



## ABOUT THE LAW-CREATING POWER OF JURISPRUDENCE. NEW DIMENSIONS, NEW MEANINGS

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### **Abstract**

*The present study takes up in its analysis an older concern. The “force” of jurisprudence to create law – whether formally recognised or not – is still a theme of scientific interest, especially from the perspective of the original meaning and substance of the notion of jurisprudence, and less from that which sees jurisprudence as a sum of solutions, an inventory of court practice, an indicator in a report with statistical content.*

*We are confident of the usefulness of our approach, based on a legal reality that needs to be constantly diagnosed, the study comes as an “update” of a documentation exercise that we carried out a decade and more ago, a context in which the concern for placing jurisprudence in the general picture of the sources that inspire law needed to be verified in a necessary relationship with the exercise of power, the quality of the act of justice being an important parameter for realistically measuring the state’s chances of being a state where law reigns.*

*Thus (briefly) reiterating some of the issues raised at the time<sup>1</sup>, keeping the treatment established by the general theory of law and circumscribed to our legal reality, the study captures, in a sum of reflections, the recent line of thought on the question of whether jurisprudence, always called upon to keep up with the times, has or does not have the power to create law.*

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<sup>1</sup> On the issue, S. Ionescu, *La jurisprudence – source de droit*, in the Annals of the Faculty of Legal Sciences – French edition, no. 2/2004, Bibliotheca Publ.-house, Târgoviște, ISSN 1584-4056; S. Ionescu, *The Significance of the Jurisprudence and the Authority of the Justice and the Great Doctrines regarding the Rule of Law*, in Studii de Drept Românesc, Year 21 (54), Nr. 1, 2009;

**Key words:** law, source of law, law-creating power, jurisprudence, relevant jurisprudence.

### INTRODUCTION

Traditionally, when talking about jurisprudence, the general theory of law seems to devote a category of analysis to the problem, circumscribed by the question – *is jurisprudence a source of law or not* – thus claiming, seductively but not realistically enough, that the question requires or at least lends itself to a clear-cut answer.

On this basis, the researcher, the teacher and, later, the learner approach the problem almost arithmetically, grating into patterns a much more complex issue that generates concern, asks for clarification, seeks solutions. Because the problem starts from the abundance of meanings, the need to delimit them, the necessary circumscription of the problem to a geographical space or historical time, variables that necessarily broaden and ramify the content of the treatment.

Because, as Ihering says, “in the field of law (...) history never stands still”, over time, the qualification given to the problem of the judge’s power to create law takes over from this dynamic and periodically demands an answer, the discussion being usually conducted in the realm of the relationship of pre-eminence between law and jurisprudence, as important forms of expression of law. History has shown that *law* and *jurisprudence* have disputed their role as primary creators of law, the arguments for the primacy of jurisprudence in its relationship with the law being summarized, as a rule, as follows: the *jurisprudence* is more responsive than the law, and its ability to respond more rapidly to the ever-changing needs of social life is indisputable. In antithesis, the law has been criticized for its slow, slow and often inconsistent pace with social dynamics and the variety and complexity of concrete situations, some of which are difficult to anticipate and regulate.

Traditionally, the doctrinal solution, which has been imposed and has endured over time, has looked at the problem by circumscribing it to the two great families of law: in systems of Romano-Germanic law, which are devoted to the written rule, the weight and importance of normative acts in general has increased considerably, thus minimizing the role of case law; in Anglo-Saxon systems, the role of judicial precedent has seemed unquestionable, being considered to this day the primary source of law. Undoubtedly, the notes of differentiation correspond to patterns of cultural experience (*M. Bădescu, 2002*).

Knowing that the work of judging is not limited to a purely mechanical application of the text of the law but requires clarification and adaptation to the new circumstances that arise daily in practice, the task of the judge is not easy. *Prima facie* or not, it is a certainty that the significance of case law cannot be

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ignored, the research effort devoted to the subject in the constructive search for new and new meanings being obvious<sup>2</sup>.

Thus, an analysis of the phenomenon, brought up to date, is useful, as the challenges of the historical time in which we find ourselves generate mutations, paradigm shifts or mitigation of some radical approaches to the problem. Despite its particularities, at least one common feature recognized in case law is its compensatory function, a quality that cannot be denied<sup>3</sup>.

The approach to which the title invites is a sum of reflections. Following three levels of treatment, the topic first fixes the accepted meaning of the concept, which sees jurisprudence as the study of a social phenomenon, in the sense of the science or knowledge of law, the judgement and/or skill in judging, the exercise of good judgement, of common sense, even of prudence in solving the practical problems that law proposes. Arguments are then brought together that underpin the way in which the role of case law was to be perceived, tracing the evolution of the conception of its place in the table of sources of law and then capturing its precedential value, with a close look at the relevant case law.

If we admit that even today for the law jurisprudence is the source of youth (*H. Mazeaud, L. Mazeaud, J. Mazeaud, 1967, p. 112*) the work of judging remains unquestionably the extent to which the law can be captured in its dynamics. Committed to the premise that jurisprudence is not just “a matter of statistics”, it must remain a “criterion – (...) perhaps the most relevant, most convincing and most objective – of the quality of the law” (*I. Deleanu, S. Deleanu, 2013, p. 144, apud M. Hotca, 2019*).

### I. LAW, RULES, JURISPRUDENCE – A NECESSARY PLEA FOR A CAREFUL UNDERSTANDING OF THE TERMS

**1.1.** All too often and undesirably, the notions of law and law are lumped together in a synonymity that is not always proven.

As we pointed out in a recent study (*S. Ionescu, M. Niță, 2022, pp. 33 et seq.*), the reasons for such an approach are (only) partially justified, if we take into account the traditional, majority view, which, when the question of the qualification of the notion of law arises, is still dependent on placing the concept in an established pattern: law as a set of general and binding rules of conduct that

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<sup>2</sup> A confirmation of the concern for the topicality of the subject is the research coordinated under the care of the “Andrei Rădulescu” Legal Research Institute of the Romanian Academy, which would dedicate two consecutive annual scientific sessions to the issue, suggestively titled: *The role of jurisprudence in the development of the new Romanian law* (2019) and *The role of the Constitutional Court and the High Court of Cassation and Justice in the configuration of Romanian law after the entry into force of the new codes* (2020).

<sup>3</sup> Either it is called to give elasticity to the law that has become too rigid through written laws and not flexible (in the continental systems), or to limit the freedom of the judge (in the Anglo-Saxon systems).

govern relations between people and whose effectiveness is given by their being charged with legal force, with the power of coercion (*I. Boghirnea, 2023, pp. 29-33*<sup>4</sup>) or any general rule imposed by the public authorities (*Miguel Reale, 1993, pp. 23 et seq.*)<sup>5</sup>. The temptation to look at the concepts together must be sought in the fact that rights and law have the same purpose. But the sign of unconditional equality between them remains reprehensible. The forced synonymy of the concepts is a limitation of what is to be understood by law and, inherently, a distortion of its genetic meaning. Hence the negative consequences that the social environment has signaled and recorded over time (*S. Popescu, 1998*)<sup>6</sup>, and unfortunately still does.

Originally, the law was characterized by being a consolidation of customs (practices) and habits of the people; in general, it was not distinguished from custom except by being written down. It was only when it was discovered to be known by all that the anonymous power of custom could be revealed, which presupposed the appearance of law. At the same time, with the formation of law as a legal norm, united with custom, jurisdiction (in the sense of *juris – dictio*). With the passage of time, the law acquires value in and of itself, reflecting the intentional will to order conduct(s) or to structure society in a general, impersonal and objective way.

For our system of law, the treatment of the subject becomes topical in relation to the observation that the Romanian legal reality admits confusion between the two concepts and often slips into the extreme of creating contradictions between them. Confirming such an association as restrictive and, implicitly, harmful, the phenomenon has become even more visible in recent years, and the lack of harmony between law (in the sense of law, of objective law) and rights has become notorious in the context of the pandemic, public discourse reminding us that man enjoys rights prior to any law (as the Greek thinkers used to say) or – as our literature was to say at the beginning of the 1980s – the core of any law are the (...) fundamental rights of man (*D. Mazilu, 1972, p. 32*).

By anticipating the relationship with jurisprudence, it is therefore clear that law must and can only be considered to a certain extent an equivalent of the notion of law, because law – as Mircea Djuvara says – is not a reality in itself, but the life of the people seen from a certain perspective, and the law is realized as positive law only through the filter of jurisprudence (*M. Djuvara, 1995, p. 304*); only understood in this way, the issuance of court decisions in the name of law acquires its proper meaning. The acceptance that is considered relevant to our

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<sup>4</sup> The first meaning of the notion, that of *norma agendi* (as an objective). However, the work examines several meanings of the notion of law, established by the legal language.

<sup>5</sup> Qualified as such from the perspective of the process of realizing the right in the form of law.

<sup>6</sup> Relevant in this sense are the examinations regarding the instrumentalization of law and other phenomena circumscribed to the pathology of the rule of law.

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approach is only that which sees in law all the forms that the idea of social order can take.

Recent scientific research in the field of general legal theory reaffirms this when, in defining the notion of law, it sees it as a permanent attempt to discipline and coordinate human behavior in order to promote widely accepted values – human dignity, legal security, property, the rule of law (...) the ultimate aim of the intervention of law being to ensure the coexistence of freedoms and to restrict actions that endanger the social balance (*N. Popa, 2020, I. Boghirnea, 2023, p. 15*). More convincingly, the new ideal of law – says Prof. Nicolae Popa – should no longer intervene only post festum but, through the content of its prescriptions, law should be able to contribute to the foundation of a responsible attitude of the individual towards the values defended by law. In other words, the law is required to slowly detach itself from its eminently punitive role and return, as is natural, to its educational role.

This way of looking at things, compared to law, which must be considered the goal, the value parameter, the law remains the means of satisfaction, of bringing about the former, a *juris instrumentum* which, as a natural extension, the work of lawmaking must make available to the addressees.

**1.2.** Keeping the register of treatment and correlating the concepts, it is useful to talk about jurisprudence from the perspective of its historical age, which must be sought before the birth of the law, because law also existed in primary societal forms (*S. Ionescu, 2004, pp. 22-24*).

It is necessary to recall that, originally, law was manifested either as an emanation of the people, expressed by custom, or as an expression of the ruling authority which created law by means of jurisprudence. Thus, from the perspective of Roman law, this process was to evolve over time, from the confusion between legal, religious and moral norms to the distinction between *ius* and *lex* (*E. Molcuț, D. Oancea, 1993, p. 5*), culminating in the birth of *praetorian law*<sup>7</sup> and the establishment of *jus dicere*. Roman law was then to be refined as doctrinal and jurisprudential law par excellence, its experimental character being defining (*M. Reale, 1993, p. 121*), judges being called upon to judge according to the *ratio juris* (*M. Reale, 1993, p. 121*). Even in Greek antiquity, the king had the power to create and apply law, and the latter could only be elaborated by jurisprudence, the solutions given – called *themistes* – being considered divinely inspired.

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<sup>7</sup> The role of the praetor was to, when the king fell, take over his judicial powers. In order to avoid arbitrariness, prior to the act of judging, he had to publish an edict containing substantive and procedural rules, which he would consider as applicable law during the exercise of his work of *jurisdictio*. His powers increase starting with the 7<sup>th</sup> century (Law of Aebutia), and a few centuries later, Emperor Hadrian (129 AD) would bring together the *Edictum perpetuum*, declaring its provisions binding on all praetors and thus ensuring a constant and uninterrupted jurisprudence. This is how the concept of praetorian law was born.

At a more evolved stage of civilization, the first organs appear, whose specific purpose is known and declared by law. They are called organs of jurisdiction. Unlike other peoples, jurisdiction (jurisprudence) appears in a clear and concrete manner among the Romans, linked to an objective system of rules and powers, and this is when the science of law showed signs of really existing, proceeding to elaborate a law of its own, beyond the creative work of jurisconsults. The history of Roman law also offers an evolutionary path in matters of court procedure, the greatness of its institutions being felt here too<sup>8</sup>.

Beyond the mutations occurred in the Roman law, the experimental feature remains essential, which makes it impossible to understand without the value given to practice. In this sense, it has been argued that the *Roman legal institutions evolved in a confrontation with the requirements of practice* (E. Molcuț, D. Oancea, 1993, p.7). The most striking example was the fact that the scientific research of the jurisconsults began with the presentation of practical cases, in whose physiognomy they noted the existence of common elements, on the basis of which they then formulated principles of law or general rules.

Jurisprudence also plays an important role in feudalism, regardless of the system of law in which we are placed.

In France, the former Parliaments had the right to draw up so-called “arrêts de règlement” (regulatory decisions), general and permanent provisions with the force of law. Collections of decisions were binding for judges. But the Revolution severely limited the judge’s power to make law and dogmatically established the thesis that the *law was supreme*. The authority to create law is now transferred exclusively to the legislature as the representative of the people. The judge is thus recognized as having only the power to interpret and apply the law, for, as Montesquieu says, he remains only *the voice through which the law is pronounced*. This was the historic moment when the principle of the separation of powers was expressly enshrined (Art. 5 of the Napoleonic Code), a principle which rapidly became an indisputable feature of most continental legal systems.

Later, it was concluded that the system of positive law is defined by the fact that the written law is the main source of law, and the judge, established to “judge”, is bound by the letter of the law and acts according to “*da mihi facto, tibi dabo jus*”. However, it remains debatable to what extent this corresponds absolutely to reality. The work of judging is not limited – nor can it be – to a mimetic application of the text of the law, but requires prior clarification, its adaptation to the concrete situation, through circumstance (A. Serban, 1996, p. 41).

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<sup>8</sup> From a chronological point of view, the three types of procedure enshrined in Roman law are: the legal action procedure (specific to the ancient era), the formal procedure (specific to the classical era) and the extraordinary procedure (specific to the post-classical era).

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**1.3.** Talking about the relationship between law and jurisprudence and their ability to create law, our more recent doctrine attributed some defining notes to jurisprudence (*V. Hanga, 2000, p. 80*). Starting from the thesis that *jurisprudence fixes positive law*, the law remains abstract, but jurisprudence makes it living law, because the judge ensures the ultimate purpose of the law: *suum cuique tribuere*.

Later (*M. Dușu, 2015<sup>9</sup>*), in the same note and associated with the urge to return to the meaning that “law” has in Romanian<sup>10</sup>, it was said that the courts interpret the law and pronounce judgment based on and not in the name of the law. The Constitution reinforces the idea that the judge's task is not exhausted by interpreting the law in the context of the case before the court but involves achieving justice. Because, if the *law and the right are (...) indispensable*, so is the application of the law intended to serve the realization of the right in a concrete case.

A concurring view (*A. Gamper, 2023, p. 13*), adds critically that over time no attention has been paid to the subtle distinction between *suum cuique tribuere* and *iustitia est constants et perpetua voluntas ius suum cuique tribuendi*. Therefore, it is not just a matter of “giving to each his own” but also of “giving to each his own law”. Putting both sentences in context, jurisprudence is a constant and perpetual will to give everyone the law, and the law itself must give everyone what is his. This does not mean that the law does not change, is not modified, but that there can be no (real – n. ns.) justice without a continuous analysis of the attention that the law must give to the individual, in order to understand and apply it in the way that is most useful to him. The quoted context is about a *suum* understood as equality, an equality perceived not in terms of egalitarianism but of proportionality, based on reasonable justification, based on facts and evidence.

Originally understood in terms of *giving to each his own*, the Roman precept has survived time, its current meaning being circumscribed by a social value associated with the idea of fairness, justice, equity, the necessary link with justice, with the doing of justice. Refined over time, *suum cuique tribuere* will have imposed itself, at least declaratively, as the basis for (probably) one of the

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<sup>9</sup> In the speech held during the scientific debates “The Role of Justice in the System of State Powers”, organized by the Romanian Magistrates’ Association in partnership with the “Acad. Andrei Rădulescu” Legal Research Institute of the Romanian Academy and with the Legal Commission of the Chamber of Deputies.

<sup>10</sup> More than welcomed, the context evokes the necessary distinction between *nomos* (the Greek that denotes the law, in the sense of the law that brings justice) and *lex* (of Latin origin and that rather brings the sum of norms that order society) and, evoking his criticism Constantin Noica – “I took the word from the Romans and gave it the Greek meaning” - attention is drawn to the need to distinguish between law and right, thus emphasizing that “law understood as *lex*, has no name; as *nomos*, it acquires (...) the name of the people to which it belongs – and in relation to which the judge (...) can appear as a representative body in the fullest possible sense”.

most *vocal* fundamental rights, present in the public discourse of recent years, often claimed as disrespected, constantly reaffirmed.

Initially only applied to criminal proceedings<sup>11</sup>, the requirement of a fair trial was later extended to civil proceedings, as confirmed by European normative documents<sup>12</sup>. And our law, both in the fundamental law<sup>13</sup> and in the framework law on the organization of the judiciary<sup>14</sup>, expressly regulates the right to a fair trial. By confirming its feature as a veritable *sum divisio*, our procedural codes adopted in 2010<sup>15</sup> confirm its *equitable character*, qualifying the corresponding attribute as a fundamental principle of the process (civil, where appropriate, criminal).

Whereas, today both meanings are accepted: judicial practice and/or judicial precedent, as the totality of the solutions given by the authorities that make jurisdiction, particularly the courts (*I. Boghirnea, 2023, p. 154*) but also that

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<sup>11</sup> In the Universal Declaration of Human Rights, a document adopted by the UN General Assembly on December 10, 1948, an attribute of the judicial procedure, in addition to equality, publicity, independence and impartiality of (the tribunal – the so-called court), is the fairness, both in terms of legality and the soundness of the judicial solution.

<sup>12</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, a catalog of fundamental rights developed by the Council of Europe, entered into force on September 3, 1953, in its text periodically amended by Protocols (16 in number until today) honors the principle of the fairness of the process – Art. 6 Para 1 of the ECHR – Every person has the right to a fair trial, (...), which will decide either on the violation of his civil rights and obligations, or on the merits of any criminal charge against him. And at the level of the European Union, the Charter of Fundamental Rights of the European Union (signed and proclaimed within the European Council in Nice, from December 2000) takes over the rights enshrined in texts already established or in other European documents, as well as those produced in the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. In its Art. 47, the Charter regulates the right to an effective remedy and to a fair trial.

<sup>13</sup> The Constitution of Romania from 1991, revised in 2003, affirming free access to justice (Art. 21) states in Para. 3 the right of the parties “to a fair trial and to the resolution of cases within a reasonable time”.

<sup>14</sup> On the same note, the recently amended framework law on judicial organization (Law no. 304/2022, published in the Official Gazette of Romania, Part 1, no. 1104/16 November 2022) provides in Art. 8 (1) that “Any person may apply to justice for the defense of his rights, freedoms and legitimate interests in the exercise of his right to a fair trial”.

<sup>15</sup> In the matter of judicial procedure, the new procedural codes – important components of the reform process that would mark the year 2010 – the right to a fair trial is among the fundamental principles of the process, the same attention being shown both in the matter of civil procedure and in the matter of the procedure criminal. In the civil process, the principle of the right to a fair trial with an optimal and predictable term is regulated for the first time with an express title in 2013 – by the entry into force of the new civil procedure code (Law no. 134/2010, Preliminary Title, provisions of Art. 6 of the Code); the fairness and reasonable term of the criminal process (current wording), a principle reaffirmed in 2014 – by the entry into force of the new Code of Criminal Procedure (Law no. 135/2010, provisions of Art. 8 of the Code).



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of jurisprudence (*M. Niemesch, 2019, p. 133 et seq.*) seen also in a comparative and necessary relationship with custom, as a source of law.

**1.4.** We have deemed it necessary and insisted on the importance of clarifying and understanding the terms used in the analysis, so that we can then argue whether the judge contributes to the legal order and, if so, to what extent and by what means. Although it may seem like academic pedantry, the exhortation to understand and make proper use of the notions of law, law, rule of law, jurisprudence, judicial practice, precedent is rather a scientific and didactic manifesto.

In a reality where communication – often described as a *communicative phenomenon* – is pushed to its limits, often too rushed and without emphasis on the careful expression of the message, attention to putting words in their place seems a waste of time. The influence of the widespread use, without assumption, of digital tools, the quasi-anonymity under which opinions are hidden, the lack of responsibility for the message generates a chain effect, definitely worrying, especially for the field of law, where attention to detail is required more than anywhere else, the cult of rigor derived from the specificity of legal language and the relationships involved.

If law expresses order, the science of law as a science whose object is “the research of concepts, categories, basic notions (...)” (*I. Boghirnea, 2023, p. 21*) must claim an equivalent condition, constantly and firmly recalling the need for qualification and clarification.

We will not refer in what follows to examples of pseudo-scientific discourse being promoted in the public space, often without the endorsement of professionals in the field, but we go closer to the school environment and point out that, not at all beneficial, legal education today lacks the proper leaning towards finding meaning. Whether intended or not, there seems to be an increasing cultivation of a superficial or ignorant approach resulting in a truncated understanding of concepts as important tools of legal language, a language defined by rigor and concision.

Contributing decisively to this state of affairs, the era of digitization was to catalyze it in the last three years. The concern for clarifying concepts is completely outweighed by the so-called quick explanations, most of which are offered on online information/communication channels, a medium that is also more than preferred in school documentation. Without discernment and attention to the source, information comes at first hand and the filtering effort remains absent.

From the perspective of our theme, eloquent is, for example, the proposed “explanation” of the concept of jurisprudence on which an official website (Romanian version), frequently viewed (<https://e-justice.europa.eu/11/EN/case/law?init=true>, accessed on 4 September 2023), qualifies jurisprudence with

reference to rules and principles developed in judgments and opinions (...) <sup>16</sup>. These interpret the law, and the interpretations may subsequently be cited by other courts or authorities as “precedents” and/or case law. It is also pointed out in the context that the influence of case law can be important in areas that are not sufficiently regulated or that are unregulated. This means that, *in certain circumstances, courts can also create legal rules.*

Subject to a literal and, implicitly, lacking translation of the text, which shows its shortcomings, in the basic information posted on the portal, it is also stated that “in some countries, case law is a major source of law and the decisions of higher courts of appeal – i.e. appeals n.n. – are considered normative, i.e. they lay down rules that should be applied (especially in countries whose legal system is based on common law n.n.). In many other countries (especially those following the civil law tradition derived from Roman law), courts are not obliged to apply the rules and principles of case law”.

Beyond the problem of dividing the issue according to the delimitation between the two great families of law in which the pre-eminence of the law and/or, as the case may be, of case law as a source of law is disputed, such a synthesis seems like a play on words. To the uninitiated (even as a law student), the proposed definition guarantees confusion and fuels a dangerous superficiality in the study. However, a commitment to conceptualization must be the first prerequisite for research, even desk research.

Given the notorious appetite of the learner of an (including) university legal school program (student or doctoral candidate), and equally of the young practitioner for documentation of this kind, a supposedly “enlightening” piece of information on the problem, offered only a click away will deepen the superficiality, overshadow or postpone, with certainty, the necessary need for reflection, which should accompany its study.

The issue under discussion is part of a broader process, because the crisis manifested on many levels of social construction means, for the Romanian environment, also a crisis of concern for study (in school and later), for science in general, for the science of law in particular, which is today – as has been said – far from being appreciated as it once was, at its fundamental value. From this perspective it is realistically stated <sup>17</sup> (*M. Duțu, 2022*) that simply observing the quality of legal reactions to the challenges of reality on current big issues (the Covid-19 pandemic, European integration or the accommodation to the challenges of globalisation) shows a deficit of legal knowledge. It is also pointed out in the context that, reduced to the role of an appendix of technical evaluation (...), legal research is far from the required level of scientific research.

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<sup>16</sup> It is also stated in the context that, when judging a case, the courts interpret the law, which contributes to the creation of jurisprudence.

<sup>17</sup> Prof. Mircea Duțu – Director of the “Acad. Andrei Rădulescu” Legal Research Institute of the Romanian Academy

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In the same context, invoking our interwar doctrine (*M. Cantacuzino, 1921, pp. 14-16*), it is stated that it is necessary to return the science of law to fundamental research, to return to those social realities that constitute the ultimate reason and foundation for the rules of law (...) <sup>18</sup>.

In the same spirit, Prof. Nicolae Popa, in the *Foreword* to the most recent edition of the work dedicated to the general theory of law (modestly qualified, university course), letting it be understood that the school of law has its sublimity only if it is accompanied by tenacity and effort, formulates an exhortation when he states that young students, understanding that *per aspera ad astra*, know that the study of law requires method, system and sagacity, because the study of general theory will mean a beginning in learning the legal profession (...), in such a way as to make the exercise of the profession a lesson of life and truth (*N. Popa, 2022*).

Although it is superfluous to argue further, in line with the above opinions, we also argue that it is important to define and understand the notions in order to be able to work with them adequately.

### II. THE PLACE OF CASE LAW IN THE SOURCES OF LAW, BETWEEN YESTERDAY AND TODAY

**2.1** We do not propose in what follows a treatment in terms of historical development, nor a detailed incursion into the current of thought <sup>19</sup> that have sought to order and even prioritize, one by one, the sources of law, seeking its place in jurisprudence.

We appreciate of interest a careful look at how the subject has been approached, particularly in our (but not only) relatively recent and recent literature in order to then reveal the current state of affairs.

Starting from the common language, which attributes to the expression “source” the meaning of origin, which serves something, (the place) from which something arises, legal theory uses the term to designate in particular those modes of formation of legal norms, those forms of expression of law (*S. Popescu, 2000, p. 143*), forms that the reality from which law “springs” takes on. The delimitation

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<sup>18</sup> From this understanding, four essential requirements or features and – we would say - four guarantees for a genuine scientific research can be derived: the requirement to be critical (“since for each norm science has to ask whether it corresponds to the true needs and intentions as they manifest in the collective consciousness of society”), historical (“since customs and laws are or must be the product of the experience of past generations, increased by the capital of thought and experience of the current generation”), comparative (“for so that from the examination of the norms adopted by the various civilized peoples one can recognize what is somewhat universal”) and, above all, positive (“for the exact knowledge of the norms”) – *Ibidem*.

<sup>19</sup> Correlated with interpretation techniques and representing great schools and currents of thought, the conceptions regarding the issue were centered around several theories: *the finalist school* - Ihering, *the current of free research* – François Gény, *the movement of free law* – Ehrlich, Fuchs, *the existentialist current* – G. Cohn.

also corresponds to a distinction, established doctrinally, according to which there are two important meanings of the notion of source: material (or source in the material sense) and formal (or source in the formal sense). In a more nuanced orientation, material source means the study of ethical motives and economic facts that condition transformations in society and require a new normativity (*M. Reale, 1993, p. 119*). Calling it open to criticism, Reale blames the harsh distinction between the formal and the material source, arguing that, instead of clarifying, it gives rise to great points of ambiguity in legal science.

About the material sources, often called real sources, it has been said that they sum up the factors of configuration of law that determine the emergence of law (*Gh. Mihai, 2002, p. 183*)<sup>20</sup>, those that correspond to the needs of social life in the elaboration of positive law, or, in other words, that condition the orientation and content of law (*S. Popescu, 1999, p. 199*).

The identification of the sources of law is linked to the process of its elaboration, being considered as decisive the moment of its establishment or recognition by the state in a certain form, a way of determination which would in fact allow a distinction between direct and indirect sources of law; the former – direct sources – being particularized by the fact that they are directly elaborated by the state organs designated with these attributions, and indirect sources being those recognized or sanctioned by the public power, in this second class being also included jurisprudence.

It can thus be argued that, from the point of view of the substance of the law, of its value, the sources are the means by which the law is produced and known in practice. It is precisely for this reason that the current equivalence between the sources of law (even formal ones) and normative acts seems forced. In other words, in the legal system there are, in addition to sources and acts, other phenomena which produce normative effects, but which are not normally classified as sources<sup>21</sup>.

From the perspective of its traditional examination and qualification, jurisprudence has been consistently listed among the sources of law, its quality of being or not being a formal source being, however, received differently depending on whether we are in the Anglo-Saxon or the Romano-Germanic basin of civilization.

**2.2** The premise from which we start is that the problem of the study of sources cannot and must not be confined to a rigid system of definition, being

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<sup>20</sup> The author gives a generous definition to the concept when he understands by material sources “the sum of *natural conditions* (climate, relief, soil and subsoil wealth, population, density, life expectancy index, ethnicity, race) and *socio-psychological* (occupational structure, social cohesion, mentality)”.

<sup>21</sup> They are brought as examples, beyond the judge’s decision, legal contracts that bind the parties with the power of a law – established principle and unanimously known as *pacta sunt servanda*.

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convinced of the truth of the statement that the study of the sources of law is dependent on the dynamics of the legal order.

In our doctrine, the debate on the qualification of jurisprudence as a formal source of law was to be accentuated in the years after 1990, in the historical context in which the former socialist countries, tending to reclaim their original specificity, tried to return to the matrix and, implicitly, their conceptual repositioning in the Romano-Germanic family of law. It goes without saying that in socialist law systems judicial practice was not recognized as a source of law. Our specialist literature (*V. Negru, D. Radu, 1972, p. 17; A. Naschitz, I. Fodor, 1961, pp. 71-92*) has stated that the question of whether or not judicial practice is one of the sources of law is settled – analyzed n.n. – in the negative. The solution given to this problem in our socialist civil procedural law is based on the principle that judges obey only the law and decide according to their inner conviction and guided by the laws in force and their socialist legal conscience.

In the context in which Romanian law was looking for improvement after the change of political regime, the subject is in the attention of research in the field causing great scientific interest (*B. Diamant, 1999; S. Popescu, 1999; I. Deleanu, 2004*). On this occasion, the concept of the formal source of law claimed a redefinition. In a broad vision, it was associated with (...) that legal provision, custom, case law or legal doctrine taken into account by the court in resolving a dispute (*B. Diamant, 1999, p. 197 et seq.*). In reply (*S. Popescu, 1999*), it was considered that such a pronounced re-dimensioning risk losing sight of the fact that, in essence, the sources of law cannot be understood otherwise than as forms in which positive law manifests itself.

In the years that followed, the issue of knowing the extent to which case law is or is not a source of law from the perspective of the classical scheme of springs was offered a unitary solution, legal theorists enter the case law in the inventory of sources, when they speak of the broadest meaning of the term and, in particular, when they do not report their qualification to a family and/or to a system or other of law (*M. Djuvara, 1995, p. 453 et seq.*). The qualification as a formal source, however, would provoke – and still do – interrogations, worries, conditions.

From this perspective, the theory of the sources of law has constantly shown that it is essential to identify them only in relation to the historical, social circumstances of various countries that determine the processes of law-creating. It is thus understood why, although in general the same lines, the sources of law have known an evolutionary path and are indisputably suitable for circumstantiation (*I. Craiovan, 2001, pp. 70*) because they “view the legal systems in different eras and countries”.

The explanation for the existence of this “plurality” of the sources must be sought in the multitude of social relations it implies and, later, in the variety of ways of organizing and governing society. And this is because the formation of

large families of law is the answer given to a path, centered around several fundamental sources whose purpose was to model the different legal systems (*M. Bădescu, 2001, p. 10*).

Claiming his membership of the Roman-Germanic family of law and seeing its similarities as a philonist, contemporary French doctrine re-evaluated the question of whether the case-law could not be considered a source of law, against the background of the phenomenon felt at the end of the 19<sup>th</sup> century, that of the aging of European civil codes. Speaking of the riot of the facts against the codes, the courts of the time would be forced to rule on unregulated matters in the code or to order where the code was obsolete<sup>22</sup>.

The debate on the subject<sup>23</sup> would bring together, in a collection dedicated to the issue (*“Archives de la philosophie du droit”, 2007*)<sup>24</sup>, several points of view that supported the need to re-evaluate the radical option, conservative until then, in favor of recognizing “the innovative activity of the courts”. Reunited under the heading “*La création du droit par le juge*”<sup>25</sup>, the communications presented issue opinions, most of which support the recognition of the normative value of the jurisprudence.

Thus, the coordinator of the works (*Guy Canivet*<sup>26</sup>, 2007, pp. 7-32), constantly concerned with the position and role of the judge in current law, it oscillates between the purely interpretative role of jurisprudence and the creative role of law, finally opting for the corroboration between the activity of the legislator and that of the judge, but giving the first word. From the same perspective, supporting the need to mitigate the current that took the jurisprudence out of the area of formal sources, seeks a solution to the heated debates in France

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<sup>22</sup> In order to compensate for the lack of review of the codes, Prof. Henri Capitant brought arguments in the sense of considering jurisprudence as a source of law; François Géný was able to lay the theoretical foundations of the method of free interpretation, which later gave rise to the “school of free law” in Germany. In the second half of the 20<sup>th</sup> century, to this phenomenon was added the reference to and the increasingly frequent comparison with the common law system, where judicial precedent had its indisputable recognition in the hierarchy of sources of law.

<sup>23</sup> Colloquium organized by the Academy of Moral and Political Sciences, Paris XIII University, Center for Research in the General Theory of Law and the French Association for the Philosophy of Law, January 25-26, 2006 – details in the review tab signed Mircea Dan Bob, \*\*\**La création du droit par le juge*, in «Archives de la philosophie du droit» (50) 2006 Dalloz, Paris, 2007, published in *Studia Universitatis Babeş Bolyai, Jurisprudentia*, no. 2/2007.

<sup>24</sup> Volume coordinated by Guy Canivet, former president of the French Court of Cassation, currently member of the Council of State, passionate researcher of jurisprudence, its role and possibilities for its evolution and improvement. Recent research is of a comparative nature, with a special emphasis on the Anglo-Saxon system.

<sup>25</sup> Two of the three sections of the event are dedicated to the issue, the titles speak for themselves: *The general theory of the creation of law by the judge* and *The law-creating role of the French courts*.

<sup>26</sup> In the communication entitled *Activisme judiciaire et prudence interprétative. Introduction Générale*.

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on changes in case law and argues that, although legal certainty is being challenged, the Praetorian power of judges should not be limited (X. *Lagarde*, 2007, pp. 77-88). Although with majority, the views expressed show openness to reconsider the creative power of the judge in his work of judgment, thus confirming the shaping of a current of thought.

A radical paradigm shift is not unanimously welcomed in our literature either, but here the problem is nuanced. Thus, Professor Nicolae Popa, faithful to the separation of powers in the state and concerned with the balance that role-taking must actually make, exercise caution when stating that the recognition of the right to direct normative elaboration as a pre-rogative of the courts would mean forcing the door of legislative creation, thus disturbing the balance of powers (N. *Popa*, 2022).

More than a decade ago, the opinion – which we share – was supported in our doctrine that in the systems of Roman-Germanic law, without prejudice to the binding nature of the law, the case law, however, has the character of a persuasive source of law (D.C. *Dănișor*, I. *Dogaru*, Gh. *Dănișor*, 2006, p. 147). Decisions in principle issued by the supreme court were taken into account. In the same matter, referring to solutions of the same nature, but called decisions of general value, it is then invited to mitigate the rule that case law does not have a creative role in law (N. *Popa*, M.C. *Eremia*, S. *Cristea*, 2005, p. 45).

We also advance as necessary (S. *Ionescu*, 2009), giving up the sharp way of dealing with the problem from the perspective of its qualification as a formal source of law, considering that it was neither constructive nor realistic, given that the power of case-law to create law was a certainty, without absolutizing its importance and without proposing another line of hierarchy. Nor could the insistence on the different valorization option caused by the delimitation between the two large families of law be supported in the same way, whereas there is already a slowdown in this delimitation. We did not then support the absolutization of the valorization of case-law, in terms of the exclusion of other established sources of law, for admitting that there is only case-law practice, the right would be reduced to a simple case study and would lack legal certainty (V. *Hanga*, 2000, p. 27).

In recent years, opposed to the traditionalist conclusion that the case law is not a formal source of law, opinions that do not share “the manifest distrust” have been expressed, motivating that the modern trend is one of approach and interconnection between the two major legal systems (Germanic and Anglo-Saxon). On this basis and reaffirming as necessary the exit from the rigid labeling promoted by the classical scheme of the sources of law, resonating with the spirit of a necessary revival of the case law (I. *Deleanu*, S. *Deleanu*, 2013) the immediate exhortation is “to leave behind prejudices and to see the fact that even in the Romanian judicial reality the jurisprudence has acquired an increasingly

important role (...)”, anticipating the necessary reconsideration of the jurisprudence as a source of law (*B. Oglindă, 2015, pp. 120-121*).

Confirming the above, today, in the face of a reality in a more accelerated dynamic than ever and crushed by turmoil, we reiterate with even more conviction the point of view, convinced that a balanced view of the issue is only that of complementarity and usefulness not only of law and case law, but of all sources of law, historically consecrated and still manifested<sup>27</sup>.

Examples, eloquent for the problem-solving line is the relationship between jurisprudence and doctrine (except for the differentiation note given by the character of the interpretation<sup>28</sup>). In practice, the arguments of authority are to be of particular importance when the opinion can help the judge, thus being the dominant doctrine. In other words, it is essential to ensure the relationship between jurisprudence and doctrine because the interpretation of the law belongs to the judiciary, but the discernment of the texts of law and the specification of the exact meaning in which they must be understood are essential attributes of the specialized literature. Hence the necessary complementary character of the two forms of expression of law.

In a summary attempt and from the perspective of the difficult-to-contest virtues of the case-law, promoting an argument to support our view, we reaffirm that: jurisprudence gives life to abstract law (which often takes the form of the law); jurisprudence interprets law, thereby ensuring the unitary law enforcement; the jurisprudence is called to “fill in the gaps” of the text of law, thus filling in the gaps through the use of analogy; jurisprudence creates new legal constructions and contributes to the implicit abrogation of provisions that have become contradictory or obsolete; jurisprudence can legitimize the promotion of new legal actions, even in the absence of normative provisions to regulate them (as the judge is not allowed not to pronounce on the actions referred to him); jurisprudence inspires the legislator and guides his line of legislation.

### **III. JURISDICTION AND AUTHORITY OF JUDICIAL PRECEDENT. RELEVANT JURISPRUDENCE SOLUTIONS**

**3.1** As we have already shown, the legal and judicial geography of the world still today bears the imprint of the compartmentalization into large families of law, having in their content large systems of law. Two of these are of particular interest for our approach: the family of the Romano-Germanic law and that of the Anglo-Saxon law. Current works on the general theory of law reaffirm through

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<sup>27</sup> The law (today in a broader sense, bringing together both domestic and European normative acts), jurisprudence, custom, doctrine, principles of law.

<sup>28</sup> This is explained by the fact that the mandatory interpretation is only that reserved for jurisprudence. In contrast, the doctrinal interpretation does not have an imposed character, but its theoretical value cannot be diminished because, although “it does not oblige the judge, it can guide and enlighten him”.



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their thematic content and propose for study the delimitation of the great families/systems of law (*N. Popa, 2020, pp. 46 et seq.; M. Bădescu, 2022, pp. 52-68; I. Boghirnea, 2023, pp. 62-93; Cornelia Ene-Dinu, 2022, pp. 16-35*). In accordance with this delimitation, it is proposed not only the circumstantial examination of the issue of the qualification of jurisprudence as a source of law – which has already been examined – but also of the authority of the judicial precedent.

The problem of the normative value of the jurisprudence is to deal with the precedent both from the perspective of the common law system and from the perspective of the new orientation of the Romano-German law systems.

**3.2** Thus, in the family of Romano-Germanic law systems<sup>29</sup>, also called Latino-continental<sup>30</sup> (*M. Reale, op. cit., p. 119*), are included the legal systems of countries such as France, Spain, Italy, Germany, Greece, Romania. What is promoted in these systems is a legal order characterized by the primacy of the legislative process (*B. Stark, H. Roland, L. Boyer, 2002, pp. 328 et seq.*), the source of law with the highest legal significance being here the law.

In civil law systems (Romano-Germanic, written, codified) the doctrine of *stare decisis* is not recognized. Nevertheless, the practice is widespread here too, according to which solutions given in similar cases are often invoked in the resolution and reasoning of jurisprudential solutions.

Moreover, in relatively recent works our legal literature proposes to treat the issue and the force of precedent in continental legal systems as well.

Thus, the problem of the law-creating power of jurisprudence is that promoted by French-language literature (*B. Stark, H. Roland, L. Boyer, 2002, pp. 332-337; L.J. Constantinesco, 1998, pp. 183 et seq.*), which places jurisprudence between: *de jure* denial and *de facto* recognition. Approaches that resonate with this can also be found in the Romanian legal doctrine of the last decades (*D.C. Dănișor, I. Dogaru, Gh. Dănișor, 2006, pp. 146 et seq.; I. Deleanu, 2004, pp. 12-36*).

On the one hand, the arguments that support the *de jure* denial of the normative value of jurisprudence aim, among other things, at the impossibility for the judge to rule through general solutions and regulation, the principle of separation of powers and the independence of judges (*I. Deleanu, 2004, p. 15*)<sup>31</sup>.

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<sup>29</sup> From a historical perspective, it should be recalled that the Romano-German legal system went through several significant stages in its evolution: the first one is qualified as the period of the adoption of the Constitutions, a specific stage of the 18<sup>th</sup> century, which was followed by the period of codifications (civil, commercial codes), specific stage of the 19<sup>th</sup> century; a third stage would be that of the adoption of International Treaties, specific to the 20<sup>th</sup> century, so that, at present, the system would go through the period of globalization in all its aspects (spatial, legal, economic).

<sup>30</sup> Expression frequently used in Hispanic literature.

<sup>31</sup> In relation to the last two statements, Prof. Ion Deleanu also adds arguments regarding the text that regulates a ground for civil appeal (Art. 304 Para. 4), based on exceeding the powers of the

On the other hand, the *de facto* recognition of the normative value of jurisprudence is supported by at least two arguments: the role that the law confers on the judge, that of filling the gaps<sup>32</sup>, and the recognition of the role of the judge to eliminate possible antinomies, contradictions, means intended to give the coherence of the legal order (*I. Deleanu, 2004, p. 25*).

Beyond these, however, above all, the judge is called to adapt the law to the (always new) needs of life. And this prerogative would make possible jurisprudential creations, commonly known today<sup>33</sup>.

**3.3** It has been said about jurisprudence that, insofar as it contains judicial arguments, it can be an optional source of law that can be imposed on the subsequent judge, primarily through the power of argument, through the judicial reasoning it contains, but also through the authority of the court from which it originates (*B. Oglindă, 2015, pp. 124 et seq.*).

Evoking the authority of a court and, implicitly, the power of judicial precedent of the solutions it pronounces, thus charging them with a binding character, we can dimension the problem known as relevant jurisprudence. The qualification is not general but corresponds to a specific category of judicial practice solutions, derived both from the nature of the case and especially from the nature of the jurisdictional entity that issues them.

In our legal system, the category brings together jurisprudential solutions viewed as exceptions to the rule that excludes jurisprudence from among the formal sources of law. Producing binding jurisprudence for the courts and having only *ex nunc* effects, intended to guide the practice of the courts (lower, as the case may be), the solutions in this category are limited to the following:

- the solutions given by the supreme court of the country (the High Court of Cassation and Justice), by virtue of its power to ensure the Romanian cassation (appeal in the interest of the law (RIL) and the preliminary ruling for resolving a matter/problems of law (HP)) i.e., in the work of standardizing judicial practice at the level of the entire system, assigned exclusively to the supreme court of the country (*Cornelia Ene-Dinu, 2022, pp. 47 -141*);

- the solutions given by the Constitutional Court of Romania, a special jurisdiction with exclusive competence in the matter of constitutionality control of laws;

- the solutions given by the European Court of Human Rights, the European jurisdiction under the auspices of the Council of Europe, with specialized competence in human rights issues;

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judiciary, as well as the nature qualified as “illogical, even bizarre” – relatively to “merging in one and the same authority – the court – the prerogative to create the legal norm”.

<sup>32</sup> As an example, the judge is called upon to choose between various possible definitions of notions of a general nature and with an insufficiently determined or even undetermined content – expressions such as “good morals”, “public order”, “good faith” “equity” are commonly known.

<sup>33</sup> Significant are the examples that concern shared property or the issue of tort liability.

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- the solutions given by the Court of Justice of the European Union, a jurisdiction under the auspices of the European Union, in the issue of preliminary references.

The essence of the problem is that of the standardization of judicial practice (*D. Lupaşcu, M.A. Hotca, 2009, pp. 222-223*), which does not need to be demonstrated, the trust of citizens in the act of justice being based, among other things, on the constancy of the solutions that the judges adopt in similar cases. *Per a contrario*, a non-unitary practice is a negative signal, a real source of dissatisfaction for the litigant and a big question mark in terms of predictability in justice (*S. Ionescu, C. Mătuşescu, 2010, p. 117*).

Speaking about the need to unify the jurisprudence and the obstacles that make it difficult to achieve, judicial Romania of the first decade of the 21<sup>st</sup> century was illustrated in gloomy colors: normative inflation, the questionable quality of some laws, the large number of pending litigations, the insufficient specialization of some magistrates, the absence of effective means for the unified interpretation and application of the law, the organization of courts and the distribution of powers are some of the possible causes of non-unitary practice (*D. Lupaşcu, M. A. Hotca, 2009, p. 222-223*)p. In the time that has passed since then, some of these are manifested in the same way or more acutely, others have been mitigated, and others have been added to the list, being hardly predictable at the time of the above “inventory”.

An adequate treatment of the problem in terms of the meaning of the relevant jurisprudence involves a multidisciplinary look since the relevance of the judicial practice with authority cannot be viewed in isolation but only by reference to the factors that configure it. That being the case, the examination framework should follow at least several coordinates, some being challenges to which justice must respond, other difficulties that it must overcome. They are hard to ignore: an unbalanced, (quasi) permanent and implicitly harmful legislative reform in the matter of the organization of the judicial system and court procedures, a real problem of allocation and use of resources (especially human) in the current Romanian judicial system<sup>34</sup>, an uncertain balancing of the risks and benefits that the digitization of the judicial system (can) bring with it, associated with the increasingly present tendency to capitalize on AI (artificial intelligence) in justice (*S. Stănilă, 2020, pp. 111-127*), the pressure exerted as effect of the monitoring of the Romanian justice process until recently<sup>35</sup>. This if we refer to the most visible

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<sup>34</sup> Notoriously, the current personnel crisis in the Romanian justice system would deepen worryingly in recent years, in the context of the adoption of some measures whose effects, in the short and medium term, do not seem to have been anticipated and, implicitly, assumed. Today, they are trying to respond to such a reality with a rapid infusion of personnel (for details, <https://inm-lex.ro> – the official website of the National Institute of Magistracy).

<sup>35</sup> Through the Cooperation and Verification Mechanism (MCV) – established by the European Commission in 2007.

and which concern the authoritative jurisprudence issued by the supreme court. No less important are the challenges posed to the constitutional jurisdiction and its role as a negative legislator, as well as those aimed at the inherent judicial dialogue between our national law and European norms, whose jurisdictional protection is provided by the ECHR and the CJEU (*C. Mătușescu, 2020, pp. 35-37; C. Mătușescu, S. Ionescu, 2018, p. 155*).

Since the size of the analysis so far would not allow the necessary developments in the present study, the aspects indicated here will constitute as many treatment points in a future scientific project.

### CONCLUSION

*Starting from the idea that an important part of law is of jurisprudential origin, the prerogatives of jurisprudence must be recognized today as being much greater.*

*Viewed historically and from the perspective of belonging to the Roman-German family of law, the traditional location of jurisprudence in the picture of the sources of law is an expression of fidelity to the requirements of the principle of separation of powers. Absolutizing the law's truth value or its fiction hidden behind the thesis that only it – the so-called law – it is the expression of the will of the people, jurisprudence cannot claim to be a formal source of law, nor must it precede the law that has this character. Still, even its placement under the law cannot be accepted without reservations.*

*Bringing the issue up to date, in the context of normative inflation that cannot guarantee the quality of the law – because the value criterion of the legal norm must be the quality and not the quantity in which it is produced – and when the legislator appointed by the people and having the immediate legitimacy of the law (the Parliament - n.n.) too often delegates its powers to the executive power, and the latter assumes too quickly (motivated by “emergency” and legislating hastily, sometimes without sufficient consultation) the judge of the country, whoever he may be, although not creates legal norms in the sense of the law, being held to give an answer to the litigant, creates law called to make juris dictio.*

*Arguing that it is essential to place the problem in a correctly understood conceptual framework, our study dedicates space to the problem of the demarcation between law and right, emphasizing the need to get out of the cliché register in which things are often viewed. Hoping not to have fallen into criticism, the discourse is located in the realm of the general theory of law, a science that claims the accuracy of law and which has the task of opposing the majority tendency that finds attention to clarification, for careful definition of terms.*

*Paraphrasing a recent diagnosis of the reality we live in ( M. Duțu, 2023), which observes – quite rightly – that today the world is on the threshold of a civilizational transition (...) which involves the transformation of the model of*

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*thinking (...), of existing individually and collectively, scientific research is called to ensure the translation of “transition” and “transitions” into the language of specific legal concepts, we join the opinions that invite a radical paradigm shift in the issue of the role of jurisprudence within the sources of law.*

*Without insistently looking for which of the sources should be given preeminence, in the current context, the way could be their necessary complementarity (in particular, law and jurisprudence), a complementarity doubled by the need for proportional assumption of responsibility for a fair placement the law in its position, having the conviction more fully than ever that, although it is not law/legal-making, jurisprudence is, without a doubt, law-creating.*

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