact that the jurisprudential discrepancies existing in fields of general interest for society

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² O. Ungureanu, C. Munteanu, *Drept civil. Partea generală în reglementarea noului Cod civil*, Publishing House Universul Juridic, Bucharest, 2013, p. 42.

³ Gh. Buta, *Jurisprudența, o nouă veche provocare*, in „Revista Română de Jurisprudență” no. 1/2011.

produce a state of uncertainty, which diminishes the public's trust in the judicial system.

Jurisprudence as source of law, implies a narrower sense of this term, namely, the entirety of decisions issued in a certain subject (not in general), but we bear in mind a constant and generalized praxis, without being limited to the isolated praxis of one or several law courts.⁴

The basic characteristics of jurisprudence are the continuity and consistency in interpreting and applying the law in a certain field, thus being formed a „habit of law courts of interpreting and applying the law.”⁵ Thus, jurisprudence is defined by repetition.⁶

An essential concept for the theme analyzed is the *predictability* of the judicial praxis. On the strength of it, anyone who will have a similar test case will have to benefit from the solution already established by the jurisprudence. It is estimated that the development of such mechanism will lead to the relief of law courts, because citizens, before referring to the law court, will inquire and will refer to resort only in the situations in which they see chances of success. Whereas, in this context, the predictability of judicial praxis is important, as it offers citizens the possibility to get informed.⁷

In the same sense has also the European Court of Human Rights expressed itself, which in 2007, in the call *Beian* against Romania⁸, decreed that the law court has the role of unifier of judicial praxis, as it has to ensure the *predictability* of the juridical act. Starting from this test case, it was claimed that jurisprudence can have a normative character in Romania as well.⁹

Hereafter we shall analyze the role and position of jurisprudence in the source of Romanian law, related to the latest theory tendencies in the context of harmonizing the cultural differences within the European Union between the two traditional systems (the great system of common law the Romano-Germanic law system).

2. The traditional position of the Romanian theory regarding the role and position of jurisprudence as source of law

In general, in the Romanian law system, jurisprudence (the juridical praxis), although it has been approached regarding the sources of law by Romanian

⁴ I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introducere în drept civil*, Publishing House Hamangiu, Bucharest, 2013, p. 19.

⁵ *Ibidem*, p. 19.

⁶ O. Ungureanu, C. Munteanu, *op. cit.*, p. 58.

⁷ C. Danileț, *Efectele globalizării asupra justiției*, in „Pandectele Române” Supplement from the 31st March 2008.

⁸ The European Court of Human Rights, the Decision from the 6th December 2007 in the Call *Beian* against Romania, available at <http://www.scj.ro/strasbourg/beian%20romania%20RO.html>, 13th March 2014.

⁹ Gh. Piperea, *Drept comercial. Vol. I*, Publishing House C.H. Beck, Bucharest, 2008.

scholars¹⁰, they reached a common conclusion, in the sense that it is not a formal source of law.¹¹

Court decisions are compulsory only for the parties involved, and they do not have a general and impersonal character, which is specific to the judicial norms and to any primary source of law. According to art.123 par.3 from the Romanian Constitution, the judge is independent and only submitted to the law. Art.5 par.4 from the new Civil Code states that „*The judge is forbidden from establishing dispositions generally compulsory through the decisions he pronounces in the calls that are submitted to his trial.*”

When the question arises whether jurisprudence will be able to be considered source of law, it is taken into account, in fact, a certain constant praxis and with a certain consistency of the court.¹² Therefore, as a rule, not only the traditional position of judicial literature, but also the one immediate after the entering into force of the new Civil Code¹³, is that „*the judge does not create the law, but rather only applies it,*”¹⁴ as jurisprudence is not considered a source of law in our judicial system.

On the other hand, a recent opinion stated quite pronouncedly a reevaluation of the traditional position, in the sense that, „the directives of art.5 par. 4 from the Civil Procedure must be rethought and adapted to reality, as they are illogical and foreign to the present conditions. They are illogical because, whereas the judge must identify an individual rule necessary and appropriate for the solution of the issue, he must first show the general rule from which derives the individual one. In the present conditions, when the national judge is also an „European” judge, being thus able, in his multiple capacity, to fashion the national norm himself or even to sacrifice it to the benefit of the conventional or European one, his onward placement in the perfect position of humble subordinate of the national law or in the traditional position of expectancy regarding the anachronisms of the law in force would simply be perplexed. Therefore, the yesterday normative lecture of the directives from art. 5 par. 4 from the Civil Code Procedure is, we categorically believe, concluded.”¹⁵

Although, in general, the theory rejects the idea of jurisprudence being considered an immediate source of law and regards it as an interpretative source, there are also authors who state this „remains a reality which cannot be avoided except for the risk of deviating from the spirit of the law.”¹⁶

¹⁰ G. Boro, C.A. Anghelescu, *Curs de drept civil. Partea generală*, Hamangiu, București, 2011, p. 10.

¹¹ C.T. Ungureanu, *Drept civil. Partea generală. Persoanele*, Hamangiu, București, 2012, p. 23.

¹² I. Reghimi, Diaconescu, T. Vasilescu, *op. cit.*, pp. 32-33.

¹³ C.T. Ungureanu, *op. cit.*, p. 23.

¹⁴ However, by way of exception, it is considered that certain court decisions are creators of law (the decisions of the Constitutional Court by which are resolved the exceptions of unconstitutionality of a law or decree). See G. Boro, C.A. Anghelescu, *op. cit.*, p. 10.

¹⁵ I. Deleanu, S. Deleanu, *Jurisprudența și revirimentul jurisprudențial. Eseu*, publishing house Universul Juridic, Bucharest, 2013, p. 144.

¹⁶ I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 20.

In theory¹⁷, it is considered that art.123 par. 3 from the Romanian Constitution and art. 9 par. 3 from the Civil Code can be arguments sustaining the idea according to which jurisprudence is not a source of law. It is also noted¹⁸ that the new Civil Code has not detained jurisprudence as source of law when listing the sources of the civil right in art. 1 of the Civil Code.

As far as we are concerned, as we will show in the subsequent developments, we do not share the diffidence manifested by the authors, generally, with regard to seeing jurisprudence as not a source of law, with the nuances and parantheses required.

3. Jurisprudence as secondary source of law (interpretative) in the Romanian law

A. Preliminary determinations

As we have shown on another occasion¹⁹, the modern trend was one of closeness and interconditioning between the two great law systems (the great Romano-Germanic system and the great common-law system), in the sense that in the great common-law system, in which jurisprudence was the main source of law, and the statute had no significance or little value, the written law began being accepted, and, from our point of view, in all countries belonging to the great Romano-Germanic system, where only the statute was considered source of law, jurisprudence gains high importance, although it doesn't reach, of course, the level of the law, but we believe that in all Romano-Germanic law systems jurisprudence can be today qualified as source of law.

Consequently, from our point of view, we have to bridge the prejudices that don't consider this harmonization between the two great systems and to see the fact that, in the Romanian judicial reality as well, jurisprudence has gained an increasingly significant role, which causes us to make the following clarifications.

B. Jurisprudence – optional source

Jurisprudence, to the extent in which it contains judicial arguments, is an optional source of law which can be imposed on the subsequent judge, firstly through the power of argumentation, of the judicial reasoning which it contains, but also through the authority of the court from which it is released.

Ever since the inter-war period it was asserted²⁰ that, „*although the solutions of law courts and even higher courts are not compulsory for trial courts,*

¹⁷ G. Boroi, C. Angheliescu, *op. cit.*, p. 10.

¹⁸ I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 20.

¹⁹ B. Oglindă, *Dreptul Afacerilor. Teoria generală. Contractul*, Publishing House Universul Juridic, Bucharest, 2012, p. 21-24.

²⁰ I. Rosetti-Bălănescu, O. Sachelarie, N. Nedelcu, *Principiile dreptului civil*, state Publishing House, Bucharest, 1946, p. 12.

these follow them nonetheless, because they strive for unity and because the decisions of the higher court enjoy prestige."

Jurisprudence is defined by repetition. Although courts do not have the obligation to align with an established tendency of judicial praxis, in the majority of cases, however, they conform „regardless of whether on the foundation of such attitude lies belief, imitation or fear of not being dissolved by the higher courts.”²¹

The unification of judicial praxis is essential to augmenting the credibility of the juridical activity, which gains thus coherence and consistency.²²

In an opinion²³ it was stated that jurisprudence has a partially creating character, in the sense that it *completes* the law where it is defective, it *corrects* the law departing from the literary meaning of law texts if they would generate unjust consequences, and also, jurisprudence *specifies* the law by underlining the alternative interpretations which can be given to a judicial norm and opting for one of the solutions.

With every juridical decision, the court rewrites a juridical individual norm appropriate to the circumstances of that call. It is not a simple transcription of the norm that existed previously, but rather a redefinition of its defining elements through the transit from general to particular, from abstract to concrete, through specific nuancing of a call, often unimagined by the legislator and through which the objective right is enriched with details or nuances it lacked. Thus, the norm is given accessibility and predictability before some future similar hypothesis.²⁴

The complexity of the effects generated by jurisprudence on norms is very well illustrated in a recent study, in which it is stated that, „the judicial abstract norm metamorphoses and recreates, through interpretation, in any concrete situation in which it is applied.”²⁵

It is acknowledged that in a binary scheme, the judge cannot establish *generally compulsory* dispositions, but he can establish *individually compulsory* dispositions. Thus, the jurisprudential constructions have „a normative force, in the sense attributed to this concept of model, guide, mark and reference.”²⁶

We can assert therefore that jurisprudence is a derived source, interpretative and partly creative, and „the legislator can establish, invalidate or modify it.”²⁷ The creating role of jurisprudence results from the general charatcer

²¹ O. Ungureanu, C. Munteanu, *op. cit.*, p. 58.

²² I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 20.

²³ O. Ungureanu, C. Munteanu, *op. cit.*, p. 59.

²⁴ I. Deleanu, S. Deleanu, *Jurisprudența și revirimentul jurisprudențial. Eseu*, Publishing House Universul Juridic, Bucharest, 2013, p.19.

²⁵ I. Grigore-Rădulescu, *Despre jurisprudență și precedent judiciar din perspectiva izvoarelor dreptului*, in „Pandectele Române" no. 2/2014.

²⁶ I. Deleanu, S. Deleanu, *Jurisprudența și revirimentul jurisprudențial. Eseu*, Publishing House Universul Juridic, Bucharest, 2013, p. 146.

²⁷ N. Popa, M.C. Eremia, S. Cristea, *Teoria generală a dreptului*, Publishing House All Beck, Bucharest, 2005, p. 174.

of the law, as the judge has a certain degree of freedom in adopting the solution. The creative role is manifested especially in the case in which the law is lacunar.²⁸

C. Jurisprudence – compulsory source

Firstly, we assess that jurisprudence becomes a compulsory source of law in the case decisions released to the benefit of the law, on the grounds of art. 514-518 from the Civil Code Procedure²⁹.

The judicial force of the decisions given to the benefit of the law is given by the directives of art. 517 par. 4 Civil Code procedure, which state that „*The solution given to law issues is compulsory for courts from the issuance day of the decision.*”

The previous decisions given for the answer of some law issues on the grounds of art. 519 and art. 521 from the new Code of Civil Procedure are also a second situation in which jurisprudence can be regarded as a compulsory source of law. The High Court will pronounce a decision that will be obligatory according to par. 3 from art. 521 Code Civil Procedure, which states that „*The solution given to law issues is obligatory for the court which requested the solution from the day of the issuance day of the decision, and for the other courts from the issuance day of the decision in the Official Romanian Gazette.*”

What is important and common for both analyzed hypotheses (the appeal to the benefit of the law and the previous decision for the solution of some law issues) is, that in both hypotheses a decision released inside a legal system by the High Court of cassation and Justice becomes obligatory, not only for a judge who judges the respective test case, but for all courts for the future, from the moment of the issuance of the decision. Which means that in these two concrete hypotheses, the jurisprudence of the High Court, on the two matters, is an *obligatory source* of law for courts. Likewise, the two hypotheses also have in common the fact that the jurisprudence is not a primary source of law. In these situations, the jurisprudence does not contain primary judicial norms, as it is only an interpretative source of law, but one extremely important for the Romanian source of law.³⁰

A third situation in which the jurisprudence is not an obligatory source of law is given by the preliminary Decisions of the Justice Court of the European Union.

The national judge, irrespective of the jurisdiction degree, is bound to apprise the Justice Court of the European Union, every time when in a litigation arises a problem of interpretation of European Union law, so that the development

²⁸ O. Ungureanu, C. Munteanu, *op. cit.*, p. 59.

²⁹ The recourse for the convenience of the law is a procedure which targets the uniformity of jurisprudence, if the courts have given different solutions in the same matter

³⁰ B. Oglindă, *op. cit.*, p. 59.

of a jurisprudence divergent or contrary to the European Union law in different member states would be avoided.³¹

The interpretations given by the court when solving a law issue are compulsory on the other national jurisdictions as well, under the aspect of interpretation of community norms.³²

4. Jurisprudence as main source of law in the Romanian law

A. The jurisprudence – main „negative” source (abrogative)

The jurisprudence – main „negative” source (abrogative) comprises the jurisprudence of the Constitutional Court and the cancellation of the Government Decisions in compliance with the Law nr. 554/2004 regarding the administrative legal departments.

In these situations, the jurisprudence is a negative source of law, a compulsory source of law, principal, but a negative one, not positive, in the sense that it does not contain judicial new norms, but only cancels the government resolution, depriving of effects previously existing judicial norms, on reasons of their illegality regarding the normative act with higher force.

B. The jurisprudence – main creator source of law

We believe that the jurisprudence gains a higher importance in the context in which the new Civil Code regulates the general law criteria as being sources of law.

The creating role of jurisprudence consists in adapting and extending the law texts to the reality and evolution of social relationships, as well as to the replenishment of law texts, assignment which it fulfills through the practical application of general law criteria, as subsidiary source of law.³³

In theory it has been assessed that, „by renouncing the mythical image of a perfect law giver, rational and preventive at the same time, we must admit, sometimes exceptionally, the accidental or guaranteed quality of the judge as „specific co-legislator,” specific because the norm created by him is not identical with the norm created by the law giver, it is not a general obligatory norm.” If the law does not provide it, the judge can and must act upon the construction of the legal norm necessary to solve the litigation he has been given, assimilating other regulations or adapting regulations already existing. Analysing the decisions given in similar situations, the judge can take over some of the considerations for those

³¹ See: M. Şandru, M. Banu, D. Călin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene și experiențe ale sistemului român de drept*, Publishing House C.H. Beck, Bucharest, 2013, pp. 5-7.

³² M. Voicu, *Jurisdicții și proceduri judiciare în Uniunea Europeană*, Publishing House Universul Juridic, Bucharest, 2010, p. 167.

³³ I. Reghini, Ş. Diaconescu, P. Vasilescu, *op. cit.*, p. 20.

decisions, which are appropriate for the cause, but without giving a general compulsoriness for those considerations.³⁴

In a situation of legislative void, as stated in art. 5 par. 2 Civil Code Procedure, we can say that the judge created the norm himself, setting up institutions validated afterwards by the law giver (as for instance, the enrichment without just cause, the presidential enactment, etc.).³⁵

In theory, it has been assessed that law courts contribute to creating or perfecting some individual legal norms through the following forms: they state the legal terms and fulfill its lacunae; they ensure the coherence of juridical order, eliminating the antinomies; they adapt the law to the evolution of facts; they transform some maxima or adages in fictional law rules.³⁶

With regard to the last form – the transformation of some maxima or adages in fictional law rules – these are fictional because they either contradict an effective regulation, or they deform concepts or judicial institutions, as the authors exemplify the arguments in terms of the next concepts, with jurisprudential principle: the common property on shares; objective liability; the obligation of maintenance on the behalf of parents; the enrichment without just cause; the appearance of right; moral prejudice; *nemo auditur propriam turpitudinem*; *exceptio non adimpleti contractus*; the right of retention; the superficies or judicial mutability of the penalties clause.³⁷

In a recent study³⁸ it is assessed that jurisprudence cannot be source of law, although it is admitted a secondary role of jurisprudence, in the sense of unification and application of the law, but without prioritizing the test case and giving it a general character in terms of which the jurisprudence becomes creative source of law. The authors claim that the decisions given based on the general law principles (applied as subsidiary source of law) do not have regulatory value, but only obligatory force applying in the case. However, it is admitted the contribution of legal praxis to the formation of the rule of law and are appreciated „the major tendencies, creative, of jurisprudence”, because they generate „a unitary and harmonious way of interpretation in the legal act.”³⁹

We believe that, in the future, the jurisprudence will be assessed as main and creative source of law when, together with the theory, it will help to outline the general law principles by means of which we are sure that some test cases will be resolved.

In the foreign theory, an emphasized opinion regarding the creating role of the jurisprudence has been presented, in the sense that in families under Romano-Germanic law, this cannot be solved by legal stipulation, as it is concealed by the

³⁴ I. Deleanu, S. Deleanu, *Jurisprudența și revirimentul jurisprudențial. Eseu*, Publishing House Universul Juridic, Bucharest, 2013, p. 26.

³⁵ *Ibidem.*, p. 27.

³⁶ *Ibidem.*, p. 38.

³⁷ *Ibidem.*, pp. 44-48.

³⁸ M. Agheniței, I. Flămânzeanu, *Jurisprudența ca izvor de drept*, in „Revista română de drept penal” Jan-Mar 2013, p. 114.

³⁹ *Ibidem.*, p. 116.

appearance of law interpreting.⁴⁰ Whereas, given the fact that the law principles, through the will of the law, were elevated to the degree of source of law, nothing can stop us from seeing the creative role of jurisprudence as being manifest including by means of interpreting the general principles of law.

For all these considerations, our conclusion is firm, in the sense of recognizing the jurisprudence as a source of law in the Romanian law, in most situations secondary and interpretative source of legal norms, optional, but also negative compulsory secondary source in the two situations (appeal for the convenience of the law and the procedure of the preliminary question), even negative compulsory principal source in the case of cancellation administrative papers with normative character.

On this occasion, as I have shown on other occasions⁴¹ as well, we sustain the acknowledgment of jurisprudence as source of law and we notice that this idea starts to have form. In this sense, it has been recently shown that, „not only cannot the normative value of the case law be ignored, but should be reconsidered in the Romano-Germanic law systems.”⁴²

Likewise in the next years, the jurisprudence, together with theory when it shapes general law principles, we believe it will be able to have also its quality of main source of law acknowledged.

As justly assessed in the theory, in the last years, the jurisprudence of the European Court for Human Rights is a source of law, as is also the Justice Court of the European Union, in other fields as the preliminary decision.⁴³

It has been assessed⁴⁴ that even in the assumption that the decisions of the court need a complex and wide reform of the internal legal system, the national judge „can and must, as far as possible, apply these decisions, until an internal law compliant with the convention comes into force.”

5. Conclusions

As far as I am concerned, I assess that the jurisprudence has incontestably a critical role in the positive Romanian law, as it can be unmistakably included among the Romanian sources of law.

The role of the jurisprudence is manifested gradually, from the role which is generally acknowledged and verbalized by the Romanian theory, namely that of secondary (interpretative) and optional source, going on with its aspect of interpretative compulsory source and coming to the undeniable role of formal and compulsory source of law, either when it manifests with a negative role (when a judicial decision cancels an administrative act with regulatory value), or when it

⁴⁰ R. David, *Les grandes systemes de droit contemporaines*, publishing house Dalloz, Paris, 1950, p. 138.

⁴¹ B. Oglindă, *op. cit.*, p. 57.

⁴² I. Grigore-Rădulescu, *loc. cit.*

⁴³ G. Boroi, C. Angheliescu, *op. cit.*, p. 11.

⁴⁴ M. Livescu, D. Livescu, *Efectele juridice ale hotararilor Curtii europene a drepturilor omului si controlul executarii acestora*, în „Revista Națională de Drept” no. 10/2012, p. 5.

manifests positively, in the shaping of general criteria of law, or in the special case of the European Court for Human Rights.

What is important is that all of us, “the actors of the judicial fact” be aware of the change of paradigm regarding the role of jurisprudence within the formal Romanian sources of law, changes whose signals have been given including through the idea that the authors of the Civil Code have tried to transmit – although here and there – “initiating” through interposing the concept “general principles of law.”

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