THE JURISPRUDENCE - BASIC CONCEPTS OF BEING A FORMAL AND CONSTITUTIONAL SOURCE OF LAW (I)

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Abstract

The jurisprudence could be characterised as being a combination of previous but also completed situations in fact, previous but also consumed facts, which have been materialised by legal sentences or guidance decisions given by courts and competent bodies, through which the solution to the problems of law tried, becomes binding for the other lower courts in all similar cases which will be tried, in order to ensure a uniform and unitary interpretation and enforcement of the law throughout the territory of the country. In order to be able to characterise jurisprudence in Romanian law, in the sense of choosing between being or not being a formal source of law, it is firstly necessary to analyse the system, the whole current legal framework, including as regards the organization of the judicial system and of the courts. Romanian national law is characterised through Roman Germanic law as being a procedural law in which the judicial activity is carried out on the basis of strict rules, as is that of the judge, who has the duty to receive and settle any claim within the competence of the courts, according to the law and no judge may refuse to judge on the grounds that the law does not provide, is unclear or incomplete and, in the case in which a case cannot be settled neither on the basis of the law nor of customary practices, and in the absence of the latter, nor on the basis of legal provisions for similar situations, it shall be judged on the basis of the general principles of law, having regard to all its circumstances and taking into account the requirements of equity.

Keywords: *jurisprudence; internal law; procedural law; source of law; justice.*

1. Introductory elements of the concept of *jurisprudence*

Romanian national law is characterised[1] through Roman Germanic law as being a procedural law in which the judicial activity is carried out on the basis of strict rules, as is that of the judge, who has the duty to receive and settle any claim within the competence of the courts, according to the law and no judge may refuse to judge on the grounds that the law does not provide, is unclear or incomplete and, in the case in which a case cannot be settled neither on the basis of the law nor of customary practices, and in the absence of the latter, nor on the basis of legal provisions for similar situations, it shall be judged on the basis of the general principles of law[2], having regard to all its circumstances and taking into account the requirements of equity. It is also prohibited for the judge to lay down generally compulsory provisions through the decisions they issue in cases which are subject to their judgement - *New Code of Civil Procedure, Art. 5, Chapter II, Fundamental Principles of the Civil Process*.

In classical law the concept of *jurisprudence* is known under the names of: *legal practice* or *judicial practice* or under that of *casuistry* and is defined in The General Dictionary of the Romanian language[3] as being *all the solutions given by courts with regard to legal issues*.

Under a strictly legal aspect[4] *jurisprudence* could be characterised as being *a combination of previous but also completed situations in fact, which have been materialised by legal sentences or guidance decisions given by courts and competent bodies, through which the solution to the problems of law tried, becomes binding for the other lower courts in all similar cases which will be tried, in order to ensure a uniform and unitary interpretation and enforcement of the law throughout the territory of the country.*

Therefore, *the decisions of courts do not have a binding force for other similar causes and therefore cannot be considered as legal precedents*, as is the situation in the Anglo-Saxon legal system, system which in fact is a creation of *jurisprudence*.

In other words, the prohibition provided by Roman Germanic law, which is applied in Romanian law, may not lead to decisions which become legal precedent and consequently, *do not receive the quality of formal sources of law, i.e. they cannot have binding force.*

However, in accordance with constitutional provisions (Romanian Constitution, Art. 126 para. (3): The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by the other courts of law, according to its competence. Law No. 304/2004, Art. 16 para. (2): The High Court of

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[1] Emil Cernea, Emil Molcut, *Istoria statului si dreptului romanesc*, (Sansa Publishing House, Bucharest, 1991), 24.

[2] Anita M. Naschitz, *Teoria si practica in procesul de creare a dreptului*, (Academiei Publishing House, Bucharest, 1969), 127.

[3] Vasile Breban, *Dictionarul General al limbii romane*, (Stiintifica si Enciclopedica Publishing House, Bucharest, 1987), 548, jurisprudenta**,** jurisprudente, s.f. Din fr. jurisprudence, lat. iurisprudentia.

[4] Sache Neculaescu, *Introducere in dreptul civil*, (Lumina Lex Publishing House, Bucharest, 2001), 25.

Cassation and Justice ensures the unitary interpretation and application of the law by the other courts, according to its competence) which are the same as those of the Law on judicial organization, the High Court of Cassation and Justice is given competences which establish that through its jurisprudence, to improve the legislation, for the purpose of ensuring uniform interpretation and unitary and uniform enforcement of the law at the level of the entire system through the procedure of the appeal in the interest of law - New Code of Civil Procedure, Chapter I, Appeal in the Interest of the Law, Art. 516 et seq.

But in *the Anglo-saxon legal system* jurisprudence has completely different dimensions in the sense that judicial solutions constitute legal precedents which acquire force and applicability equivalent to the law, for both parties and the courts[5].

For this reason, the jurisprudence in this system is given the nature of *formal source of law* and also within this system, the judge is given wider prerogatives, therefore having a double task, both in respect to the enforcement of the law and in terms of its creation.

2. The importance of *jurisprudence* in the interpretation and enforcement of positive law

As regards the role and importance of jurisprudence in the interpretation and enforcement of positive law, it can be said that it is an undeniable reality, even if in the Romanian law system it is not assigned the quality of formal source of law[6], and the powers of the Romanian judge are limited, both in the interpretation and the enforcement.

For better understanding it should be noted that the positive law represents all the existing legal rules in a society at a certain given point in time[7].

So, if in the Anglo-Saxon system the law is used as an additional source of law, in the Roman Germanic systems of law jurisprudence constitutes an additional source of law.

In this respect it might be said that, in the context of the evolution of the current legislation, the importance and the role of jurisprudence have acquired increasingly more obvious dimensions in the Romanian legal system as well.

In argumentation, this fact would be highlighted first as a result of the need for harmonization of national law with the provisions of the European legal system.

Secondly, the immediate, direct and priority enforcement of the European legal rules in national law[8] are mandatory principles, consecrated and dictated by the European legal order and also by the jurisprudence of the European Courts of Justice[9].

It should be pointed out in this respect that the legislation of the European Union categorically grants jurisprudence the qualification of source of law with regulatory attributes. [10]

Also in support of the growing role and importance of jurisprudence, it should also be stressed that it has the following characteristics: it contributes to the formation and consecration of the general principles of law; it constitutes an urgent need in the development, interpretation and enforcement of laws; it fills in the shortcomings in law texts, it completes and adapts them in accordance with new realities; it contributes to the elimination of conflicting provisions, to the repeal of those which have become obsolete and last but not least, in the Romanian legal system, through the High Court of Cassation and Justice, it has a primary role in achieving a uniform and unitary interpretation and enforcement of the law by the other courts.

In order to be able to characterise jurisprudence in Romanian law, in the sense of choosing between being or not being a formal source of law, it is firstly necessary to analyse the system, the whole current legal framework, including as regards the organization of the judicial system and of the courts.

Last but not least, a new study and approach to the prerogatives and the powers granted to the courts, to the Constitutional Court, to the Romanian judge, an objective analysis of the judicial practice in contrast with practical realities are necessary.

Not recognizing characteristic of source of law of Romanian jurisprudence has been duly substantiated and justified many times in doctrine by the fact that it would thus infringe the principle of separation and balance of powers in the state, which is one of the defining features of the rule of law,[11] and it would also breach constitutional provisions, and the courts would exceed their authority and acquire legislative powers.

Against such seemingly logical at first sight arguments, the question may arise of how such principles are violated in other countries such as: The U.S.A, Canada, England, France, Germany, etc. - countries which have recognised jurisprudence as formal source of law for a long time?!

Obviously, according to the current legislative framework, this can only be achieved through the adoption of new regulations, both at the level of the system, including that of the constitution, granting adequate powers and organising laws to the entire judicial apparatus, the Constitutional Court, the courts and magistrates.

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[5] Mihai Badescu, *Familii si tipuri de drept*, (Lumina Lex, Publishing House, Bucharest, 2002), 9.
[6] Ion Dogaru, *Elemente de teoria generala a dreptului*, (Oltenia Publishing House, Craiova, 1994), 7.
[7] Mihail Niemesch, *Teoria generala a dreptului*, (Hamangiu Publishing House, Bucharest, 2014), 27-29.
[8] Article 38 of the Statute of the International Court of Justice - *where European jurisprudence is mentioned as part of the sources of law*.
[9] Augustin Fuerea, *Manualul Uniunii Europene* – ediţia a – III – a revăzută şi adăugită, (Universul Juridic Publishing House, Bucharest, 2006). 37-41.
[10] Gabriel Micu, *Diplomatic Law*, (Pro Universitaria Publishing House, Bucharest, 2017), 77.
[11] Sofia Popescu. *Statul de drept in dezbaterile contemporane*. (Academia Romana Publishing House, Bucharest, 1998), 78-91.

However, beyond these controversies we could ask the question of what would happen if the current system, taking into account the existing legal realities, would judicial practice decisions be regarded as legal precedents equivalent to the law?

As regards the legality and soundness of decisions, of the effects, great reservations may be expressed, and, furthermore, the fear regarding the separation and balance of powers in the state may arise.

One of the important gains could be a uniform enforcement of the law, and the role of the judge would increase.

In the event that all these *technical* aspects would be theoretically resolved, with reference to the existing judicial practice, in the concrete realities in Romania, it may be observed, unfortunately, that: many different solutions are issued in similar causes; there are different interpretations of the same text of law; many decisions of the European Court of Human Rights are not complied with; revisions are allowed on the basis of others, although in their contents, the European Court has not found or assigned any quality to the applicant; cases are accepted or rejected by differently invoking the grounds; there is an arbitrary enforcement of texts of special laws; quite a lot of decisions of the Constitutional Court are not complied with or are enforced with delay, etc.

In this context the question arises, what would come out of this kind of *Romanian judicial precedents* resulting from such decisions, in the case that they would be granted the same powers as in the Anglo-Saxon system?

Numerous studies in comparative law[12], as in the entire literature, reveal on this subject that in order for a judicial decision to become a *precedent*, it requires an in-depth reasoning before being issued, to be well thought out and *to take into account only a situation in law*, not in fact.

On the other hand, *the judicial precedent* involves a much too technical approach, *specialized and exhaustive research* of decisions, for long periods of time[13], which is less convenient for the regular lawmaker.

In such a case, the question would also be if in such a difficult system, would access to justice be hindered or restricted?...

It is important to emphasise the fact that, regardless of the system, the essence of things is not and cannot be reduced to jurisprudence being or not being the formal source of law.

The quality of the act of justice firstly starts from the interests and will of the lawmaker who, as a general rule, is the representative of the political class, from the quality of the human factor, from creating and implementing settled, coherent and impartial legal system and framework, without the adoption of transient, equivocal, ineffective and inefficient laws for justice seekers as target recipients of legal rules and the justice system.

Furthermore, we should not overlook the most important thing, namely observing the law texts, their consistent enforcement, compliance with the terms and punishing those guilty in the event of non-compliance, the procedural provisions, as well as the accountability of the magistrate, which is one of the main objectives necessary and binding in the functioning of the justice system.

In support of these points of view, which are considered to be essential and of utmost importance, it should be stressed that paradoxes and anomalies are found not only in the Romanian justice system, but in many other systems. The European Court of Human Rights itself, though it does not speedily settle the requests that are addressed to it, in exchange, issues decisions of conviction of European states after many years, invoking reasons such as unreasonable time limits, lack of celerity, etc., which this court itself is unable to comply with.

Another aspect bizarre in the practice of the European Court of Human Rights would be that given the procedure of reference to the Court of actions of the justice seeker, as a copy, it is not even required to be certified.

We should also emphasise in this context that, without a precise definition of the institutions and the significance of the terms with which they operate, also applicable with regard to the text of the European Convention and the activity of the Court, there will still be arbitrary, different interpretations, and therefore such decisions.

In the reality of the Romanian law system, returning with the proposed analysis in order to find a proper answer to the question at hand, reference may be made to a certain category of examples which is considered to be eloquent in supporting, on the one hand, the non-lawfulness of many judicial decisions, as well as the non-uniform enforcement of the legislation.

We may take as an example, on this subject, the actions in the sphere of ownership, particularly claims for real estate, and this being a highly important and, at the same time, controversial matter.

In this respect, it may be observed that, unfortunately, most of the *precedents*, not judicial ones, but those of non-compliance with the legal provisions, for the non-unitary interpretation and enforcement of the texts of law, are to be found in such cases - many illegal, arbitrary or contradictory decisions in similar cases. For all these - nobody is held responsible, either under the pretext of the independence of the magistrate, of the separation and balance of powers in the state, etc.

Another serious aspect found in the practice of some courts would be that many times evaluations and qualifications of previous law texts are made in terms of constitutionality, going beyond their authority and violating the principle of separation and balance of

[12] Ioan Les. *Organizarea sistemului judiciar in dreptul comparat*, (All Beck Publishing House, Bucharest, 2005), 7–31.
[13] Aurel Pop, Gheorghe Beleiu, *Drept civil. Teoria generala a dreptului civil*, (University from Bucharest, 1980), 75.

powers in the state, which the European Court of Human Rights itself has never done.

So it may be concluded that the property is holy, in fact, exactly in this matter, paradoxically, the most situations in which *the real estate fight* has gained unimaginable, even tragic, meanings and the connotations, may be observed.

In judicial practice we can also observe a variety of decisions that are issued rather depending on the *quality of the person*, *their interest*, *lack of interest*, or *co-interest*, by the *financial power* of the justice seeker or by *their relations* and *position* in the political sphere.

We should remember only as an example some of the major cases of this situation in fact, namely: the increase in the instrumentalisation of law; the creation of *parallel institutions and instruments* which exceed the judiciary apparatus; ephemeral and ineffective laws adopted to serve certain *target recipients* and, last but not least, n order for them to serve certain election purposes and interests.

By way of example a multitude of legal rules may be mentioned, such as Law 10/2001, Law 112/1995, G.E.O. 40/1999, etc., only for the fact that both the number of former owners and of the tenants or the current owners, represented a special electoral interest, which led to real dramas, the *reparation* of illegalities committed with the *commission of* greater ones, which had great social implications on either side of justice seekers.

All these happened with the exclusive intention of achieving the above mentioned purpose, for the materialisation of which the political class resorted, in fact, to a traditional and original course of action in order *to please everyone*.

Within this category of examples multiple situations, multiple decisions given on the basis of *false notary acts*, obtained by the would-be *descendants* of the old owners, which they acquired illegally in various European countries or in other words: *to order*, without the applicant being required to prove with documents attesting such quality, may be highlighted. On the other hand, the ease of Romanian courts in recognising the content of such documents, judging them perfectly valid only for the simple fact that their *translation was certified* ?! should also be emphasised.

Another question that has arisen is how is it possible that a building which has been claimed in the whole by a justice seeker claiming to have the right to property, has been restituted in kind to them, and to another in equivalent, and in the case of other claims on the same building, some defendants have won the lawsuit, and others have lost through different decisions - in the same case, with the same parties and the same object?!

Conclusions

Concluding, although the examples could continue, we think a clear answer to the question of whether jurisprudence in Romanian law could be a formal source of law or not, is very difficult to give under the current conditions, meaning that being able to become a *judicial precedent* is a premature problem at present and that a longer period of time would have to pass in order for this matter to be justifiably discussed, namely to ask the question but also to find the answer of how to achieve it.

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