

## Interpretations of Legal Doctrine - Source of Law. Elements of General Theory of Law and Comparative Law

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### ABSTRACT

*This study addresses both theorists and practitioners of law and aims to recognize the legal doctrine as a source of law that can be seen from several senses of pragmatic or philosophical approach. Legal institutions are the result of the crystallization of legal thinking and are based on principles, theories, currents, on genuine legal systems. Law cannot be created without knowledge of specific theories and principles, because they explain the evolution in time, the need to permanently adapt to social realities and find the most appropriate solutions. Jurisprudence and legal doctrine are considered indirect sources of law, whereas they do not act directly on regulating social relationships, but have an indirect influence on them, by means of regulations included in the normative acts which receive the messages transmitted by them.*

*The legislator must know that from all social needs he must select only those that meet real needs, and the judge must know how to select the most relevant rules to apply them in the process of individualizing a case. Also, the administrative body, like the magistrate and the lawyer, must possess the art of knowing how to apply the law in accordance with its letter and spirit and in accordance with the diversity of persons who carry out their aspects of life in time and space.*

**Keywords:** *legal doctrine; law; legal institutions; source of law; comparative law; general theory of law.*

### INTRODUCTION

The concept of legal doctrine can be seen from several ways of pragmatic or philosophical approach.

In a first sense (Terre, 2003, 153), legal doctrine may be understood as "the opinions issued on the law by persons who study it (teachers, judges, lawyers, etc.)" So it concerns the meaning which the source of law has, in other words, it is represented by the opinions of teachers or scientists, but having an opposite meaning to that of jurisprudence, custom or law.

In a second sense (Terre, 2003, 454), legal doctrine is understood as an opinion which is expressed on a specific issue.

In another sense, the term of legal doctrine, used in the plural (legal doctrines) designates, in a different meaning, all the theories, trends, schools with regard to the legal phenomenon. (Craiovan, 1998, 184)

### THE EVOLUTION OF THE CONCEPT OF LEGAL DOCTRINE

The formation of legal concepts did not take place at once; it is the result of an ample process of unrest, debates, legislative solutions, permanently stating proposals for improvement. In the conditions of contemporary scientific revolution and in the context of the rule-of-law state in which the status of the law achieves new meanings, reflections on law must integrate to a greater measure the experience and the acquisitions of science as the science of scientific knowledge which is the subject of the epistemology and lean towards specialized epistemological knowledge, in which law is investigated as an activity of specific knowledge.

The idea to examine the activity of knowledge of law through itself may first give the means of progress of the science of law, to improve knowledge of this phenomenon. The complex approach, without borders, of the phenomenon

of legal knowledge has relevant epistemological bases. Scientific knowledge of the legal phenomenon developed in close connection with social-historical practise, has continuously expanded and deepened, being critical and reflexive, having specific purposes.

Legal institutions (Troper, 2003, 3) are the result of the crystallization of legal thinking and are based on principles, theories, currents, on genuine legal systems. Law cannot be created without knowledge of specific theories and principles, because they explain the evolution in time, the need to permanently adapt to social realities and find the most appropriate solutions.

Traditionally, there have been three major concerns of legal thinking: (Villey, 2003, 51)

- Those relating to the definition of the law or legal ontology;
- The sources of law;
- Legal axiology (the principles governing the content of the law).

### ELEMENTS OF THE GENERAL THEORY OF LAW OF LEGAL DOCTRINE

The general theory of the law addresses the term of source in a broad sense and in a restricted one, namely in a formal and material sense.

Legal science law defines the sources of law as concrete forms of expressing legal regulations, acting within the framework of a system of law in the different stages of its evolution. More simply put, the source of law is the main way by which law becomes known to those whose behaviour it regulates.

It is necessary to make a distinction between material and formal sources of law. The material sources, also called real, are represented by the external reality, which determines the action of the lawmaker.

Consequently, by source of law in a material sense, we understand the social, economic and cultural life, in its complexity, the social progress which causes the birth of legal regulations and institutions. The legal meaning of the notion of "formal source of law" includes a multitude of aspects and ways in which the contents of the law is represented in the rule of conduct prescribed and exteriorised, contained in a specific legal garment. (Rousseau, 2014, 15)

Making a certain classification of sources of law, it can be said to exist:

- Written and unwritten sources, respectively the written regulation and legal doctrine, on the one hand, and the legal custom, on the other hand;
- Official sources - law and jurisprudence and unofficial sources - legal custom and legal doctrine;
- Direct sources - normative acts and custom - indirect sources - or the regulations drawn up by the non-state organizations which, in order to become binding, must be validated by a state authority.

In another opinion, there are creative sources (law and custom - because it creates new laws) and interpretative sources: jurisprudence and legal doctrine which interpret the existing laws.

Enumerating, the formal sources of law are:

- a) Legal habit - custom,
- b) The practice of the court - the jurisprudence,
- c) The legal precedent,
- d) The legal doctrine,
- e) The normative contract,
- f) The normative act.

Traditionally, four formal sources of internal law may be distinguished: law, custom, jurisprudence and legal doctrine; the autonomous law and the acts-norms," as well as the general principles of law" should be taken into account.

As regards legal doctrine, in accordance with the Romanian Dictionary, it means "The entirety of the principles of a political, scientific, religious system'. In Latin, we have *doctrina*, in French - *doctrine*, in German - *Doktrin*. (Levy-Bruhl, 1971, 5) Legal doctrine includes analyses, investigations, interpretations which law specialists give to the legal phenomenon. The legal doctrine creates legal science, whose role in theory is indisputable, both as regards the explanation and scientific interpretation of the normative material. It is important and from a practical point of view, for the process of creating law, as well as in the practical activity of enforcing the law.

Jurisprudence and legal doctrine are considered indirect sources of law, whereas they do not act directly on regulating social relationships, but have an indirect influence on them, by means of regulations included in the normative acts which receive the messages transmitted by them.

## **LEGAL DOCTRINE - SOURCE OF LAW**

An important problem facing us is to determine whether legal doctrine is a source of law. Legal doctrine is constituted by the work of the authors explaining and commenting on the legal rules, exposing the theories about law, as well as about the practical application of the principles and showing their views with regard to legal issues. Legal doctrine has played a great role in Roman law, in which the views of great jurists such as Paul, Papinianus, Ulpianus, Gaius, Modestinus, Justinian were considered as having the force of law. These views” *communis opinio doctorum*” had a genuine creative role, of source of law.

With the codification of custom and the inclusion of legal rules in laws, the role of legal doctrine was reduced, but it did not disappear. In the Middle Ages, legal doctrine also played an important role due to the obscurity and uncertainty of customary law, so that judges looked for solutions in the comments of the jurists.

The writings of great jurists such as: Philippe of Beaumanoir, Dumoulin, Domat, Pothier, become texts from which jurists did not stray. Even in modern times, Marcadet's influence is observed on the Romanian Civil Code or Josserand's, on the evolution of the theory of liability” for the deed”. It is undeniable that legal doctrine plays a strong indirect role in the development of legislation. (Niemesch, 2017, 31)

Modern legal doctrine investigates the spirit of the law rather than its text, because it leans not only on the law, but on jurisprudence.

The opinions of an author, even a famous one, are not binding, and are not imposed to the courts and the lawmaker.

Legal doctrine has an important role: it interprets the law, carries out the synthesis of law, helps the lawmaker in the development of law and the judge in its enforcement.

However, legal doctrine has intellectual authority, exercising its influence with arguments and conviction on the lawmaker, by proposals for *lex ferenda*, which it makes as a result of a critical analysis of the legislation. These proposals may be appropriated by the legislative and transposed into the new normative acts.

Legal doctrine exercises a considerable influence on the judges also, by recourse to the authority of theoreticians in the matter it bases the motivation of resolutions.

Legal doctrine fully proves its usefulness by educating jurists called upon to apply or to interpret the law.

Mircea Djuvara (Djuvara, 1943, 8), in the work *On the theory of the sources of legal relationships and causality in law*, referring to the classic legal doctrine on both contracts and offences and quasi-offences, firstly states that” this legal doctrine highlights the fact that they produce obligations by the conscious and harmonious will of the parties over the entire complex agreed by the agreement or their consent and this would be just the definition of the Convention. The will of the parties undertaking would therefore be the original creator of all the obligations in agreement with respect to offences and quasi-offences, and the classic legal doctrine distinguishes them precisely by the fact that though both are detrimental deeds, the former are made with intent and the latter without intent, even some quasi-contracts can be detrimental deeds with or without intention.

Professor Victor Dan Zlatescu (Zlatescu, 200, 57-60) by referring to the interpretation of normative acts specified that,” together with the official interpretation we also have the unofficial, optional and doctrinal one. Characteristic of this is the fact that it is not mandatory, it is imposed by the power of persuasion of the arguments on which it rests. Is the interpretation which prosecutors, lawyers, the parties in general give, which seeks to persuade the deciding authority.

In this context, doctrinal interpretation promoted in monographies, treaties, courses, legal communication, has a considerable weight, as it is carried out by scientists which are presumed to study the problems with which they are faced in a complex manner. The most important role of legal doctrine is seen in ancient times and in the medieval age, where legal doctrine played an important role. In difficult situations of customary law, judges sought solutions in the comments from scientific works. In such cases, the common, harmonious opinion of the jurists had the authority of law, being invoked in judicial decisions.

In the modern era, legal doctrine has virtually ceased to be a source of law, although, throughout centuries, it has contributed to the unification, development and adoption of the law to new social realities in continuous development in different countries.

In certain situations, the lawmaker is forced to ask the point of view of specialists, law theoreticians, before the adoption of some normative acts. A recent example: The Constitutional Court of Romania asked the point of view of professionals at the Law School in Bucharest, with respect to a case brought to Court for settlement. In general, jurisdictional, legislative, administrative practice would be inconceivable without the legal theory which materializes in university courses, monographies, studies, reviews, critical notes on the resolutions of the courts.

A situation often encountered in practice is that of agreements, the price of which is determined or determinable, but making no reference to the value added tax, within the meaning of including it in the price negotiated or adding it to that. Starting from the situation in fact - the silence of the special law in matters relating to this issue - in the Romanian legal doctrine several views have been formulated, but which have not been substantially supported by the practice of the courts.

#### **ELEMENTS OF COMPARATIVE LAW OF LEGAL DOCTRINE**

Jurisprudence and legal doctrine constitute persuasive sources of law. A decision is binding only to the parties in the case.

In Belgium, the system of the legal precedent does not exist. The only decisions that are universally binding are decisions handed down by the Court of Arbitration (the Constitutional Court). The other superior courts are the State Council and the Court of Cassation.

Although legal doctrine has a very important role in knowledge of the legal phenomenon, in the knowledge of social relations subject to legal regulation, in the interpretation and the correct enforcement of the law in the development and improvement of law, it cannot be considered a source of law.

If French doctrine and jurisprudence talk about "the constitutional block" by reference to the institution of the exception of unconstitutionality, we believe that in the

Romanian legal system as "the constitutional block" is expressed by the legislative changes made after changing the political regime. When we analyse the institution of "the constitutional block" we have the Constitution in mind, together with the other laws which represent the pillars of a system.

Identical in content, but different under the aspect of the reference point "the French constitutional block" and "the Romanian constitutional block" have the same purpose, namely maintaining the system of values consecrated and protected by the fundamental law.(Niemesch, 2017, 35)

In the Romanian legal system, the legal regime of surety has been deduced through jurisprudence and legal doctrine. Another issue refers to the Code of Civil Procedure. According to this article, in" case of annulment, the judgements of the Court of Appeal on the issues of law resolved are binding for the trial court".

The solution consecrated by this article has a full justification and an indisputable legitimacy resulting from the very reason for judicial control, but the provisions cited limiting the compulsory nature of the decision of the court of appeal to the issues of law resolved and the need for the administration of evidence. Therefore, for the interpretation of a legal text or the enforcement of a principle of law, under conditions established by the Court of Appeal, it is compulsory for the judges of first instance, and the deciding Court for retrial may not refuse such an interpretation, since judges are independent and subject only to law. (Popa, 1994, 47)

Another author defines doctrine as "an instrument for the interpretation and enforcement of laws and contains a set of scientific analyses, theories, opinions and interpretations of the normative material, and does not constitute a source of law in the traditional sense of source of law, but the solutions of doctrine are sometimes transposed in legislation.

As regards the interpretation of national legislation of E.U. Member States in accordance with the provisions of Community directives, the doctrine in the matter therefore aims at ensuring the consistency, coherence and uniform enforcement of E.U. law in Member States.

Doctrine especially analyses in literature, under more than one possible names such as: the indirect, mediated effect of directives, suitable, loyal, voluntary, harmonious, conciliatory interpretation, the obligation of interpretation. The ability to interpret national law in the light of Community Directives, the use of concepts for the harmonious or consistent interpretation is recommended.

The process of harmonious interpretation can operate in different contexts. From the point of view of European Union law (Françoise Labauz, 2003, 293), the following stages of implementation of the doctrine of harmonious interpretation can be found:

- a) The level of national law, the purpose of the enforcement of doctrine being to give effect to the provisions of Community legislation, in the context of the national laws of the Member States.
- b) The level of the interpretation of secondary Community law, in accordance with the provisions of primary Community law;
- c) The level of the interpretation of E.U. law, in accordance with the regulations of international public law.

The process of harmonious interpretation may also be encountered at the level of the national law of Member State, or in the relationship national law - international law, for example, in Germany, a conflict between the constitution and another hierarchically lower regulation is resolved by the interpretation of the latter regulation in accordance with the supreme law. Similarly, the same solution is used in the situation of the relationship national law - international law, in the sense that internal regulations may not be interpreted in such a way that they contravene international law, as long as another interpretation is possible.

In the Netherlands, the same rule for the interpretation of national law, in accordance with the provisions of an international treaty, as a method of resolving a possible conflict between the two types of regulations, is generally accepted. (Micu, 2007, 50)

On the other hand, in Great Britain, the courts will interpret the internal regulations in accordance with the provisions of an international treaty, only to the extent that the national regulations are unclear, ambiguous.

In France, in a first stage, in accordance with the provisions of the Constitution, which proclaims the superior legal force corresponding of international treaties suitably ratified, a conflict between a national law regulation and a provision of an international treaty is to be settled by the competent courts, for the purposes of reconciliation through interpretation of the internal regulation in the light of the international law regulation. At a later stage, the French courts were empowered to review and declare contrary to international treaties prior to the national law regulations which were to be applied. (Micu, 2007, 69)

The legal doctrine of harmonious interpretation takes priority over the legal doctrine of direct effect, the role of the first legal instrument being to neutralise the potential conflicts that may arise between national law and the provisions of Community law.

Finally, it is evident that resorting to finding state responsibility for injury caused to individuals by the infringement of Community law constitutes the third option.

The problem of the interaction of international law with the national law of states, has triggered various contradictions and disputes between the theoreticians of legal doctrines, being addressed throughout time by two opposing legal doctrines: dualism and monism. The main monist theoreticians being Albert Zorn, Wenzel, Philippzorn - they claim the theory that international and national law form a single legal order, a single system, the rules of which have a hierarchy and that international law would be a variation of national law.

A second version of the monist theory supports the primacy of international law in the internal legal order.

The dualist theory, even if it starts from the exact scientific premise, namely that international and national law form two distinct legal orders, denies the mutual connections and influences between them. We should mention that the Romanian legal doctrine has criticized both the dualist theory as well as the monist theory.

In the Constitution of Italy, it is noted that the Italian legal order complies with the international law regulations which are generally recognised which provide that:” the legal status of foreigners is regulated by law in accordance with international practice and

treaties". Of the two amendments it may be noted that in Italy, the legal regulations of international law interact with the legal regulations of national law. In relation to the treaties in the field of human rights, the Romanian Constitution provides that "the constitutional provisions concerning the citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.

In the Constitution of the Netherlands, it is mentioned that "any provision of a Treaty, which shall enter into conflict with the Constitution may be approved by the chambers with at least 2/3 of the votes".

Provisions of the same Constitution mention that "the laws in force shall not be applied, if such enforcement is in conflict with the provisions of the treaty or with the resolutions of international organizations".

The primacy of international law over national law was also confirmed by the International Court of Justice, through sentences, such as: Advisory Opinion of 26 April 1988, on the compatibility of U.S. anti-terrorist law with the Agreement of the headquarters of the U.N. regarding the New York Office of the Palestine Liberation Organisation.

## CONCLUSION

In conclusion, according to the contemporary legal doctrine, recourse to the models of establishing the priority for the enforcement of a regulation in one system or another, cannot include all complex cases which arise in practice, and legal doctrines are the main theoretical constructions, showing the evolution of law. Through the legal constructions, solutions and models which they propose, legal doctrines contribute to creating law due to the

fact that often the principles which they formulate are taken over by the lawmaker or by judicial practice.

Because of the role it plays in the construction of positive law, legal doctrine also has the role of increasing the value of the other sources of law, in particular law and jurisprudence, in the sense that we cannot imagine a legal system without legal doctrine, because it is the one that makes the other components of law to be conscious of their existence.

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