The Necessity to Review the Role of Doctrine in the Elaboration and Implementation of Law

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ABSTRACT

This study aims to examine the role of doctrine and how it impacts on law. The role of doctrine is nowadays located at the border between consideration and disregard, with stronger emphasis on the latter. The message we want to convey is to attach more importance to the solutions that the specialized doctrine and the general values of law promote in legislative drafting and implementation.

KEYWORDS*: doctrine, scientific research, role, public administration, excellence, law.*

1. Introduction
General considerations regarding the unwritten sources of law

The *doctrine*, or the *specialist literature,* is analyzed in the general theory of the law as being part of the unwritten sources of law alongside the customary law and jurisprudence. Globally, it is necessary to specify that in each state the role of the doctrines differs. For example, there are states in which the customary law is not considered a genuine legal source but in other states its nature is meaningful.

In Romania, we consider that the role of the three unwritten sources requires to be re-evaluated. The Romanian Constitution stipulates in the 41st amendment, in its first version[1)] which has become the 44th amendment after revision and republication, that the owner is obliged to respect all of his attributions according to the **law** or **custom**[2)]. We notice that the word **custom** is on the same level with the word law, regarding the obligations of an owner. As we have always maintained, this means that the custom has become a "constitutional source of law"[3)].

Regarding **jurisprudence**, there are different situations from state to state. For example, in the United Kingdom of Great Britain and Northern Ireland, by virtue of stare

1) Constitution of Romania was published in Official Journal no. 233/21 Nov 1991. It was reviewed through Law 429/2003, published in O.J. no. 758/29 Oct 2003 and republished in O.J. no. 767/31 Oct 2003.

2) Art. 44 paragraph (7) of Constitution indicates: *"The right of property compels to the observance of duties relating to environmental protection and ensurance of neighbourliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom."*

3) Vedinaș, V., 2020, *Drept administrativ*, 12th Edition, revised and completed, Bucharest: Universul Juridic Publishing House, p. 70.

decisis, the decisions of the Superior Courts are mandatory for those proposed by the Inferior Courts[4], whereas in other states the judicial precedent cannot be imposed to the legislator or the judge.

In Romania, both the Constitution and other laws require that the role of jurisprudence be reconsidered. The Constitution through Article 126 (3) provides that: "The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence". The High Court of Cassation and Justice exerts this role with the help of the **recourse in the interest of the law.** (Art. 514 - 518 from the Civil Procedure Code[5]) and also with the help of the resolution which is rendered to solve a matter of law. In both cases, the adjudications decided by the High Court of Cassation and Justice are obligatory and opposable erga omnes[6].

Thus, some decisions delivered by the judicial power convert into "law".

By Law 554/2004 of administrative contentious[7] it is statutory, according to Art. 23, that "The definitive and irrevocable judgement which has cancelled everything or mostly everything in an administrative document with prescriptive character are obligatory and have authority only in the future. These judgments are mandatory to be published after motivation, at the request of the Court."

We ascertain the obligatory character and the opposability erga omnes of these judgments, proclaimed through the organic law, which denotes that the jurisprudence is converting into a genuine source of law.

The jurisprudence includes those decisions that can invalidate an administrative document with a normative character. If this kind of document has both compulsoriness and general opposability, it is logical that its dissolution to follow the same criteria. The jurisprudence of the Constitutional Court provides by Art. 147 that the decisions of the Constitutional Court **are generally binding and effective only for the future, from the moment they are published.**

Regarding the doctrine of specialty, how the late and much lamented Antonie Iorgovan said "even though it is not officially a law, any respectable judge, and lets presume everyone has that attitude, gives solutions and expresses his ideas relating to the doctrine of specialty".

2. The specialized doctrine – between ignorance and worship

In this section, we will focus on the role and place of specialized doctrine, based on scientific research. Our approach takes into account a painful reality, more precisely the fact that the results of scientific research are not sufficiently exploited in practical fields that they apply to, and we are taking into consideration the field of law, obviously.

Declaratively, we often hear the thesis that political leaders are opened and interested in colaborating with academia, with universities, with research institutes, as many as there

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4) Alexandru, I., 2000, *Drept administrativ comparat*, Bucharest: Lumina Lex Publishing House, p. 74.

5) The Civil Procedure Code was approved through Law 310/2018, published in O.J. 247 from 10 April 2015. It was enforced through Law 76/2012, published in O.J. 365 from 30 May 2012.

6) Recourse in the interest of law is regulated by Art. 514 – 518 CPC, and solving a question of law by Art. 519 CPC.

7) Published in O.J. no. 1154/7 Dec. 2004.

are left. But, when we reach the point of a concrete and practical implementation, we easily fail the exam. This is a fact that must be changed.

In the following, we will exemplify some categories of research activity.

The first category, is represented by the **doctoral research,** which, in our opinion, should be valued in the activity of "making" the law. The in-depth analysis of a topic, of an institution within an institution, during the doctorate, transforms the authors into specialists. They have the abillity to profoundly understand the background, philosophy, shortcomings. This, as well as the requirements to complete their academic work, is what gives them the approval to recommand, upon completion of their programmes, the traditional de lege ferenda proposals.

Our question is, how many of these proposals reach their purpose? The answer is too few. In our opinion, Universities and Ministry of Education and Research should take the initiative and create an effective mechanism that would identify and apply author's legal suggestions, as a main form of implementation of scientific research in the academic environment.

The second category should be the regulation and institutionalization of some structures, where specialists would be involved in the process of drafting primary, secundary or tertiary normative acts or strategies, in their areas of expertise. This implies, in our opinion, a collaboration between the legislative and executive public authorities, on the one hand, and the higher education institutions or other institutions that are doctoral studies organizers, on the other hand. Based on this collaboration, it is necessary to set up databases that can be used in the process of adopting normative acts, governmental strategies on certain segments of administration or targeting it in its entirety.

In our opinion, it cannot be accepted that such processes take place without the involvement of those who represent authentic professional values in certain fields. This explains the fact that precarious regulations are being adopted, which are regularly patched and, instead of hiding, they rather highlight the shortcomings, the black holes of the legislation.

The third, and also the last example we refer to, is represented by all kinds of studies that are developed in research projects with international funding, generally European, but it can also be funds from other sources such as World Bank, IMF, etc. Often, activities financed by such programs also involve the elaboration of specialized studies which, unfortunately, although they contain interesting information and promote solutions that could bring a certain efficiency in practice, end up in drawers that no one opens, dusty and outdated, in an almost complete uselessness. However, statistically speaking, it is reported that Romania has benefited from substantial amounts, even though the benefit is limited or precarious. We do not want to induce the idea that such programs do not bring any advantage. What we intend is just to question, to raise a real alarm, on the need to capitalize on such concrete forms resulting from the activity carried out in some programs, so that the benefit is real, not hypothetical or virtual.

3. Conclusions

The conclusions of this study were expressed during the whole debate, with each topic addressed. We could even say, metaphorically speaking, that this study is equally, a conclusion but also a debate, both academic and public, about the need of reconsidering the role and the place that research should have in the present, but also in the future of

a country. The Parliament also has an important role due to its status as the supreme representative organ[8)] of the Romanian people and the only legislative authority. It has the purpose and the legitimacy to create the necessary framework to reconsider the role of scientific research, in general, and the research of excellence, in particular, influencing the destiny of the country.

In this respect, we believe that the following measures can be considered:

a) supplementing the regulations regarding doctorates with provisions about the possibilities of capitalizing the results of doctoral research,
b) completing their own regulations adopted by each Doctoral School with provisions on capitalizing on original and innovative ideas in the content of doctoral theses,
c) stipulating attributions regarding this field within the normative acts that regulate the organization and functioning of the public authorities with competence in the matter of research[9)].

We strongly believe that these are some ideas that express not only our concerns, but also a must and a priority for the future.

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3. Romanian Constitution.
4. Romanian Civil Procedure Code.
5. Law 554/2004 of administrative contentious.

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8) As provided by Art. 61 of the Constitution of Romania.

9) We refer here to the National Authority for Scientific Research and Innovation (ANCSI).