# EVOLUTION OF SOURCES IN ROMANIAN LEGAL SYSTEM

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**Abstract**

*The mechanisms by which social relationships are strengthened depend of the law maker's capacity to create an optimal juridical environment. Social function of juridical messages emitted by the Legislator it can be completed by the role of jurisprudence and case law.*

*The reason of being of Laws is the citizens to be obedient to the prescriptions of rules. This must be the major interest of the Legislator and justifies efforts to make the Law easily perceived.*

*Protection against legislation's inflation is for certain what citizens ask from Legislator, but most of of, the justice seeker is demanding a predictability of justice.*

*The danger brought by the judge activity interference in legislative is no longer sufficient to offset the risk of perpetuating a non-unitary judicial practice.*

*The damage even of the smallest incoherent legal practices is felt among both judges and litigants and must be prevented.*

**Keywords**: *Jurisprudence, case law, Preliminary decision, Sources of Law.*

## Introduction

To say simply that the law is like a living organism, can be perceived easily and not without reason, as sophistry. Its total dependence upon society, but predestinates the right to a relentless dynamism which, in spite of dramatic formulations, can only have happy consequences.

However, this reality can sometimes lead the animosities between people meant to be beneficiaries the right and those who create it or enforce it. If only this argument requires a permanent and striking necessity to adapt the Law.

Dynamic normative, even in the presence of a legislative inflation, or perhaps especially in its presence, has been shown to be inferior to the increasing rate of the situations necessary to apply those rules.

The fact that any legal system is perfect can not be disputed. This is confirmed both by the appearance of Equity in the sixteenth century as a way of improving the common law and by the importance they acquire in the Roman-Germanic legal system jurisprudence and caselaw.

Conservative conceptions, although they certainly have their advantages, if taken to the extreme can be just as damaging as those which are trying to innovate at all costs.

Legal sciences are no exception to this principle, however, they are required, with even more rigor, the attainment of a stable balance between any exaggerated tendencies.

It can not be denied, rightly, that a lack of consistency of jurisprudence flaws the foundation of the seeker's confidence in the justice itself and directly leads to deformations in the judge's image in society. More seriously, the principle of juridical security relations itself is affected, which can only be harmful, regardless of such a signal receiver.

Ensuring legal guarantees against unpredictability[1], either normative or jurisprudential contributes to strengthening the principles of proper functioning of society. Meanwhile, the lack of guarantees irreparably erodes the construction of a solid constitutional state.

Romania joining the European Union takes effect and recognition the rule of Treaties which substantiates it, which had however, as reverse effect the appearance of a significant number of Decisions of the European Court of Human Rights that bring vehement criticism regarding the lack of a unit of practice at the level of our national courts.

At this level, it is sometimes identified an antagonism between the foreseeability of court proceedings and inconsistancy of Romanian jurisprudence, being an intolerable situation according to the European Court of Human Rights and, therefore, punishable.

A side effect of the admission was the monitoring of our country through the Mechanism for Cooperation and Verification, on which occasion, in 2013, it is stated in a report to the European Parliament and the Council, the advantages of the institution appeal and the proceedings freshly introduced the Preliminary Decisions pronounced by the High Court of Cassation and Justice.

We can not help throwing away a word that monitoring was undertaken by representatives of countries with perfect justice, customary endogenous criticism.

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[1] Nicolae Popa, "Sistemul dreptului, un concept perimat" *Revista de Drept Public* 1 (2015): 16.

Social cohesion can not be perceived in terms of the role of law in society, in the absence of standards of behavior induced through concrete images to be integrated easily into the collective consciousness[2]. It is obvious that the current psychological heritage[3] of our society is enriched by televised Justice.

We consider that the efficacy of rules in regulating the behavior of modern man, as opposed to the power of the example set by intensely advertised caselaw and jurisprudence is crucial.

**1. Content**

The current Civil Code novel mentions only practices, maybe not in the best way, as sources of civil law, besides law and general principles,.

It should be made clear that practices are worth of being considered as a source of law only within the limits of the law, and the possible role ceases when its moral practices contravene public order. Their importance can never exceed that of the law, not having the power to recall it[4].

The notion of practices, or business practices is proper commercial terminology is but it is possible that the actual place to be determined by the embracement of monistic theory concerning the codification of private law.

However, there are areas of law in which customary law is totally inapplicable due to exclusivity in terms of sources of law, the written law, the effect of the principle of legality and incrimination.

Starting from this premise and taking into account the provisions of civil proceedings expressly forbid the judge to lay down generally binding directives by means of court orders given in cases inferable from his trials, we can only reach the conclusion officially stated by the Constitution according to which judges are subject only to the law.

It is well known that what mainly justifies the imperative as jurisprudence not to be accepted as a source of law is the very principle of separation of powers.

To enpower the judges with legislating force, given that they also enforce the law, implies, of course, some drawbacks if not real risks.

You do need lucidity and especially objectivity when analyzing the assigning institutional capacity to enforce the law. And, such an analysis does not require a special study in order to identify any administrative bodies, representatives of the executive, the courts in competition law enforcement. So the argument, according to which the possibility of creating law courts threatens the balance of powers, remains vulnerable.

It must also be introduced in this equation the role of another fundamental body of the state, with an aura of independent authority, without belonging to any of the executive or legislative powers law.

The Constitutional Court which, through its decisions, essentially influences the applicability of a legal text.

Unconcealed intentions of politicization of the Constitutional Court have a strong negative impact, perceptible or not to society at large, given the erga omnes binding force of caselaw that its decision creates .

Attracting the constitutional court in political disputes has the potential of a phenomenon with strong social impact, including, perhaps most importantly, the perception of partiality justice.[5] And this perception can seriously damage the perception of the unquestionably positive role that caselaw and judicial caselaw can have as a source of law.

Regarding the notions of jurisprudence and judicial caselaw, it should be referred to one of our great advantages as our law being right descendant from Roman-Germanic family of law. This allows us making a brief incursion in the history of jurisprudence, both etymologically speaking and legally or deep lawfully meaning.

None of the juridic languages of the countries belonging to the basin of juridical culture Roman-Germanic lack the notion of jurisprudence, its shape is similar and easily deductible as understood, especially in Latin countries but with the same sense and in terms of the German word for Rechtwissenschaft .

All decisions of courts that converge towards a certain rule of law are what shapes doctrine as the concept of jurisprudence.

Roman era of building the law, highlighted the need to establish boundaries between different categories of rules, to distinguish them on the legal or moral religious, at which required the notion of *Jus* [6].

Although they fundamented the rule of law related to that period, those rules have come to be complemented by the issuing legal solutions of Pretor since the Republican period and the emergence of Aebutia Laws and Iulia iudiciaria[7], until the advent of monarchy.

[2] idem 17.
[3] ibidem 17.
[4] Nicolae Popa, "Teoria Generala a Dreptului" (Bucuresti: C.H. BECK 2008), 152.
[5] Nicolae Popa, *Cuvant inainte* to *Actele Jurisdictionale ale Curtii Constitutionale*, by Dan Cimpoieru (Bucuresti: Wolters Kluwer, 2010), 13.
[6] Emil Molcut and Dan Oancea, *Drept roman* (Bucuresti: Sansa, 1993), 5.
[7] Mircea Dan Bob, Despre precedentul judiciar si valoarea sa de izvor de drept, accesed on April 7, 2016, http/juridice.ro/39497/ despre precedentul judiciar si valoarea sa de izvor de drept.html

Praetorian law loses its role with the work of codification of Justinian [8], moment at which the creative force of law jurisprudence, though inexhaustible, fades in the light sources of law.

Formal enforceability of law [9] is identified by the founders of modern schools of law, Savigny and von Ihering as relying solely on the specialist legal profession. Its mission is to design scientific norm which then have to translate into plain language.

It raises the problem of finding interdependence between the concepts of French origin, belonging them Fr. Geny, and Given and Built in Law, to analyze the optimization of the existing regulatory framework by jurisprudence.

It is indisputable sentencing jurisprudence to discovering ways of enforcing law, little contemplated by the legislator but which by their frequency or logic lead to improved forms of rule.

Consacration of the three doctrinal theories about the creative ability of law jurisprudence does not exclude criticism with solid arguments.

A pick-wide supremacy will of the legislature, without taking into account the imbalance between relatively limited regulation capacity and the possibility that an unlimited number of concrete situations are likely to come into conflict with the intent had when designing the legislative product, constitute the essential flaws of the exegetical theory.

In terms of evolutionary theory appeared in the field, claiming, without being able to be scientifically contradicted the fact that one of the legal fictions indispensable to the good functioning of the Roman-Germanic law system as *nemo censetur ingorare legem*, will be excluded when, litigants will be required to know,not only all normative acts but also judicial caselaws.

Forced distinction that seeks autonomy theory texts is vulnerable in terms of interpreting the will of the legislature as we replace with the judge who will enforce the law text abstract.

The actuality of Rene David's statements is certain, when he refers to the fact that the creative role of jurisprudence through the relationship with the law can only be evoked behind the apparent interpretation of the law[10] and untenable in its absence.

Any research measure influencing our legal system and jurisprudence of judicial caselaws and their potential sources of law must begin with an overview of the forms that are in current legislation.

In the foreground, the Constitutional Court decisions should be mentioned that, by their general compulsory ruled by Article 147, para. (4) of the Constitution, have undeniable value as creative.

To the extent that we wish the nuancing of the creative power of law of those decisions, we can initiate a discussion with point of departure that essentially and mainly by the subsequent verification of laws, the Constitutional Court has the call to render a law inapplicable.

It can therefore be highlighted, that the role of the constitutional court is not to create but to dematerialize an act contrary to constitutional precepts.

As shown in doctrine, generally binding decisions of the Constitutional Court are not influenced by the solution of admission or rejection of the objection.

The main argument in considering the practice of the Constitutional Court as being very close to the law is the abolition of legal provisions unconstitutional.

What makes the difference between declaring decisions as unconstitutional and the rejection of the objection, lies mainly in the fact that the Court can modify in the presence of new elements, the character originally established as constitutional.

The Constitution does not allow the reconsideration of a decision by which a legislative provision was previously declared unconstitutional.

Distinctive for Costitutional Court decisions is that not only the Decision but also its grounds are binding[11].

Failure of constitutional decisions can attract different legal sanctions, depending on the active subject of the violation thereof.

Thus, a sanction of the legislature or executive is considered to be the declaration as unconstitutional of the provision appealed in Court or of the direct censorship of the administrative provisions ruled by the court.

It is a different situation if the judiciary when, in addition to rebutting unconstitutional decision that ignores character can apply by virtue of Article 99, letter (s) of Law no.303 / 2004, including disciplinary sanctions.[12]

It should however be made more accurate that, under no circumstances can the sovereign attribute of the courts be appropriated by the Constitutional Court which is not competent to rule on the application and interpretation of the law.[13]

Another issue that must be addressed when analyzing the creative power of jurisprudence and case law decisions should have as their object High

[8] Andreea Ripeanu, *Drept roman* (Bucuresti: Pro Universitaria, 2008), 7.
[9] Nicolae Popa, *op. cit.*168.
[10] Rene David, *Les grandes systems de droit contemporaines* (Paris: Daloz, 1950), 139.
[11] Catalin-Silviu Sararu, *Examen critic al deciziilor Curtii Constitutionale* (Bucuresti: C.H. BECK, 2015) 5.
[12] idem 6.
[13] ibidem 10.

Court of Cassation and Justice of appeals on points of law.

The procedural provisions of civil and criminal converge about conditions that advertise union practice the way of this wonderful tool available of reach to the general prosecutor of the High Court of Cassation and Justice, leading boards of the High Court of Cassation and Justice or the courts of appeal but the Ombudsman.

In consideration of their mission to ensure consistent interpretation and application of existing laws by all courts, the doctrine treated with important decisions of High Court of Cassation and Justice pronounced in the appeals on points of law.

Given that it is not intended to create new legal rules, such decisions have formal representation of the sources of law, which does not however diminish their creative role.

If judicial institutions represented by the decisions of the Constitutional Court that the High Court of Cassation and Justice in the appeal on points of law is not news in the Romanian legal landscape, advance rulings pronounced by the High Court of Cassation and Justice and the Court of Justice of the European Union have a strong sense of novelty.

Occasioned by the novelty brought to our legislation, the doctrine also welcomed a natural needed clarification of terms then sought to identify novel sources of inspiration of the legislature.

Neither of the two approaches had encountered difficulties in research, mainly due to the existence of a rich legal literature in the field, at European level.

It was regarded as uninspired, through the associations with existing procedural terminology, the phrase prior decision. It has been expressed the view according to which the concept is easily confused with the decision can be passed with absolution, by the court judging the Fund, of certain conditions of admissibility of the main application[14].

Given that, regarding this procedural incident, the legal effects are similar in terms of competence and suspension of Decision, leaves less room for ambiguity.

The doctrine also brings up the analogy between matter of law, found in Article 519 of the Civil Procedure Code and the issue of law identified in Article 514 of the same code, the matter appeal on points of law.

Regarding the formulation there was brought criticism on the issue of official use of the term "problem", considered inadequate legal language, expressing the opinion that it is preferable notion of "matter"[15].

Going beyond aspects of form, it is distinguished the common goal of the two institutions belonging to our legislation, which is to ensure uniform interpretation and application of the law and the exclusive authority of the High Court of Cassation and Justice.

Referring to the inspiration of the referral High Court of Cassation and Justice, it is found both in the procedure currently regulated by art.267 TFEU on prejudicial references addressed to the Court of Justice of the European Union, and in the request opinion proceedings addressed to the French Court of Cassation.

Given the origin of the French law but also of Community law, it is impossible to ignore the fact that this procedure is not invented in modern times. It would be difficult, if not impossible, if we refer to the vastness of Roman law and the genius of its creators.

We are so forced to a brief foray into Roman law and will be spotted with ease, similarities with the institution rescriptum by which the sovereign shall act upon, at the request of a judge, a governor or another person on a matter of law. Binding force of rewritable rebounds on all the judges not only on the one who the matter of law is brought up[16].

However, it can be distinguished a difference between rewritable effects mentioned above, specific especially to the period we call the Distinctive, particularly to the effects of domination and limited to the Distinctive case in question which appeared, for the period Principality[17]

Returning legal institution in our legislation, it was uncertain whether, referral High Court of Cassation and Justice with a question of law, not be diverted from the purpose intended by the legal text.

In intransigent terms, it was mentioned even the malicious character of these legislative creations, invoking disruption of the due course of justice by guiding judges of lower courts to laziness, due to the possibility that they will exploit to care about solving cases at special panel of the High Court of Justice[18].

By overcoming the doctrinal criticism, somewhat valid, about other uses of the term uninspired Decision [19], it has been stated that the overall effect of the mandatory interlocutory

[14] Ioan I. Balan, "Sesizarea Inaltei Curti de Casatie si Justitie pentru pronuntarea unei hatarari prealabile/prejudicial in temeiul codului de procedura" *Dreptul* 6 (2015): 9.

[15] idem 10.

[16] Vladimir Hanga and Mircea Dan Bob C*urs de drept privat roman* (Bucuresti: Universul Juridic, 2009): 64.

[17] Constatin Stoicescu *Curs elementar de drept roman,* (Bucuresti: Universul Juridic, 2009): 58-60.

[18] Stefan Beligradeanu "Reflectii critice cu privire la caracterul vadit daunator bunului mers al justitiei al reglementarii in noul Cod de procedura civila a posibilitatii sesizarii de catre anumite instante judecatoresti a Inaltei Curti de Casatie si Justitie in vederea pronuntarii unei hatarari prealabile pentru dezlegarea unor chestiuni de drept" *Dreptul* 3 (2013): 110.

[19] Ioan I. Balan, *op. cit.* 12.

decisions has the ability to compromise judicial independence of judges.

Specifying that the force of res judicata is attached not only to the device but also to the considerations it relies on[20] requires marking the difference between interpreted and the res judicata.

Obviously, the decision prejudicing the specialized panel of High Court of Cassation and Justice conducts a work of interpretation of the norm, not hear a dispute.

Publication in the Official Gazette of the respective interlocutory decision proves the new legal situation has created a spring force of law, forcing a general nature, to respect.

Before getting to analyse jurisprudence of the European Court of Justice, from the perspective of the source of law institution, we mention the issues that concern comparative procedure interlocutory decision of our supreme court.

In a first phase, we will contrast this procedure with the appeal on points of law with which I compared concisely and above.

In a plastic manner, it is even used the phrase antechamber of appeal on points of law when treating the two legal institutions[21].

It highlights the fact that the two law institutions approach different situations in the following aspect: while decision damage is pronounced in situations that match a rule that could create future non-unitary practice, appeal on points of law aims union jurisprudence when it was divergence.

In relation to the conditions of admissibility of a referral to the French Court of Cassation, it was stated that the decision injury distances itself from the opinion institution, and in that the Supreme Court Hexagon is legally invested only when the point of law has been raised in many disputes.

In this respect, it is found an approximation of appeal on points of law by the institution under French law system.

We therefore witness a source of law created by a court having clearly determined and stated the purpose of uniting practice, however, in the absence of evidence that it was not unitary. It detaches with the preventive role of this procedure, confirmed by the absence of pre-existing casuistry.

Regarding the notification addressed to the High Court of Cassation and Justice, it is optional for the initiator of the procedure which supplementarily differentiates it by the procedure of appeal on points of law. But it is coming through the unravelling obligation on the High Court of Cassation and Justice.

The challenge legislature to prevent a looming uneven practice and the extent of publication, subsequently recording, including referral signing on the website of the Supreme Court.

Overriding interest applicability similarly to an appeal on points of law, formulated opinion written by recognized specialists in the subject matter of the complaint, aiming at overcoming the nature of any intellectual pride.

The fact that the effect of the new procedure of advance rulings in the first phase, High Court of Cassation and Justice will be charged with such cases is inherent in any beginning.

Long term, which should be considered by a legislator with vision, the effect will be to discourage initiation of processes whose purpose is easy to guess.

Also, the courts of law mission will be eased, the reasonable period no longer being a simply unattainable ideal, in the presence of a uniform practice, even if it draws in the first phase, the activity mentioned agglomeration High Court of Cassation and Justice.

It is accurate in doctrine, the reality regarding the nature of the complaint subsidies High Court of Cassation and Justice injurious to a Decision by reference to an appeal on points of law.

Complaints stated that the principle of subsidiarity, in relation to the precondition to provide a solution for a new point of law.

It is not a unitary view that it creates a dependency between this term and the requirement that the origin of this new law matters to be found in a new normative act.

It therefore accepts that, including a law without a novelty in our legal landscape has the potential to lift some considerable difficulties of interpretation or application, undetected for a long period.

And legal institution of advance rulings is what lies in bringing critical opposable erga omnes effect that attaches and considerations, mentioning the ability to compromise the independence of judges, based on the fact that such effect[22].

These critics do not pass through the filter but Distinctive aforementioned authority of res judicata and the interpreted.

Preliminary ruling procedure which shall recognize a fundamental role in the development of Community law was originally regulated in Article 177 of the EEC Treaty change is producing its first phase by the Treaty of Amsterdam, as art.234 and subsequent Treaty Lisbon on the functioning of the European Union, in the form provided by art.267.

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[20] Stefan Beligradeanu, *op. cit.* :110-111.

[21] Ion Deleanu "Proceduri prefigurate pentru asigurarea interpretarii si aplicarii unitare a legii de catre instantele judecatoresti" *Revista Romana de Dreptul Afacerilor* 1 (2010): 94.

[22] Decizia Plenului Curtii Constitutionale nr.1 din 17 ianuarie 1995, publicata in Monitorul Oficial al Romaniei, Partea I, nr.16 din 26 ianuarie 1995.

It created necessary tool connecting national courts and Court of Justice of the European Union and thus relations between the national and European legal order.

Conceived as a procedure for judicial cooperation between Member States' national courts and the Court of Justice of the European Union, it can be started by sending preliminary request to ascertain the compatibility with Community law.

Common desire of the two instances, referral and resolution of the matter prejudicial, is to ensure a uniform application and interpretation by national courts of Community law.[23]

Subsequent to such referral by a court of a Member State of the European Union, the European Court of Justice a preliminary ruling.[24]

As with Decisions prejudicial next to our current, was identified in an early stage of the procedure European risk that is subjected effective functioning of the system while extending the use of that Article and thus overcrowding activity Court of Justice of the European Union[25].

Inevitably, it cannot be given special care of each individual case, and the European construction, started with six states face in the current component with the legal systems of the 28 states with the inherent dissonance.

Coexistence of the two great systems of law, Roman-Germanic and Anglo-Saxon in EU led to different expectation from national judges.

Incontestable roles of source of law of judicial caselaw and jurisprudence in the common law judges justify the claim states that it applies to find the European Court of Justice an exhaustive approach to questions of law subject to Decision.

Via their binding on States, ECJ rulings are aimed centralized interpretation and application of Community law.

The national court is obliged not to quote passages from the European Court's Decision, much less that of taking those decisions in its own device content device.[26]

However, the national court is required to harmonize their decisions by the Court of Justice answer in the spirit of respecting the principles of the Treaty.

In the event that method of interpretation of the Community provision was not sufficient for the national court, is provided a fresh opportunity for reference.

This situation is the solution for cases in which the national court should avoid non-compliance with the acquis Community law even if it shares the view expressed in the answer to question his preliminary court.[27]

The advantage that presents European provisions compared to those of our legislation regarding advance rulings is the fact that in the first case, the European Court may alter the outcome of earlier, not only in case the legal provision making the point preliminary ruling was repealed or modified but whenever appreciates that changed circumstances or considerations of applying the legal norm or, in order to clarify certain aspects of the first decisions or due to the emergence of new factors or if it considers the existence of an interest in this.[28]

It is much more difficult to deny that such a system as designed at European level is different from the one recently adopted by Romania and just be in this regard.

In doctrine, claiming radical views were strongly and categorically indubitable need to direct express repeal of provisions relating to procedural decisions of our legislation prior[29].

Place antithetical to the ECJ decisions and castigated posing important European ones in terms stated above.

We appreciate that is overlooked as one of the greatest vulnerabilities of our legal system is the lack of predictability of Decisions.

And, the situation presented above, the Court of Justice of the European Union change its frequent practice in the absence of amendment or repeal of a legislative act initially looked not believe it reinforces the confidence of litigants novel in the judge whose decision acquires finality different the conditions shown.

### 3. Conclusions

Lack of flexibility and suppleness of the sources of law consisting of jurisprudence and caselaw can be criticized for, in our opinion, when confidence in the quality of justice has become impregnable.

Until we have a unitary practice but that will not arouse suspicion of morality when a court pronounces, in conditions almost identical, totally different from the previous decisions of other courts or, flexibility and suppleness occupy a secondary concern.

To be able to healthily develop, any organization needs to develop a strong immune system. And this immunity is acquired possibilities

[23] Ami Barav and Christian Philip, *Dictionnaire juridique de l'Union europeenne*, (Bruxelles: Bruylant, 1994): 475.
[24] Daniel Greenberg, *Jowitt's Dictionary Of English Law* (London: Sweet & Maxwel, 2010): 1771.
[25] Alfred E. Kellermann, *Introducere* to *Procedura trimiterii preliminare* by Sandru, Banu and Calin (Bucuresti: C.H.BECK, 2014): xvi-xxiii.
[26] Mihai Sandru, Mihai Banu and Dragos Calin, *Procedura trimiterii preliminare* (Bucuresti: C.H.BECK, 2014): 527-536.
[27] idem: 527-536.
[28] Nicoleta Diaconu, *Dreptul Uniunii Europene*, *Tratat* (Bucuresti: Lumina Lex, 2008): 264.
[29] Stefan Beligradeanu, *op. cit.*: 111-112.

of contamination conditions that are, if not excluded, limited to a maximum.

To recognize the superiority of a court, whose name is Supreme or High, must involve accountability of judges operating within it.

And if, the leading judges in their legal system predefine a route that follows it themselves but also their colleagues in the lower courts, the effect will be to strengthen legal certainty.

In the current social context in which legislative inflation is uncontrollable, a fortiori

must it be anchored in a stable environment in legal terms that we can build a unitary practice.

And the tools that seem appropriate to the erection of such building are jurisprudence and judicial caselaw transparent and based on good faith.

And additional arguments to accept them as sources of law are not required. Motivation danger brought by the legislative interference in the judiciary is not sufficient to offset the risk of perpetuating a non-unitary judicial practice.

Ignoring the damage even of the smallest incoherent legal practices is felt among both judges and litigants must be prevented.

If admission jurisprudence and caselaw as sources of law have the ability to counteract this, of course, any arguments to the contrary can be interpreted as an inability to adapt.

And the statement that inability to adapt equates to extinction has an axiomatic value.

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