STUDY ON REAL AND FORMAL SOURCES OF LAW

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Abstract

The right switch first factual existence of the form, a fact that gives him the opportunity to be known and, consequently, to be respected and applied to the specific case. These specific ways of expressing the content of the law in legal theory and legal sciences branch of law called the source or sources of law. The concept of source of law is the ideological source and meaning in the sense of legal civilization pool connects to a national legal system.

Keywords: *formal sources, streams real-time legal, legal system, doctrine, law*

1. Introduction

By understanding sources of law elements forming substrate law rules and the different ways in which these rules are set and we are known. The phrase "sources of law" is employed to designate documents we can find to a particular era.[1]

Analysis of the sources of law highlighted the two meanings, namely: a source of law in the material sense (real) and a source of law in the formal sense.

Material sources of law (referred to as real sources) are designed as external realities right, true "s given" thereof, which determines the action of the legislature or give rise to rules arising from practical needs (whether it is usual).[2]

The contents of these springs are introduced elements belonging to different spheres of social reality.[3]

Scientific analysis of law can not ignore the role of material sources (social, economic, cultural, ideological, etc.). These are factors that give concrete substance as positive as Djuvara Mircea said: "positive law, is (...) essence legal awareness of your company."[4]

Of course, the study of these sources are important both in the theoretical investigation of the phenomenon of the complex legal and practical work of creating the right.

There are many the idea that the right spirit merges with the law or, rather, the only source of law as law. We must mention, however, two things:

a) first, that laws are not all right;

b) the law, like other formal sources, is only one of "law enforcement expression"[5]

Other acceptable source of law notion called formal sources or forms of expression of the rule of law. Along with the law find that organ of expression of legal custom and case law. We must point out that the right value is manifested in diverse eras and opinions Juris consults entries, which form doctrine sometimes requires the same power as other sources.

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[1] Alexandru Vălimărescu, *Tratat de enciclopedia dreptului* // *Treaty of Law Encyclopedia*, Bucureşti: Lumina Lex, 1999, p.159.

[2] Nicolae Popa, *Teoria generală a dreptului* // *General Theory of Law*, Bucureşti: Actami, 1999, p.191

[3] Idem.

[4] Mircea Djuvara, Teoria generală a dreptului (enciclopedie juridică) // General Theory of Law (legal encyclopedia), Bucureşti: All, 1995, vol. 2, p.406.

[5] Alexandru Vălimărescu, op.cit., p.160.

Law, like other sources, not form than clothes that dress right formula expressing the legal reality. Behind these forms - law, custom, doctrine and jurisprudence - is real substrate, the material forming the substance of the law.

2. Content

The theory of term source of law is widely debated. Distinction between the legal sense of the term source of law and its historical significance. History and archeology spring term legal means a document evidencing a superimposed form as (s - relics or vestiges of legal civilization).

The concept of source of law has meaning in the sense of ideological source pool Legal civilization connects to a national legal system.[6] In this regard, the basin of legal civilization Roman-Germanic type was the source of many national legal systems, including the Romanian legal system. Legislator, judge, legal advisor, popular consciousness in the development of legal rules expressed in first, and not exclusively as claimed Historical School and positivists, the external imperatives of the social environment.[7]

Thus, we come to the essential difference between actual and formal sources of law. Real sources are the substrate material or moral law, social phenomena, economic, moral dictates legal needs. Formal sources are fatal forms determined to be inevitably put external behavior rules for society to impose coercive power under the shield of law.[8]

Legal sense of the term spring formal law covers a multitude of issues, the ways that perceptual content of the rule of law becomes a rule of conduct, it is necessary as a role model in human relationships. The variety of forms expressing legal rules have led some authors to speak of heterogeneous forms of law.[9]

While dominant interpretive concept that sees only one source of law, namely the law, which he considered as the inspiration philosophical rationalism of the eighteenth century as a work of reason and the will of the legislature, nor raised the issue of external which determines the right training.[10]

As stated Hans Kelsen, when using the concept of source of law must consider the correct sense of the problem, understanding the source of law no technical form which will manifest will of the state, since such expression is not only anthropological metaphor, but the reason for that is a valid time.[11] Validity is the very condition of existence of the legal norm. The normativist conception validity of any rules lies in the so-called fundamental rule.[12]

The effectiveness of the legal norm is given by the fact that she is a carrier of rationality. Classical legal theory distinguishes law sources written sources of unwritten sources, official sources unofficial sources, direct sources of indirect sources. To illustrate this effect, a spring unwritten custom is legal, unlike the document that is always present in writing. Custom and doctrine are considered unofficial sources, unlike the statute or case law that official sources. Also, legislative enactment or contract are considered direct sources, while practice or standards developed by non-governmental organizations are indirect sources (media), they must be validated by a state authority to become sources of law.[13] We note also

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[6] Nicolae Popa, op.cit., p.193.
[7] Georges Cornil, Le droit privée: essai de sociologie juridique simplifiée, Paris: Marcel Giard, 1924 p.2.
[8] J. Bonecase, *Introduction à l'étude du droit*, (1939), apud Alexandru Vălimărescu, op.cit., p.161.
[9] Jean-Louis Bergel, *Théorie générale du droit*, Paris: Dalloz, 1985, p.56.
[10] Henri Capitant, *Introduction à l'étude du droit civil: notions générales*, Paris: A. Pedone, 1912, p.5; Bonecase, op.cit., p.72 şi urm.
[11] Hans Kelsen, *General theory of law and state*, Harvard University Press, 1949, p.367.
[12] Nicolae Popa, op.cit., p.193.
[13] Nicolae Popa, op.cit., p.194.

other categories of sources: sources of creative and interpretative sources.[14] In this regard, we stated that the law and custom are creative springs as it creates new rules on the case law and doctrine, but they not create new rules interpreting existing ones, not only interpretive innovativeness.

As the professor Nicolae Popa, classification sources of law must be made by accepting real data and consider its implications logical order, thus avoiding contradictions that may occur by interpreting notions of content and form. It should also be noted that, as stated prof. C. Stegăroiu, necessary to prevent the danger of confusing the right form of expression with one of its sources. In accordance with these requirements, the author suggests classification law sources into two categories: potential sources and current sources.[15] Potential sources express opportunity to develop, amend or repeal rules of law. Will social unit designed and made exclusive opportunities and externalized through the state, is the potential factor. Current sources are efficient sources determined, operating on concrete social relations and consist of normative acts. We note that in such a classification are included only normative acts, omitting the existence of the plan formal sources of law and other sources, custom, case law, etc.

Concerns latest classification of sources of law have emphasized other aspects of expression to refer to forms of legal norms. Discussed the formal sources of law and the legal or historical sources its materials.[16] Some authors have considered this unnecessary division and has been criticized by those who disagree with dividing the two areas - material and formal.

Hans Kelsen believes that its meaning source material and historical concept of the simple case law history that led to the existence of legal rules. Among the historical causes and reasons of validity and effectiveness of legal norms, Kelsen made a clear distinction.[17] What is really interested in this. Theory of law must deal with the reasons of validity and efficiency of law. These issues can not be learned but only on the basis of analysis dogmatic right is a closed logical system.[18]

Regarding knowledge of historical sources, Kelsen theory of law raised before a true exception "incompetence"[19] Historical School had merit but to show that law is the product of social, historical and moral, that the legislature may not arbitrarily create simply by will. The theory also revealed the role that schools Legal habit exegetical school rationalism suppress it altogether. However, the historical school also fell in excess of ignoring the role of human intelligence, initiative in the development and evolution of the law solicitor.[20]

Scientific School, represented by Francois Geny, transactional formula found between school exegetical and historical school, seeing Sources of external factors, material and moral, and rational factor, human intelligence work.[21]

In interpreting the sources of law, legal literature ruled a double conceivable springs right - a genetic conception and a gnoseological conception. The genetic conception aims to highlight genetic factors underlying the emergence and existence of legal rules and the gnoseological conception seeks enhancement cues after recognizing the legal nature of the rules of conduct.

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[14] I. Rosetti-Bălănescu, O. Sachelarie, N.G. Nedelcu, *Principiile dreptului civil român // Romanian civil law principles*, Bucureşti: Editura de Stat, 1947, p.10.
[15] C. Stegăroiu apud N. Popa, op.cit., p.194.
[16] H. Kelsen, op.cit., p.131-132.
[17] Idem.
[18] N. Popa, op.cit., p.195.
[19] Jean Dabin, *Théorie générale du droit,* Paris: Dalloz, 1969, p.24.
[20] Alexandru Vălimărescu, op.cit., p.162.
[21] François Gény, Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique, Paris: Société du Recueil Sirey, 1913, p.442.

Together with known sources of law, some authors include the so-called informal sources preferable to judge as they may better guide the delivery of fair solutions.[22] This view has been criticized that it introduces subjective elements in the application of law, with serious consequences for the principle of legality. It corresponds , however, specific guidelines socio - legal school American (especially school in Chicago) who reckons that since the law embodies the history of a nation's development over time , it can not be treated like a math book containing only the axioms and corollaries , laws may deteriorate over time due to the continued need for modeling based on community interests . The American experience in this area has shown the image of a hectic fluctuations, the corresponding rules logically and legally become ineffective or contradictory effects, disturbing instead to organize social relations.

The prevailing concept today, sources of law is presented dual aspect: look real (material) and a formal look , the actual layout representing the changing field of law (except a few principles) and formal aspect renders fixed form of dress that matter. The law transposes Aristotle's famous distinction between form and matter. This duality springs merely reflect the needs of the human mind. Once the right is born of the necessities of life filtered by human intelligence must know the formal sources, because the law is clear and precise rules need to be able to achieve order and safety, social harmony.

If it is true that the right arises spontaneously as soon as the society, this right must be translated into specific rules, certain and uniform society to make him known . Or just can fulfill this role than formal sources, the real sources of law , by their very nature. Through formal sources is known right people, people (Romans said ex quibus fontes juris notitia hauritur).

Imposed by the evolution to date of the law, its formal sources are: legal custom, doctrine, case law, regulatory and contract enactment.[23] Romanian legal system is a Roman-Germanic the main source of law is the enactment writing. In the hierarchy of sources of law in our country, the Constitution occupies a prominent position, all other sources are subordinate to it.

Today in Romania applies rules previously adopted Constitution in force, but does not contradict its provisions - it is about some decrees of the Council of State, but most of the normative acts shall be adopted after 8 December 1991.

Hierarchy of sources of law issue is closely linked to that of their legal force. According to this criterion, the sources of law are ordered from the one that takes precedence over any other source of law and to the one to produce legal effects must be consistent with all others. In Romania the main source of law is the law. The term of law, however, can be understood in two ways. Broadly speaking, the law is synonymous with law (or, more rarely, the rule of law) this is the term used in art law 15 para. (2) of the Constitution , for example, or some of the provisions of Law 24/2000 regarding the legislative technique . Narrow, technical, legal, law is the enactment came from parliament adopted after a predetermined procedure which enjoys supremacy over all other sources of law, as the Constitution uses the term in art. 73. for the definition of the law in this narrow criterion adoption procedure is as important as that of the body from which it comes. I concur with Professor Tudor Drăganu opinion considers that the infringements procedure for adopting the law is non-existent.[24]

Regarding the second criterion of body adopter must emphasize that in our country, as in most states, Parliament has primary regulatory law, a concept that expresses the

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[22] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of Law*, Harvard University Press, 1974, apud Sofia Popescu, *Introducere în studiul dreptului* // *Introduction to the study of law*, Bucureşti: UNEX-AZ – University Complex, 1991, p.87.

[23] Emilian Ciongaru, *Teoria generală a dreptului* // *General Theory of Law*, Craiova: Scrisul Românesc, 2011, p.53.

[24] Tudor Drăganu, Drept constituţional şi instituţii politice. Tratat elementar // Constitutional Law and Political Institutions. Basic Treaty. Vol. II, Bucureşti: Lumina Lex, 2000, p.118 şi urm.

competence of Parliament to enact laws in any field without restrictions. According to art. 73 of the Constitution, the laws are constitutional, organic and ordinary.

The concept of constitutional law concerns in a broad sense, both constitutive laws Silas revision. Regarding the fundamental value provisions of national law system, is also used the term "constitutional block", meaning a constitution . This is the case of the French constitution, formed by the 1958 Constitution, the French Declaration of the Rights of Man and Citizen of 1897 and the Preamble to the Constitution of 1976. Austrian constitutional system block consists of international treaties constitutional law Constitutional Court's organization, etc.

To detach the Constitution of the other laws, we can use several criteria. Thus, a criterion regarding the subject matter of regulation, we note that, unlike the ordinary laws governing each a segment of social life , the Constitution contains rules which govern society as a whole, rules on both the main and the state authorities human and civil rights. Constitution is considered "law of laws", the "supreme law" etc.

After a formal criterion, referring to the procedure for adopting the Constitution, we must note that it is governed by principles apart from the ordinary legislative procedure. There are special rules for adoption and entry into force of the Constitution, and on the review we mention that it is quite difficult procedure, aiming at turning the Constitution into law perennial as possible. The Constitution is adopted by a special assembly called "Constituent Assembly", "Convention" etc., is passed by a qualified majority open vote in solemnity, is subjected to a referendum - as the Constitution itself and the laws amending the Constitution so. In the text of the Constitution stipulates whether and how they can be changed.

For example, the U.S. Constitution is considered from this point of view, a rigid constitution, and one semi-rigid Constitution. Although in most states the Constitution is detached from other laws by adopting the procedure, there are countries which do not have such a distinction. This is the case of Great Britain, Switzerland, where the constitution is revised by the ordinary legislative procedure.

Regarding legal force, the constitution is superior to all other sources of law, and its upper position finds its legitimation in social contract theory. For overseeing compliance with the constitution even by ordinary legislator, was created as a constitutional review conducted either ordinary courts or special court created for that purpose (the Constitutional Court, the Constitutional Tribunal, the Constitutional Council, etc.). [25]

Organic Law is, in the Romanian legal system, a infraconstitutional and supralegal law; in that scale hierarchy of norms follows immediately after the constitution and above ordinary laws. For its definition there is a material criterion, meaning that organic laws shall be adopted in areas expressly and exhaustively listed in the Constitution, and formal procedural criteria. Organic laws shall be adopted by an absolute majority can not adopt organic law mandates extension during meetings and can not be authorized the government to issue ordinances in reserved areas of organic laws. Organic laws governing the most important areas of social life and the state, having a position distinct from the legislative hierarchy. Ordinary laws are normative documents drawn up by Parliament after a procedure predetermined areas by their importance justifies laws. They are legally superior to other sources of law. We can see that if the definition of constitutional laws or organic material I could use a criterion for the definition of ordinary leaves us only formal criterion because parliament having primary regulatory law, adopt laws in any areas where they judge it necessary. Legislative procedure is common both organic laws and the ordinary, except that the final voting ordinary laws is reached by a simple majority. We must emphasize that the initiative for the adoption of laws often comes from the government, but it can also come

[25] Emilian Ciongaru, op.cit., p.55-56.

from lawmakers or citizens.[26] The project, once sent to the secretariat of the Chamber, is discussed in the Special Committee then discussed in plenary voted and sent for promulgation to the President of Romania. Law shall enter into force after 3 days from its publication in the Official Gazette or a later date specified in its text.

Evident also that according to their content material laws differ in laws regulating the conduct of subjects of law and procedural law, which regulates the conduct of a public or private activities, as the ones who should be punished have disregarded the laws of materials.

International treaties occupy a special place in the hierarchy of sources of law in Romania. Their position in this hierarchy emerges from a systematic interpretation of art. 11 and 20 of the Constitution of the Special Law no. 4/1991 on the conclusion and ratification of treaties and of Law 24/2000 regarding the legislative technique. The problem of consistency between treaties and domestic law, especially the Constitution, in areas other than human rights, previously put their ratification. If necessary, revise the Constitution first, with the consent of the electorate, and then ratify the treaty, thus saving principle of supremacy of the Constitution over any other source of law.

Although it is the only legislative authority (art. 61 of the Constitution) some sources of law are the fruit of the government headed by administrative authorities. We emphasize, however, that these sources of law as legally inferior laws.

Ordinances have a special position among value- normative acts in the country. From the interpretation of art. 61, 108 and 115 of the Constitution , it follows that the formal point of view , organic, are acts of an administrative nature , but are materially legislation, although adopted by an administrative authority - government , being comparable with the law . Orders are the result of Parliament's legislative delegation, which mandates the government to adopt provisions the force of law, in certain situations and areas. They come into force after their submission to Parliament for approval.[27]

Decisions are acts that the Government shall, by its own power, but point out that not all decisions are sources of law. Some are individual acts, others acts. Only the latter are sources of law. Decisions are subject to review by the courts through administrative proceedings.

Presidential Decrees are for the most part, individual acts. As if government decisions only normative decrees are sources of law.

Regarding **the Constitutional Court decisions**, they are sources of law, the Constitutional Court acting as a "negative legislator" when removed from the unconstitutional provision or application you reveal consistent interpretation of the constitution, and her creative interpretation of the legal rules.

Decisions of the European Court of Human Rights in Strasbourg have also normative value.

Rules of the European Union are also a source of law since the entry into the European Union.

Creating law based on the needs that life is a great action depicts social resonance and deep implications in the normal course of essential relations between people. A fundamental role in modern societies has scientific knowledge, legal theory.

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[26] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*; Ediţia a IX-a, revăzută şi completată // *Constitutional Law and Political Institutions*, Ninth Edition, revised and supplemented. Bucureşti: Lumina Lex, 2001, p.515-518.

[27] Tudor Drăganu, op.cit., p.125 şi urm.

3. Conclusions

The need for a variety of forms of expression that they are right and it is caused by multiple social relationships that require legal regulation. The society is more advanced, more organized, the formal sources and especially the law take greater development.

Study law sources the conclusion that there a variety of sources.

All right so far experienced a plurality of springs: acts of state authorities, customs, literature, legal precedents, etc.

Share one or another formal sources report changes in the legal system , the degree of its development , the complexity of social relations they express . In this respect, the laws in general but especially the Constitution must be the mirror of a nation reflects its degree of development and understanding.

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