Nicolae Titulescu University

SUMMARY OF THE PHD THESIS

Evolution of the sources of law. Role of the new configuration factors in the elaboration and consolidation of the European Union law

Thesis advisor,
PhD POPA NICOLAE

PhD Candidate,

AXENTE ALINA MONICA

Bucharest,
2015

CONTENTS

1.3.2.1. Curiate Assembly

1.3.2.2. Centuriate Assemblies

1.3.2.3. People's Assembly

1.3.2.4. Tribal Assembly

1.3.3. Law structure

1.3.4. Summary of Roman laws known by us

1.3.5. Law of the Twelve Tables

1.4. Magistrates' edicts.

1.4.1. Praetor's edict.

1.4.2. Praetor's creative activity and impact of praetorian law on the entire Roman legal system

1.4.2.1. Legal actions and procedural creation of law.

1.4.2.2. Praetor's reforms in inheritance matters.

1.4.2.3. Influence of praetor's activity on the legal property regime.

1.4.2.4. Praetor's impression in other fields.

1.5. Jurisprudence.

1.5.1. Overview.

1.5.2. Sacral jurisprudence.

1.5.3. Laic jurisprudence.

1.5.4. Jurisprudence in classical era.

1.5.4.1. Scientific nature of classical jurisprudence.

1.5.4.2. Law schools.

1.5.4.3. Gaius – symbol of classical jurisprudence.

1.5.4.4. Climax of classical jurisprudence.

1.5.4.5. Decay of jurisprudence in post-classical era, Ius publice respondendi and Subpoena Law.

1.6. Senatus consulta.

1.7. Imperial constitutions.

1.7.1. Mandata.

1.7.2. Decreta.

1.7.3. Rescripta.

2.2.3. Principle of subsidiarity

2.2.4. Principle of proportionality

2.2.5. Principle of institutional balance

2.2.6. Principle of primary rank of federal law compared to the national law

2.2.7. Principle of direct application of the European Union law

2.2.8. Principle of democracy and transparency

2.2.9. Principle of non-discrimination or equal treatment

CHAPTER II. Legislative system and legal order in European Union.

Section 1. *Primary sources.*

1.1. Constitutive treaties

1.2. Treaties and agreements for the change of constitutive treaties

1.3. Accession agreements

1.4. Conventions and attached protocols

Section 2. *Secondary sources.*

2.1. General issues

2.2. Regulations.

2.3. Directives.

2.4. Decisions.

2.5. Recommendations and permits.

Section 3. *Complementary sources.*

CONCLUSIONS

BIBLIOGRAPHY

SUMMARY

In an era of globalization, the importance of basic elements, like the law sprouts, can easily be omitted. Such phenomenon may be the result of a plurality of factors, from the speed of life in the current society to the regulatory surplus, to which the diminution of the interest in the past in opposition with the tendency to look ahead, in elaborating and consolidating a unitary law, is added.

This paper intends to take a short break to look into the past, towards the creative sources of law as presented these days, after a millennium development. Such analysis of the current law "architects" may be the perfect occasion to weight the advantages and disadvantages which our predecessors knew in building the legal systems, and, however, a sensible point from which one can go towards the building of the future legal systems.

In this regard, the objectives proposed by our study aim issues such as: The identification of issues regarding the influence which the hierarchy of law sources may have on an entire legal system and, indirectly, on the entire social and economic system, the enumeration of the main advantages or, on the contrary, disadvantages which a legal system based on codification or a purely jurisprudential system may generate, the analysis and description of the initiatives and the best practices for the unification of law in European Union, starting from the hierarchy of sources of law, the need to unify the national regulations with the practice requirements and, at the same time, the reality of international society.

Why a past analysis?

The answer results from the fact that, as a continuity and discontinuity can be noticed in the field of sources of law in the Roman law, the same phenomenon is also found in the European Union law, especially if we consider the relation between the sources of continental law and those of the Anglo-Saxon legal system, because, if the continental system takes over the Roman technique, the Anglo-Saxons take over the spirit of the Roman law. The constant side is represented by the law, but the discontinuity is reflected in the praetor's activity and in the role of jurisprudence. In Anglo-Saxons, we can also notice the same relation between the judicial precedent, jurisprudence, science of law and codification.

As regards the continental law, the constant side dominates the discontinuity side, given that in this legal system, the procedural means and scientific research do not have the weight of the English law, although it seems a synthesis is prefigured.

The history of the sources of law is also governed by the law of denying the negation, thus, the medieval law, by degeneration, denies the Roman legal construction, while the sources of bourgeois law lead to a return to the Roman concept, on a superior plan (perceived in the systematization of institutions, based on a unitary terminology, also noticing an institutional uniformity). It is explained by the fact that both the Roman law and the modern law mirrored the requirements of the exchange economy, which it does not happen in the feudal law.

The sources of modern law are thus configured as a higher synthesis in terms of terminology, principles, institutions and law branches. Thereby, the Anglo-Saxon law seems less systematized and the sources of continental law much more systematized, in a much more harmonious but less efficient way.

By researching and analysing the impact which various sources of law had on the efficiency of the main legal systems, the thesis proposes to emphasize the size of the future of a legal system which corresponds to the needs of the European Union climate, by reporting to the parameter of the law creating sources.

In order to fulfil the purpose and objectives proposed by the chosen theme, in the elaboration of this paper, I firstly selected the Romanian and foreign legal, jurisprudential and pedant material, which I tried to capitalize, using the already dedicated methods of the scientific researches of legal phenomena:

- comparative method

- Being essential in building the legal typologies and classifications, it has been used to achieve both the law typology study and, especially, to extract the advantages and disadvantages which the promotion of certain sources of law, in the main legal systems, present.

- Thus, besides the comparative study between the sources in the Anglo-Saxon system and the sources of continental law, for example, the comparison has been carried forward, looking into the mirror at the legal systems and the specific sources of a single legal system. Therefore, for example, regarding the sources of Roman law, the comparison has especially been made as regards the statics specific to Roman civil law (in which law, codification presented the main source of law) and the dynamics provided by other sources of law (especially by the *praetor's creative activity*, which by procedural means but also by its *edicts*, not only did he create new subjective rights, in procedural terms, but he also became the guarantor of the survival of the Roman law over decades and, of course, the *jurisprudence*, as law science, both, sources whereby the harmonization between the regulatory system and the social reality has been achieved);

- Also, this method is used in the comparison of the role of the same sources of law in our country, to the one specific to the European Union law;

- Another example would be the conceptual delimitation between what we today call the *jurisprudence* – namely, the plurality of decisions which the courts of all degrees (District Courts, Tribunals, Courts of Appeals, High Court of Cassation and Justice…) deliver in cases which they have to judge, to solve the conflicts which are referred to them – and what the Romans called the science of law or the research and interpretation of legal advisors (as the Emperor Justinian said ,"*juris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*").

- historical method

- Used by the jurists both for revealing the sense of past events which, by the regularities which determine their succession, directly influence the law, influence mirrored into the changes supported from the level of content of regulations and physiognomy of legal institutions, it is used in the preparation of the thesis to emphasize the changes suffered by various sources or institutions in the historical evolution of legal systems.

- Thus, a special attention has been given to the fluctuations which the importance of various sources of law presents as a result of the changes occurred in the historical evolution of various people. For example, we shall see how the reorganizations at political level of the Roman society led from an initial huge acknowledgement of the custom, as primary source of law, to its negligence, which in the alert economic development which the society has known, was rapidly dethroned by the law, so that, in the end, as a result of the society's palpable degradation found behind the empire from the commanding era, it tries to return to the initial values, dedicating again to the importance of this source of law called common law. All sources of the Roman law whose importance oscillated depending on the state government systems had a similar fate, each of them answering to the society's needs found in a certain stage of evolution.

- Also, the same method has been proven to be necessary in the analysis of the European Union evolution and the jurisprudence of the Court of Justice of the European Union as regards the dedication of the general legal principles;

- logical method

- being defined as all specific methodological and gnoseologic processes and operations whereby it creates the possibility to suppress the structure and dynamics of the required relations between various

components of a society's legal system, it has been used for the synthesis of the aforementioned authors' opinions as regards the investigated theme and in the exposition of its own conclusions;

- sociological method

- it was automatically used because the law is a social reality and the legal rules have important consequences involved in the social and individual destiny of the human being, not being able to isolate under the cover of the legal technique and having to be placed in the centre of the social life;

Thus, the first part of the paper has been dedicated to the anchorage of terminology in the field and the defining concepts, from the idea of law to the new globalization tendencies. In this regard, in the chapters and sections of the first part, I have tried to present the anchorage of law into the social regulatory system, from its conceptual definition, to the relation with the other forms of human conduct (religion, morals, customs, rules of social coexistence but also technical rules). After analysing the classical factors of law configuration (natural, historical, ethnic and national, social and economic, political, human, cultural and ideological background), the last section of this part proposes the globalization as a new law configuration factor. To define the globalization in a permanent and universally accepted form can be a Sisyphean labour, given than it is by far the most extensive process of social and historical transformation of humanity and, at the same time, a huge challenge of our century whereby the entire society is trained towards a common direction. In general, the globalization indicates the vortex of social, economic, political, culture, etc. changes, by various elements, from phenomena to strategies and even ideologies. Although, at the level of scientific researches, various social sizes require various visions about the concept of globalization, in fact, at the level of effects, a relation of interdependence can be noticed between the economic, political and legal scopes. The justification results from the imposition of the resizing the law functions in relation to the changes made in the other fields. In this regard, the need of legal harmonization is configured in the member states of the European Union[1]. The adaptation of the legal environment to the new conditions required by the phenomenon of globalization aims not only all branches of the law (from the business environment, which is directly shaped by the extension of freedom of movement of merchandise, people, services, capitals and, of course, information[2] to the common need of fighting against terrorism or protecting the persona data) but also a harmonization at institutional level. However, the chronotop of

---

[1] Nicolae Popa, *Teoria generală a dreptului*, Ediția a V-a, Ed. C.H.Beck., București, 2014, p.10;

[2] Mircea Coșea, *op.cit.,* p.21;

globalization which is represented by the contemporaneous generation is certainly just an incipient act in the historic evolution of law, scene on which the main original authors (states) cede gradually the spotlight to a new protagonist, namely the *universal law* (created by the regulatory uniformity which can be built only by elements such as: strong institutions, interregional cooperation and regional integration; political integration).

The second part of the thesis proposes the monitoring of the law source evolution, from the Romans to date. A special attention is given to the sources of Roman law not only due to reasons related to the historic size of law but especially because models and answers can be found for the current problems in their solid legal construction (paradoxically), whereby a new type of universal law can be developed. On the current legal scene, the modern law seems to have metaphysical colours, the reformation of basic law sources and the codification process seeming to be a priority. However, we consider that besides the concerns regarding the legislative technique, the analysis of the true causes of law is also essential. In a context in which it leaves the impression that the law plays the role of a creator of new social relations, leaving us to think of the appearance of a virtual right, it is useful to look back to a system in which the social relations are factors generating legal actions, and, therefore, generating law. The evolution of the sources of Roman private law is a real interest, because they are profoundly original creations, there being no model in other sources of law. The dynamics of the sources of Roman private law has been determined by the joint action of three factors: the conservative mentality of Romans, their practical spirit and the reception of justice and good faith ideas, as components of law. To exceed the disagreement between the legal provisions and the new requirements of social life, the Romans appealed to procedural means and scientific research which they elaborated in the light of the justice and good faith requirements. That is in the end of the republic, the praetor's edict and the jurisprudence fulfilled the functions of a legal filter, likely to align the provisions of the old laws with the new realities. Therefore, the originality and efficiency of the sources of Roman private law were due to their evolution depending on the practice requirements and not metaphysical reasons or thirst of codification and legislative techniques. The instruments of thinking and legal practice, namely the principles, institutions, categories and elaborated concepts were only expressions of the transformations in social, economic and political life of the Romans. Being established on the ideas of justice and good faith, the jurisprudence, praetorian right and law of nations were configured as replicas of the formalist and rigid civil law. The harmony between the statics and dynamics of the Roman private law sources was provided by the conjugation of the praetor's activity with the jurisprudence, which

acted at the same time, promoting the same ideas, but by different means; the legal advisers extending the scope of legal regulation in terms of interpretation and the praetors, by sanctioning new subjective rights in procedural terms.

In the same second part, the sources of law are also found in the continental system in the mirror with the sources specific to the Anglo-Saxon system. From the perspective of lawyers of the continental system, the jurisprudential procedure of Anglo-Saxons seems slow and subjective, given that it is not based on a scientific systematization, or the letter of law cannot be susceptible of human error such as the activity of a court. The justification consists in that the *common law* system is the product of a long evolution, carried out in the conditions specific to the British Islands, the result of a legal mentality completely different from the one found in the European continent. While, in the continental system, by the abstract interpretation of the case, in terms of the categories of pre-established legal institutions, the lawyers contribute to the permanent perfection of the legal system, the representatives of the common law, by their concrete interpretation of the relations between the parties, their rights and obligations and using the court decisions as a guide, they only act according to the conviction that the law is purely human, not theoretical, any codification representing an alienation from it. The Anglo-Saxon legal system is exempt from criticism in one aspect only, namely its dynamic nature, which is always adapted to the external reality of the law. The advantage of this system consists in the fact that it mostly avoids the paradoxical situation in which "what is legal" is opposable to "what is just".

The following part of the thesis refers to the analysis of the law sources in our legal system. In the first chapter, which is dedicated to the sources of the Romanian feudal law, as a result of the analysis of the County Law, the religious rites, the laic rites and the sources of law in Turkish and Phanariot regime, I have concluded that although many historians contest the originality of the Romanian feudal law, it must be considered that, although the sources of our feudal law have Byzantine influences, they correspond and mirror a comprehensive legal system, adapted to the specific nature of the Romanian reality. Chapter two of the same part includes the presentation of the formal sources of law: Legal custom, doctrine, legal practice and legal precedent, regulatory contract and normative document.

The sources of the European Union law are analysed in the fourth part of the thesis. The first chapter reveals the importance of the law principles but also the methods of interpretation of the European Court of Justice. The two types of sources find their communicating bridge in just the designation of the

institution in Luxembourg, namely the guarantee of "the compliance with the right in the interpretation/application of treaties" to which the duplication of content acknowledged in the specialized literature are added. Among the methods of interpretation of the Court of Justice and the general principles of law, there is an obvious connection, the Court of Justice of the European Communities, in the absence of determined methods, often appealing to the latter in the rule interpretation. Of course, the Court of Justice of the European Communities is not limited to these principles, having within its grasp the specific methods of interpretation of the member states's legal systems, which are adapted to the community requirements. Looking for the just and to achieve justice, the interpretation of the regulatory document does not take the shape of an option, but a condition *sine qua non*, because the general and abstract legal rule comes to life by the creative activity of the judge who, by his analysis, capitalizes the original meaning and confers the practical finality. Last but not least, the close connection between the principles of law and the actions of interpretation of the Court of Justice of the European Union is also confirmed by the fact that the fundamental principles of the European Union law are based on the capitalization of general principles of law by the jurisprudence of the Court of Justice of the European Communities. The fundamental principles of the European Union law stated in the jurisprudence of the Court of Justice are:

- Principle of limited special power of attorney;
- Principle of default power of attorney (implied powers)
- Principle of subsidiarity;
- Principle of proportionality;
- Principle of institutional balance („checks and balances")
- Principle of primary rank of federal law compared to the national law
- Principle of direct application of federal law (principles of community preference)
- Principle of democracy and transparency (principle of states' solidarity as regards the information on their behaviour, both in community relations and third states);
- principle of non-discrimination or equal treatment.

In the second chapter of the fourth part, I have stopped at the legal system and legal order specific to European Union. Thus, I have assigned different sections to the primary sources, secondary law and complementary sources.

The final pages of the thesis are related to the radiography made by the contents of the law sources from the legal systems which are already mature, and those whose roots are currently configured.

The latter must be elaborated and consolidated gradually, based on the long existence (and experience) of the former, to avoid the jams already known in the previous legal constructions and to solidly build the future legal systems. As I was saying, the evolution of the sources of law was permanently marked by the combination of two dominant elements, namely their continuity and discontinuity. It can be talked about a similar relation between the sources of law in case of the European Union law, whose sources constantly interact, thus configuring a not only dynamic but also complex law. Thus, the tendency is not to diminish the role of some sources but to maximize the efficiency of each source of law and, therefore, to satisfy the needs of various people found under the same dome. The same importance is given to the need of codifying the European Union's law, unifying the private right (the contractual side being predominant in the relations between the member states), the development of a common contractual technology, so that the institutional law, material law and procedural law specific to the European Union take the shape of a legal system successfully exceeding the test of history. Equally, the role of essential source of the European Court of Justice's jurisprudence law is recognized "whereas, in numerous problems, it supplements and specifies the provisions of the Treaty while ensuring their compliance"[3].

Therefore, looking at their evolution, we can say that the sources of modern law appear as a higher synthesis in terminological, institutional, principle and law branch terms.

As a matter of fact, in Europe, a tendency is noticed for finding the best solutions (both for the scope of legal nature and for the social need), solution coming not only from the area of regulatory document but the legal precedent. Because the Romans knew the most efficient "legal government" during the period in which the praetor was free to create and in which the jurisprudence know the climax, the acknowledgement of the role of sources related to the legal practice, the praetorian jurisprudence and their capitalization wouldn't be quite hazardous.

Finally, the harmonization, including at European level, of the sources of law can be made only by the seriousness of the entire process of law elaboration around justice and good faith, which must be fundamental to any legal system. Moreover, their acknowledgement as universal language would lead to the prevention of a possible future legal hubbub.

---

[3] Felician Cotea, Drept comunitar european, Ed. Wolters Kluwer, București, 2009, p.469;