THE RECONFIGURATION OF THE JUDGE`S ROLE IN THE ROMANO-GERMANIC LAW SYSTEM

ELENA ANGHEL*

Abstract

The role assigned to the judge varies from one legal system to another. In the Anglo-Saxon legal systems, in the context of the absence of an independent legislative body, judge is the one who creates law; his mission consists in solving a specific case, given the existing judicial precedents; if he can not find an appropriate rule of law, the judge has to create one and to apply it. On the other hand, in the continental system, creation of law is the mission of the legislator. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxons by: the assuming of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.

In spite of these essential differences, the last decades of the twentieth century have found out the convergence of the written coded system and the common law system. Thus, the increasing of the legislature`s role in common law system is accompanied by the reconsideration of the judge`s role in the Roman-Germanic legal system. While Anglo-Saxons accept the "compromise" of coding, Continentals shyly step towards rethinking the status of law source of the jurisprudence. History has shown that, one by one, law and jurisprudence have disputed the the role of prime creator of law.

Emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, examining the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[1].

However, as we shall see below, in the Roman-Germanic law system, the creative role of jurisprudence still raises controversy.

***Key words**: creative role of jurisprudence, controversy, common law system, continental system, judicial precedents.*

Introduction

By analyzing several opinions of academic commentators on the expansion of the role of continental jurisprudence in postmodernism, we notice that the phenomenon is often qualified as a danger threatening the rule of law. Thus, amongst the symptoms of the crisis of the current juridical universe, Ioan Vida also includes the government by judges, who transfer their own decision in legal precedents, creating legal regulations (norms established by way of appeal in the interest of the law) or removing from the legal system certain norms declared as unconstitutional. All these, shows the author, "undermine the fundamental architectonics of the law and its enforceable nature" and render the reconstruction of the law, "the rebuilding of the legal universe", necessary[2].

Dana Apostol Tofan notices that the interpretation of legal texts, with such confuse and imprecise renditions, has become difficult, and blames the judges for an increased consideration margin, which also increases their discretionary power[3]. In the same train of thought, Sofia Popescu

* Lecturer, PhD, The Faculty of Juridical Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, pag. 80.

[2] Ioan Vida, *Orientări post-moderniste în procesul de creare a dreptului*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, page 28.

[3] Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, All Beck Publishing House, Bucharest, 1999, page 350.

deems the current role of judges as paradoxical, considering that, sometimes, they must settle cases "near the limit of the mandate granted to them by the position they fill"[4].

From the above considerations, it would result that the Romano-Germanic legal system is still anchored under the domination of the law, and any additional consideration given to judges seems to open the way to their discretionary power. Within this orientation, an "abusive" nature seems to be ascribed to jurisprudence.

However, as one will further notice, this theory does not constitute *communis opinio doctorum*. The postmodernist law is a controversial law. Today, an extensive part of the doctrine considers that jurisprudence can no longer be denied the nature of formal sources in the Romano-Germanic legal system. Since the purpose of law resides in aligning the aspirations to fairness with society's exigencies, the presence of judges in the legal order is absolutely necessary. While the moral relation unfolds within an individual's innermost self, and the religious relation involves two entities, man and God, the legal relation is triangular in nature: it requires the presence of a judge[5]. Thus, the judge has evolved from a mere servant of the law to that "impartial and detached" servant, authorized to construe the law in a creative sense.

Content

The ***formalist school*** founded by Kelsen placed law in a strictly normative area, the only entity which may be associated with law being the State. The reduction of law to a system of hierarchized norms, within which each norm draws its compulsory force from its compliance with the next higher norm, resulted in the exclusion of jurisprudence and common law from the sources of law.

In the 19th century, the so-called "interpreters" of the French Civil Code raised against the normative formalism, creating, however, a theory as formalist as the Kelsian one. They believed that the law is the only source of law, thus, neither the common law, nor jurisprudence can introduce in the legal order new regulations, derogating from the legal provisions. All the other sources, which didn't derive from the law, were ignored. By exaggerating the importance of codification, these jurists claimed that the entire civil law could be found in the Napoleonic Code, which succeeded in covering all legal situations. By identifying the law with the statute, a perfect, complete, faultless statute, the role of the judge was exclusively limited to interpreting the statute. However, interpretation was seen as a purely logical action, beyond any political or moral considerations, the only duty of a judge being that of extracting legal consequences from legal texts.

In time, the exegetic interpretation proved to be overpowered by the practical necessities: Paul Roubier asks himself what purpose could an interpretation which, although it is in harmony with the lawmaker's view, is in complete disagreement with the judicial practice, serve?[6]

The first steps to freeing the judge from the strict letter of the law were taken by the ***School of Free Will***. In the paper *Méthodes d'interprétation et sources en droit positif*, Gény reacted against the doctrine at that time, which considered the law as the sole source of law. Through its scientific works, Gény wished to put an end to the "fetishism of written law" and to the belief in its sufficiency, considering that it is incomplete and that "no matter how much sharpness we assign to it, the mind of an individual is not able to completely grasp the image of the world in which it moves"[7]. Thus, the lawmaker must examine the given, in order to create the construct. The given of law means that reality external to the positive law, which confers upon it the substantiality need to exist. The given

[4] Sofia Popescu, *Continuitate şi discontinuitate, din perspectiva integrării europene în domeniul dreptului*, in Studii de Drept Românesc, year 15 (48), no. 1-2/2003, page 19.

[5] François Terré, *Introduction générale au droit,* 7th edition, Dalloz Publishing House, 2006, page 45.

[6] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Dalloz Publishing House, 2005, page 69.

[7] *Apud* Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, page 316.

must "phrase the legal norm as it results from the nature of things and as much as possible in rough form".

The school of free will explained the sources of law from a sociological perspective, in complete opposition to the Kelsian normative school. The formal sources of law, the law and jurisprudence, are only means of ascertaining the law. They are static in nature because the law precedes them. The law is, first of all, that living, spontaneous, dynamic law, product of social forces. It is the work of society and not of the state[8]. It stems from the social reality, hence, it cannot be deemed as being the creation of certain state authorities. The state holds the monopoly of coercion due to its superior public power. However, it does not hold monopoly over the creation of the rules of law.

The law cannot satisfy all the requirements of the social life. It cannot keep up with the dynamics of society. Therefore, when the law fails to offer any solutions, the judge, helped by the doctrine, must discover them through a free scientific research, in custom and in what Gény called "la nature des choses positives". Philippe Malaurie writes about Gény: "No work and no author symbolized an intellectual revolution so profound in the existence of law. From the Revolution and until him, the law represented exclusively the statute; according to him, the law no longer represented only the statute"[9].

In the free will doctrine, there are several alluring aspects, shows Paul Roubier, especially the reaction against "this outrageous fiction" according to which the judge is a mere interpreter compelled to abide by the law[10]. This school overstates, however, the role of a judge, assigning to it as main duty a real work of creation of law and establishing that this is the rule and not the exception. If it were to be accepted that the judge is entitled to thrust aside the law and jurisprudence, for the mere reason that such sources are static, the notion of rule of law itself would be altered. Therefore, the author concludes that we cannot believe that the law may be completely free, because the need of security, which commands the entire social order, requires, to some extent, that the normative power of a judge be restricted.

According to Paul Roubier, the law expresses itself through formal and informal norms. The authority of the formal norms stems either from the legislation or from jurisprudence. Informal norms are divided into two categories: customary rules based on experience and rules "based on rationality, which correspond to a certain ideal of justice"; the latter are the general principles of law, rules which Roubier calls "doctrine rules", since they are discovered by doctrine[11]. The system of legal norms founded on formal sources is, to some extent, virtual in nature; there can't be an absolute overlapping between the law of the sources and the actual practiced law. The real sources exist behind the formal sources of law, and the validity of the formal sources of law depends on their compliance with the real sources[12].

A judge's main duty consists in applying the formal sources. At the same time, a creative role must be given to the judge, if there is no rule of law applicable to the dispute pending settlement: "he/she must find the best solution and, thus, to release a rule of law which may constitute the principle of a new jurisprudence"; this issue, shows Roubier, is not a subject up for debate, since the law itself forces him/her to adjudicate the case, regardless of its silence or insufficiency. The difficulty occurs when the law of formal sources, being static in nature, no longer meets the needs of society or the ideal of justice of that era. How is the renewal of the law possible, when a greater freedom of consideration is not granted to a judge?[13]

---

[8] *Apud* Paul Roubier, *op. cit.*, page 76.
[9] Philippe Malaurie, *op. cit.*, page 315.
[10] Paul Roubier, *op. cit.*, page 80.
[11] *Idem*, page 12.
[12] *Idem*, page 76 and the following pages.
[13] *Idem*, page 85.

William Dross proposes the examination of the sources of law from a Jusnaturalist perspective as well, as manifestations of the law and not causes thereof[14]. From a philosophical point of view, the law cannot be a source of law, but a manifestation thereof, thus, the true source of law is found way upstream. Since any source of law is essentially an authority which constructs legal phrases, the author analyzes the sources of law based on the authority which creates them. The main issue here is finding an answer to the question: **which authorities are legitimately authorized to create law**? The real source of law, reveals Dross, is the sovereign, i.e. the Nation. Behind the apparent trilogy of the sources of law, law, jurisprudence and custom, comes into prominence the monist ideology of the sovereignty of the Nation, the only one authorized to create the law. In this light, the law is undoubtedly the source of law, since it derives from the sovereign, expressing the general will of the nation.

But the time of exegetic interpretation has ended in the era of Gény, says the author. Today, no professor can teach civil liability, without taking into account the decisions delivered by the Court of Cassation. Jurisprudence protrudes *in fact* as a source of law, and those who qualify it as "abusive" may criticizes its legitimacy, but not its nature of formal source of law.

Therefore, if the normative power of jurisprudence is undisputable, its legitimacy gives rise to controversy. Certain authors consider that the principle of separation of powers in the state transforms the judge into a mere "servant" of the law, the creation of law being the exclusive preserve of the Parliament and Government. In this light, the creation of law by a judge would represent usurpation. Other authors believe that, pursuant to the principle of delegation of powers, the judicial power, being a key element of a state's organization, is legitimated to create law.

In the same train of thought, François Terré notices that debates on the status of jurisprudence of formal source of law have outlined two orientations[15]. As a first mindset, based on the revolutionary ideologies and on the principle of separation of powers in the state, it is believed that a judge cannot participate in the act of creating law, since it would acquire a power which pertains only to the nation's chosen ones. Since the written law is able to foresee all situations, the judge must only apply it. To this effect, the Court of Cassation was established for the purposes of protecting the law against the usurpations of judges, and not of imposing the law interpretation unit.

As another mindset, the opposite is revealed. The law cannot cover all legal situations, sometimes being obscure, at other times incomplete or even obsolete. Portalis is one of the people who emphasized the undisputable role of a judge, consisting in interpreting, supplementing and adapting the law: "When the law is clear, it must be followed, when it is obscure, its provisions must be further refined. If there is no law, one must turn to custom and equity. Equity is a return to natural law, in the silence, obscurity or opposition of the laws".

For that matter, the lawmaker expressly admits the possibility of the law's insufficiency and implicitly acknowledges the power of the judge of supplementing the law, of extensively interpreting it and even of changing its meaning, when this is required for dispute settlement. The obligation imposed on the judge by Article 4 of the French Civil Code, reveals the author, has a general scope; it is not set forth only in the interest of the litigant, nor to fill in the voids of the law or to characterize the legal system as being closed or open; this obligation contributes to the definition of the law: "this obligation to adjudicate certifies, as concerns the judge, the presence of an immediate given of the law"[16].

As concerns us, we believe that the interpretation given by a judge does not consist in the mechanical application of certain methods and procedures; it is an act of creation, within which the interpreter lays the entire extent of its creative spirit. A judge cannot be restricted to the literal

[14] William Dross, *Retour aux sources*, in Pandectele Române no. 2/March 2007, pages 183 and the following pages.

[15] François Terré, *op. cit.*, page 283 and the following pages.

[16] *Idem*, page 48.

application of the law. He/she must reveal its spirit. Each case is unique and requires innovative solutions, and the judge must possess the art of distinguishing the meanings of the objective law. He/she must feel the law, so that he/she may resort to general principles, to mysterious presumptions and fictions, to other regulations referring to similar cases and last, but not least, to the values he/she introduces into the rule of law, because any interpretation implies an objective consideration, a valorization.

The judge interprets the law and applies it to real cases. This is his/her key purpose. However, by way of interpretation, the judge does not accomplish a mechanical action, in fact, he/she reveals the truth, adapts and particularizes the law, shapes it according to needs, fills in its voids, remedies its various obscurities, so that the law becomes more supple. When the texts no longer meet the requirements of a particular time, the judge attempts to elude the law and to apply the solutions imposed by the new circumstances of social life. When interpreting the laws, the judge must refer not only to the meaning of words and the intention of the lawmaker, but also to the spirit of the law. Otherwise, supreme justice would only be a supreme injustice: *summum jus, summa injuria*. Since the Roman age, one knew the principle according to which "it infringes the law to remove its spirit, only by considering the words used by the lawmaker", principle included in the *Code of Justinian*.

Jurisprudence is, undoubtedly, the formal source of law. However, its creative nature sparked many disputes. Terré emphasizes the fact that jurisprudence exercises an overwhelming influence on creation in law, however, it cannot be self-legitimating. Although it offers innovative solutions to various law issues, jurisprudence cannot directly create rules of law, fact which clearly differentiates the judge's power from the lawmaker's power. Therefore, jurisprudence remains subordinated to the law.

We notice that one of the arguments underlying the theory of those who refuse to designate jurisprudence as a source of law, is the principle of separation of powers in the state, developed by Montesquieu in its work *L`ésprit des lois*, published in 1748. Montesquieu was distrustful of judges, with "their frightful power over people", insomuch as it chose to subordinate them to the law: judges are only "the mouth that speaks the words of the law, lifeless beings who cannot temper its force or its severity"[17]. After the French Revolution, pursuant to the principle of separation of powers, the law was predominantly asserted as stemming from the Nation and the right of judges to deliver decisions by way of general and regulatory orders denied.

The exegetic approach, identifying the law with the statute, the revolutionary theory of the separation of powers, as well as the codification phenomenon, have minimized the role and natural evolution of jurisprudence in the Romano-Germanic legal system. By postulating on the uniqueness of the law as a source of law and its completeness, the law was kept on hold, and the creative role of jurisprudence denied. According to Robespierre, "the word jurisprudence must be removed from the language set; in the new regime, it stands for nothing. In a state which holds a Constitution, a legislation, jurisprudence is none other than the law itself"[18].

We believe that the separation of powers cannot be brought up as an argument today, since the lawmaker itself understood to implicitly empower the judge to interpret the law in a creative manner, when the law is silent, obscure or insufficient. For the authors of the French Civil Law, the law is not infallible, perfect, on the contrary, it is a human creation, imperfect by definition. Therefore, custom and jurisprudence will cover the gaps of the law. The idea of the authors of the Code is expressed in the preliminary Book, which was suppressed: the judge, in the absence of a precise text of law, is a "minister of equity", hence, his/her power to supplement the law, by resorting to customs and equity, is acknowledged[19].

---

[17] *Apud* Philippe Malaurie, *op. cit.*, page 123.

[18] *Apud* Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, page 166.

[19] Quote from Alexandru Vălimărescu, *op. cit.*, page 364.

On the European continent, we also find such "empowerment" in the Italian, Belgian, Austrian, and, of course, Romanian Civil Code. Complete freedom of consideration is granted to judges by Article 1 of the Swiss Civil Code, according to which: "The law determines all matters to which the letter or spirit of one of its provisions refers. In the absence of applicable legal provisions, judges issue a decision based on the customary law and, in the absence of a customary law, based on the rules they would establish, if they were to act as a lawmaker. They draw upon the solutions established by the doctrine and jurisprudence". Acknowledging the imperfection of the legislative work, the Swiss Code expressly proclaims the creative role of judges. In spite of this generous regulation, which was applied in the first 30-40 years upon their drafting, the federal court of law found it convenient to considerably reduce the creative power of the Swiss judges, placed under the continuous pressure of the doctrine.

Another argument, whereby it was attempted to discourage jurisprudence as a creative source of law, was that, given the principle of separation of powers, only the Parliament represents the nation, hence, judges, not being empowered to this effect, have no legitimacy in creating laws. This argument was argued against in the specialized literature through the fact that: justice presents a certain form of representativeness, since the judges of supreme courts of law, as well as those of constitutional jurisdictions, are appointed by a court established through vote, fact which grants them a certain degree of legitimacy; by ensuring free access to justice and by the publicizing of hearings, the courts ensure the representation of the interests of the citizens, a minority class from a political point of view; through the control of the constitutionality of laws, exercised *a posteriori*, justice guarantees the "participation" of citizens to the law-making process[20].

"In theory, one may easily discuss the legitimacy of the actions of the courts of law, when they drift away from the sources of law", writes Mircea Djuvara. However, "to the extent that such debate is not effective and a difference remains between the *proposed* law and the *practiced* law, surely only the law applied to real life is the positive law. The order of sources remains a mere desideratum. If it is not listened, it remains only at a theoretical level until it succeeds in asserting itself: until then it is yet to be a real law"[21].

J.L. Bergel believes that, today, the creative role in law of judges can no longer be denied[22]. Beyond the application, interpretation and filling out of legislative voids, a judge's mission also consists in adapting, animating or obscuring it, sometimes being able to ignore or argue against it. Even if judges must remain subordinate to law, they must also ensure its effectiveness. Although court orders contain rules of law only binding upon the parties participating in a trial, nevertheless, given the hierarchy of courts of law, precedents "may have a certain authority and, in fact, cannot be ruled against by lower courts".

Conclusions

In the Roman-Germanic system, the pursuit of knowing to what extent jurisprudence contributes or does not contribute to the creation of law, still sparks controversy. History has shown that, successively, law and jurisprudence have fought over the role of first creator of law. Those who acknowledged the creative force of jurisprudence have based their opinion on its more receptive nature compared to the law. While, as Ihering noticed, "in the field of law, as anywhere else, history never stops", jurisprudence has the ability to promptly meet the needs of social life, while the law has a slower rhythm, disconnected from the evolution of law.

[20] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, page 151.

[21] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedia juridică)*, All Publishing House, Bucharest, 1995, page 473.

[22] Jean - Louis Bergel, *op. cit.*, page 311.

From the matters discussed above, it results that jurisprudence is undoubtedly a formal source of law, the debates being about its creative nature. By emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains essentially abstract, but the consideration of jurisprudence makes it a natural law, because judges, by understanding the law, taking into account the interests of the parties and taking inspiration from equity, ensures the final purposes of the law: suum cuique tribuere"[23].

In our opinion, the paradox of post-modernism does not reside in the creative power of the continental judges, in full expansion. The paradox consists in the fact that judges is trapped between the obligation to pass judgments in strict compliance with the letter of the law, on the one hand, and the absolute requirement to settle the case, under the penalty of denial of justice, irrespective of its insufficiency. It would seem that we would rather hide behind certain theoretical and traditional rigors, instead of attempting to expand our horizons to a free drafting of the law, by means of jurisprudence. Similarly, judges, meeting the needs of the age, also maintain the appearance of fully abiding by the letter of the law. However, in reality, they depart from it or create new legal norms. For these reasons, the doctrine rightfully places continental jurisprudence, in terms of creative role, between two limits: ***de jure* denial** and ***de facto* acknowledgement**[24].

References

- Alexandru Vălimărescu, Treaty of Law Encyclopedia, (Lumina Lex Publising House, Bucharest, 1999).
- Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *General Law Theory, (*C. H. Beck Publishing House, Bucharest, 2006).
- Dimitrie Alexandresco, *Romanian civil law principles*, volume I, (Graphic Workshops SOCEC, Bucharest, 1926).
- Dumitru Mazilu, *General Theory of Law,* 2nd edition, (All Beck Publishing House, Bucharest, 2000).
- Gheorghe Mihai, *Law foundations,* volumes I – II, (All Beck Publishing House, Bucharest, 2003).
- Gheorghe Mihai, *The Foundations of Law. The Theory on the Beginning of Objective Law*, volume III, (All Beck Publishing House, Bucharest, 2004).
- Jean – Louis Bergel, *Théorie générale du droit,* 4th edition, (Dalloz Publishing House).
- Jean - Pierre Gridel, *Le rôle de la Cour de Cassation Française dans l'élaboration et la consécration des.*
- Philippe Malaurie, *Anthology of legal thinking* (Humanitas Publishing House, Bucharest, 1996).
- Mircea Djuvara, *General Law Theory (Legal Encyclopedia), (*All Publishing House, Bucharest, 1995).
- Nicolae Popa, *General Law Theory*, 3rd edition, (C. H. Beck Publishing House, Bucharest, 2008).
- Nicolae Popa, Mihail C. Eremia, Simona Cristea, *General theory of law,* 2nd edition, (All Beck Publishing House, Bucharest, 2005).
- Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition (Dalloz Publishing House, 2005).
- Sofia Popescu, *General theory of law*, (Lumina Lex Publishing House, Bucharest, 2000).
- Sofia Popescu, *General Law Principles – again under our attention,* in Romanian Law Studies, 12th year *(*45), no. 1-2/2000.
- Sofia Popescu, *Research of legal methodology for the support of law's elaboration activiy,* in Romanian Law Studies, year 11 (44), no. 1-2/1999.
- François Terré, *Introduction générale au droit,* 7th edition, (Dalloz Publishing House, 2006).

[23] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, page 80.

[24] Steluţa Ionescu, *Justiţie şi jurisprudenţă în statul de drept*, Universul Juridic Publishing House, Bucharest, 2008, page 115.