

# CASE LAW IN THE BULGARIAN LEGAL SYSTEM

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**ABSTRACT**— *The sources of law contain legal norms that have legal force. Only sources can objectify the law. They are not only an external form and means of manifesting the law, but also an essential feature. A legal rule is legally binding only when and because it is recognized as a source of law. According to some authors, case-law has a binding force based on its silent adoption by the legislator. The essence of the case law in Bulgarian legal literature has been the subject of study mainly in the field of sources of law in terms of the general theory of law, the general part of civil law and constitutional law. With very few notable exceptions, most contemporary authors underestimate the normative quality of judicial acts. Too lenient in Bulgarian legal theory was the role of the court in legal hermeneutics. The judge, in our opinion, should not be equated with a state official.*

**Keywords:** case law, jurisprudence, legal essence, legal norm, sources of law, theory of law

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## 1. INTRODUCTUON

First, we must start by emphasizing that the term ‘case law’ used in the Anglo-Saxon common law systems has different connotations than the term ‘judicial practice’ or ‘jurisprudence’ of the Romano-Germanic law or the law of continental Europe, part of which is the Bulgarian legal system. Bulgarian law does not know the so-called ‘precedent’ but for lack of better translation we will use the terms as synonyms.

Undoubtedly, acts of the judiciary occupy a special place in the system of the sources of law: on the one hand, they are subject to the law and therefore cannot change or abolish it, and on the other hand they can clarify the meaning of the law which not is equivalent to a change in the law itself. But the court as the sole owner of the judiciary also creates a secondary rule of law. In Bulgarian legal doctrine, law-making is often opposed, or at least sharply distinguished from law enforcement. While lawmaking is seen as a process of law-making by the parliament (or the executive), law enforcement is seen as a process of ‘implementing’ the already prepared legal norms - that is, bringing a concrete factual situation to the general rule. This application can be implemented on the occasion of a legal dispute and without such a dispute. The rigid division of law enforcement and justice is, in our opinion, already outdated. Justice also contains creative activity because the court creates a new legal norm based on the primary legal norm. This in no

way contradicts the principle of separation of powers, but on the contrary it only proves it and affirms it because in the modern rule of law there is the so-called soft separation of powers as opposed to the strict separation of powers and authorities are mutually balanced.

As sources in the study of this article we will use Prof. Dimitar Radev's works "The normative structure of law" (Radev,2008) and "The philosophical normativism in law" (Radev, 2017), also we will use Prof. Lyuben Dikov's study "The essence of the activity of judges" (Dikov, 1923), prof. Venelin Ganey's "Course on General Theory of Law. Introduction. Methodology of Law"(Ganey, 1921-1932, 1946), Prof. Rosen Tashev's "Theory of interpretation" (2003) and others.

In this article, we will try to defend the view that the objective nature of court rulemaking lies at the basis of judicial trials for a number of reasons, including the existing gaps in the law - the court makes a normative filling and in some special cases of the so-called court discretion. Moreover, the precondition for judicial proceedings is its 'legal basis' - the disposition of the rule of law, depending on the degree of certainty of its content and the scope of the court's freedom to determine the factual circumstances, such as legal facts and the meaning of the general rule, which takes the secondary rule of conduct for solving the particular case. Moreover, the motives of judicial acts contain legal rules.

## **2. MATERIALS AND METHODS**

In the course of this study it will be used not only the purely normative, but also the comparative, the historical, the philosophical, the relational and the ontological scientific method in order to fully explain the essence of the case law. But it should not be forgotten that, as an element of the legal system, the notion of 'jurisprudence' and 'case law' is strictly normative, since the law cannot have any other content, being, character (or any other qualification) but its existence in one and only structure - the normative, so the method of philosophical normativism in law will be used as a basic one. German and Austrian legal schools have played a major role in the study of the sources of law, the achievements of which will be used in the course of our research

## **3. RESULTS AND DISCUSSION**

The term 'source of law' is rather doctrinal, it does not have a definition in the positive law. It means many different concepts that give rise to some ambiguities and contradictions. Historically, the understanding of lawyers about the term 'source of law' is changing. Initially, the concept has a natural meaning - universal and eternal principles and principles that serve as a basis for legal norms and their corrective. 'Sources of law' are sometimes also called texts of perceived Roman law. Legal positivism adds to the term new meaning. A 'source of law' is the will of the sovereign.

Modern legal doctrine speaks of historical, material and formal sources of law. In a formal

sense, according to Prof. Rosen Tashev, the sources of law are certain procedures and acts by which legal norms are created and expressed and acquire legal force. Sources of law are the 'material carrier' of legal norms and the criterion of their differentiation. In a legal system, only those legal norms which are found in established sources of law are known as legally binding. A source of law is a generic term, which is formed on the sign that the rules of conduct contained in it are legally binding and have a legal sanction (Tashev, 2010)

Sources of law contain legal norms that have legal force. Only sources can objectify the law. They are not only an external form and means of manifesting the law, but also an essential feature. A legal rule is legally binding only when and because it is recognized as a source of law. As basic properties of the sources of law, Rosen Tashev points out the legal force and the effect of the legal norms contained therein.

Legal power is conditioned by the legal obligation of behavior prescribed in the operative part of the law. Obligation is guaranteed by legal coercion. Legal power is characteristic not only for legal norms but also for individual prescriptions. It is conditioned by the overall systemic and logical operation of the legal order. Sources of law cannot have legal force independently and irrespective of the legal norms, from which it follows that the legal power of the source of law is identical to the legal force of the legal rules contained in them.

Similarly, the relationship between the sources of law and the effect of the legal rules contained therein seems to be the same. Sources of law have an effect identical to the norms contained in them.

According to their role in the system of law, the sources of domestic law are divided into basic and subsidiary. The main sources of law are typical of the relevant system of law and are indisputable legal obligation and determinative nature. In the Bulgarian legal system such are the Constitution, the international treaties under Article 5 of the Constitution, the laws, the normative acts of the executive power, etc.

Subsidiary sources of law are not typical of the relevant legal system; their legal norms support the operation of the main sources. Subsidiary sources are mass contracts, internal regulations of corporate associations, court practice (case law), legal doctrine, etc. For the operation of subsidiary sources of law, it is necessary to have a major source, together or to assist them to act. The legal obligation of subsidiary sources is not always available. Depending on whether or not the application by the judge is mandatory, they are subdivided into direct and indirect sources. The use of indirect sources is optional. Typical examples are case law, legal doctrine united under the name jurisprudence. Direct subsidiary sources of law are the interpretative verdicts of the General Assemblies of the Supreme Administrative Court and the Supreme Court of Cassation which are binding on the bodies of the judiciary and the executive.

It is very important to emphasize that, according to some authors, so-called indirect subsidiary

sources of law cannot be qualified as sources of law. They are not legally binding and therefore have no normative character. Such opinions, for example, are of Prof. Vitali Tadjer, Prof. Maria Pavlova and others. On the other hand, authors such as Prof. Zhivko Stalev and Prof. Dimitar Radev argue that the judiciary is a source of the law and when the court grants a court decision, it creates a new reality, a new legal reality. This reality is reallocated and validated to the established legal order and constitutes a new element which adds to the current legal situations established by the existing legal norms.

For the purposes of this paper, it should be noted that in the Bulgarian system of law and legal science, along with the term ‘source of law’, the term ‘normative act’ is used. Normative act is a type of a source of law, which is adopted by a competent state body and contains legal norms. The concept is positive and it is valid only within the boundaries of the Bulgarian legal system, which reduces its doctrinal value. However, it is often used as a synonym for a ‘source of law’.

The generic concept of the source of law, relative to the case-law, begins to acquire a different outline. Since the issue of case law as a source of law is controversial, the author's position on it is relevant when defining the ‘source of law’.

Prof. Vitali Tadjer, for example, notes in his study “Case Law and General Acts of the Supreme Court of the People's Republic of Bulgaria” to their normative character, that they are general and abstract and mandatory (Tadjer, 1978). In his article "Judicial Practice as a Source of law" Prof. Zhivko Stalev also points out that normative acts are sources of general and abstract regulation, so they are sources of law (Stalev, 1997). However, he does not adhere to the view that the provisions on a particular case are not a source of law, which is why it provokes disagreement with some other researchers. According to Prof. Maria Pavlova sources of law can be only provisions binding on all subjects of the law or for an indefinite circle of them (Pavlova, 2002). Professor Rossen Tashev, in his monograph “Theory of Interpretation”, emphasizes that the doctrinal notion of ‘source of law’ is too broad, and attempts to use it in some cases can lead to ambiguities and contradictions. In general, however, it shows a wider understanding of the content of the concept. According to him, there are indirect subsidiary sources of the law that are not mandatory. Among them, he puts, for example, the case-law in the sense he perceives and the legal doctrine (Tashev, 2003). The same author acknowledges as direct sources the interpretative decisions and rulings of the General Assemblies of the Supreme Court of Cassation and the Supreme Administrative Court. (Article 130 (2) of the Law on the Judiciary in the Republic of Bulgaria).

In order to clarify the importance of case law as a source of law sanctioned by the legal system, it is essential to specify the notion of ‘case law’.

The term ‘case law’ has a different content. From a theoretical point of view, the case law refers to a set of acts of the courts in one country, one court, in a certain type of law, in a given

legal sector, for a given period of time. Case law can also mean the realization of the law through the exercise of the judicial function, and other meanings of this term, validated over time.

The analytical case law is formed by some motives of the courts and by the interpretative judgments of the supreme courts. Since the conclusions, legal logical constructions and the reasoning of the Supreme Court of Cassation and the Supreme Administrative Court constitute a future directive in dealing with similar cases, they are nothing more than general legal norms of analytical jurisprudence (Radev, 2017).

The detailed examination of the legal norms contained in a law shows that the latter is able, in a very limited number of cases, to give a ready law solution to a case. This will be the case in which the factual composition of legal disputes fully corresponds to the factual composition contained in the law itself. Such are usually the simplest legal relationships that rest on only one legal institute and not a complex of such. These cases are numerous in themselves and form the judging practice of the judge. However, the legal provisions contained in the law are not able to provide an immediate response and solution to complicated and entangled legal relationships based on a whole set of well-known legal institutes or on newly formed legal entities. In spite of this finding, it was accepted that the law is capable of solving all possible cases, that it is omnipotent and that the law is without gaps and that it is an absolute master in the legal life of the people.

According to theories that consider the law the only master in the relationships between the people who put the monopoly of the law as an ideal, the same is the highest manifestation and expression of the state's will. The attitude of the judge to the law, along with the customary law, to the first group of sources of law, which we can call a common positively written and unwritten law, according to this theory is the attitude of a subordinate to the orders of the higher authority. Positive law serves exclusively to instruct the courts and individuals how to resolve legal disputes.

Case law and the legal system are elements of positive law. Since a priori principles and natural law situations influence the positive identification of legal phenomena, we can assert that indirectly unwritten rules also have some impact in building the legal system. In any case, the case law and the legal system form the dynamic, the positive side of the law, whereas the legal statics (principles, ideas, inviolable conditions) are characteristic of natural law. Positive law handles its own specific toolbox, which expresses the legal technology and the formal legal rules for the validation of legal phenomena. But this does not mean that there is no philosophy in the positive law - there is the line of philosophical positivism, which is opposed to the empiric technological, to documentary factual positivism.

The legal literature has different views on court practice. Traditionally, 'jurisprudence' and 'case law' mean the set of all final acts that have entered into force and are fit to produce the appropriate legal consequences - those who decide on a dispute (or legal issue) on the merits. In a

wider sense, we could claim that it is a case law that is formed by all judicial acts - whether they are substantial in the case, or they deal with some legal or technological procedural issue. The case law then includes judgments (the outcome of a case) and court rulings (which deal with intermediate litigation issues).

The legal provisions contained in the positive law consist of orders and prohibitions on the one hand, and guarantees on the other. The first obliges people to some behavior, to some act or inaction, while the latter assures some power over things or the right to ask something from another. The rule of law that entitles them to property on one item gives them at the same time the right to ask others to not disturb their dominion over the same thing. The rule of law, which orders the debtor to pay the debt, also gives the right to ask the debtor to fulfill his obligation. All these legal rules are also instructions-orders to the judicial authorities on how to resolve conflicts of interest. However, we have found that written positive law norms are not always able to provide a direct solution to more complex conflicts. There are cases in which there are quite new phenomena that cannot be subsumed under any written norm of positive law. According to some authors, the judge has some artistic work in his work - for example, Imbert-Quaretta claims: "... the judge is ... an artist." (Imbert-Quaretta, 1995).

The court, by issuing its judgment or verdict, not only applies the rule in the hierarchy, but also creates a completely new norm in its content. It resolves a legal dispute by indicating to whom the right belongs. This is the case for all disputes and case studies - criminal, civil, administrative, constitutional (Radev, 2017).

In such cases, the other group of sources of law come to the aid, namely legal justice, the scientific results obtained from the research of doctrine and the case law or the 'practice of court places' as Professor Dikov calls it (Dikov, 1923). Positive law contains the crudest, the primary in the rule of law, it forms the skeleton of this legal order, and the muscles, the blood and the whole body are formed only with the assistance of the so-called 'Juristenrecht' in Germany, or the law derived from the scientific studies of doctrine, constant jurisprudence (with the assistance of legal justice).

Freedom of the judge, according to the author, is the counterbalance of the positive law of the state authorities, it is the result of the "creative activity" of the judge or the theoretician. In cases where the positive law does not contain instructions or contains contradictory ones that mutually cancel each other out, in cases where the norms contained in the positive law are not able to satisfy the legal needs of the time and specifically to properly solve the particular conflict of interest, in such cases, the judge and the theoretician through thought processes in which the appreciation of values plays a significant role, serving as the available mass of legal and ethical views of society and from them forming the new statute, a new right, the right to freedom of judging creativity and scientific activities.

The judge is not a slave to the law but a constructor of the law (Kohler, 1883). Since the rule of the law does not, by its very nature, undergoes permanent changes, firstly, because it should not be permanently changed in the interests of legal certainty, and secondly, because it cannot be permanently altered by the comparatively sluggish and heavy apparatus of state law, the task of this line of law has been enacted through interpretation, analogy, addition and, as a last resort, an amendment to the constantly changing constitutional bodies, namely the free law created by the judge and theoretician. In this way, they elaborate sophisticated theories, systems and institutes, which together with the positive law, serve shoulder to shoulder and induce to advance the lawful life of society.

We have to admit that the existence of a free judiciary law today is not universally recognized. At least, it is refused the right to be a source of mandatory rules for the judge alongside the positive law. We will return to these disputes further. However, one thing is undeniable fact - that all possible cases cannot be resolved directly by the positive law, but it is necessary to think and appreciate the values, it is necessary to adjust the legal order to the new social conditions, we can say that the legal structure and creation needs a new rule of law to resolve the case. According to Ronald Dworkin: "Some people may think that judges are solving difficult law cases, too, preferring the alpha in front of beta, although others, perhaps more sensitive to the differences between the questions raised by the two institutions, will not agree." (Dworkin, 2003)

As part of this free law, we will also accept the concept of 'legal justice.' It is often used by the legislator himself in the legal regulations he has issued, precisely in cases where he himself does not want to give precise and detailed directives and instructions, as to how a case is solved, but gives only general instructions on how to deal with it, often because it is impossible to give detailed instructions and directions, which means that the legislator deliberately left the judge the free field for valuation of values, so to decide as to how a normal and well-reasoned individual would decide. When searching for what is fair and conscientious, the same mental operation is done, creating the same thing as looking for a new norm to replace an old one that has become an unsuitable one, as well as in assessing conflicting interests in search of what is appropriate and useful.

What is the judge's attitude towards these two sources of law? Do both have the same right to exist, do both enjoy the same authority, or do both have the preference and supremacy of the other? According to one theory, positive law contains orders to the judge, which the latter must perform because he is an ordinary clerk and a law officer. According to the second group, or the free law, assuming it exists, positive law serves only as a material for the education of the judge, as a source of knowledge, but not as a source of norms for his decisions. Such a judge should only look for law principles in the positive law. Whether this is true or the second group of sources of law are sources of binding norms is a controversial issue that raises the problem of free judicial rulemaking. This question will be the subject of the following considerations.

In legal doctrine, there is no dispute that the judge is subject to the law. This thought, however, does not say what the content of this obedience is, or what is its volume. Different opinions are possible here and there are in fact disputes. On one side are the theories of the absolutism of the law, of its omnipotence and power to resolve all controversial questions, of its infallibility and universality. This theory is best represented by Beccarias and Montesquieu in classical Western literature. The judge applies the law mechanically. We disagree. This is not so. It is a complex intellectual and logical process in which the facts of the case are lead on under the hypothesis of legal norm. Then there is a process of ‘combining’ legal provisions in one direction, the objective (goal) of which is a non-contradictory from normative point of view outcome of the lawsuit. That is why the outcome of the case cannot be asserted by any other professional (lawyer, prosecutor or other jurist). This process is an internal thought process that finds only a superficial explanation of the reasoning (motives) behind the judgment. Even if these motives are in a huge volume, they cannot fully reflect this judge's internal thought process. For these reasons, the judge should apply the law not mechanically, but intelligently.

According to Beccarius, the judge is a slave to the law: "The judge has no power to interpret the law, for if he had such power, he would be raised to the rank of legislator. It is very dangerous to call upon the so-called spirit of the law because it gives too broad field of judicious discretion. The best law is precisely the one that leaves the least room for interpretation. The more the law is interpreted, the more crimes are committed. The damages that may arise from the exact application of the letter of the law are less than those that come from interpreting because the despotism of the law is more tolerable than the dominance of the judge's discretion of numerous judges. Even science is dangerous because it produces opposing views and theories, thus making crazy and disturbing the mind and the thinking ability of man. Happy is this nation, where the laws are not the subject of science." (Beccarius, 1903). We cannot agree with such an opinion. As has been pointed out, we believe legal doctrine (science) is a necessary corrective and a source of normative solutions *de lege ferenda*. In the case of opposing views in theory and when there is no interpretative rule of the Supreme Court of Cassation, which explicitly regulates a case, we think the judge should have a free judge's discretion about which of the contradictory theories to apply.

In one of the most famous chapters of his essay “*Esprit des lois*” Montesquieu puts forth his own teachings: “There are three authorities in each country: legislative, executive and judiciary. These three authorities should not only be theoretically separated from each other but in practice they must develop and operate separately in order to preserve the freedom of the individual citizen. Care must be taken to avoid and remove any interference by any of these three authorities in the sphere of action of others. Legislative authority has the task of issuing laws, that is, it is called upon to produce abstract, binding norms for all, even for the rest of the authorities. This power creates law, but it does not say in the specific case what is law, it does not even execute its own decisions. The latter is the work of the executive, which in turn should not interfere in the

work of either the legislative or the judicial one. Lastly, the latter is given the option of applying the law in the case of a single specific case, to translate the abstract legislative order contained in the rule of law into an operative part of a judgment. The judge is the living voice of the law, he speaks specifically what the law has abstractly wanted to regulate.” (Montesquieu, 1748)

According to these theories, the law is the highest expression of the state's will because the very law is an expression of the will of the state. They want to be against every absolutism, and they have succeeded in destroying the absolutism of the monarchs in the age of the bourgeois revolutions. In his place, however, they lifted the absolutism of the law. According to Prof. Dikov, “this is a great success and it means liberation from the personal whim of one or a few, which is a guarantee for the rights and the individual. The assertion, however, that in the very form of the law there are material guarantees against any kind of despotism that is not justified by history.” (Dikov, 1923).

These theories freed the judge from the bonds of cabinet justice and the royal decrees, leaving him independent from the executive, even giving him the opportunity not to apply in controversial cases unlawful orders of the latter. However, the freedom of the judge is not limited to that. Only free is that judge, to whom people go with the necessary trust and to whom is left some free space to solve at his own discretion, within the circle of which he will show his legal conviction and fulfill his duty. Beradt notes: “You are free, o judge, only you have to obey a million paragraphs.” (Beradt, 1909).

Modern constitutionalism has led to the idea of a more stringent subordination to law of the judge. Two of the important tools that have served him to succeed in this obedience are the compulsion for the judge to motivate his decisions and the creation of an institute to exercise the function of guardian of the law, namely the Supreme Court of Cassation. For the legislator's decision to the judge to motivate his judgments is not intended to convince the parties of their veracity, but to be a means of controlling the judiciary, forcing the judge to construct his legal conviction in the light of positive law.

The older school of history was not a great fan of written laws, it preferred much more the organic creation of customary law, pointed to the bad aspects of the coding system, and tried to develop the right way through scientific research. There is no right but the positive, teaches this school. A positive right is only what the state has recognized and proclaimed as such. The form in which this is done is called law. This law contains an answer to every question that could be asked for permission, the law is without any gaps, it is comprehensive and the task of jurisprudence lies in this and only in discovering and applying the meaning of the law, the will of the same. The judge cannot make any assessment of the values, to ask the question of justice and expediency, because justice is not a policy, the latter must be exercised by parliament. This teaching reached its culmination in the book Windscheid's *Pandektenlehrbuch*, in Binger's writings, and finally in the Bergbohm book: *Jurisprudenz und Rechtsphilosophie*, 1896 (Bergbohm, 1896).

This school has its own merits. It has prompted the nations to create sophisticated codes that have created better conditions for the study and application of law, to increase legal certainty. The law has ceased to be a secret land for the uninitiated citizen, the book of the law is available to everyone. The mistakes in the administration of justice have diminished, but the template work has increased. To these merits must be added the bad consequences that brought this school with him. The judge, the lawyer at all, Reyhel says, was reduced to a machine that deduces and deducts. The question is no longer whether the judgment is fair or expedient, but whether it was issued in accordance with the law or not (Reyhel, 1915).

In this way, justice is in danger of enhancing brain work at the expense of the work of the soul and the heart. But there is even greater danger, says the same author. Cowardly obedience and obedience to a law written in act, the letter of this law, is capable of blurring the very legal sense of the person who enforces the law. Once the judge is satisfied and has to satisfy himself that his decision is based on the law, it is deducted by the judge, the same judge gradually loses his subtle sense of justice, whether his internal decision is fair. And there is nothing worse about justice than choking and killing the judge's legal sense. Not all judges, however, succumb to this harassment by the law. Many, when a rule of law is very strict or inappropriate, surround it with various artificial interpretations and analogies, in general, constructing artificial legal constructions. And thus, it goes the way of circumventing the law and tolerates the lack of honesty.

We think it is best to find the balance between these two theories. As we have many times mentioned in our logical conclusions, the judge should proceed not at all from "living life" or "life justice", but from the legal principles that constitute constants and the basic principles of the normative system, respectively the case law should be subordinate of normative justice. And what is meant by a lawful (normative) justice the answer is given by the legal theory.

So the judge is subordinate to the law. This principle dominates the modern life of constitutional states. Many think that it deals with the whole issue of the essence of case law. How much the judge is subject to the law remains an open question because the law itself is unable to resolve it. The judge is called upon by the state to apply the law in force in the country, the norms of the latter are dressed in words. To understand the latter means to know the will of the person or body that pronounced them. The judge who is called upon to give a judgement to a case, with the deduction under a rule of law, acknowledges that the conflict of interest in question falls within the scope of that rule.

According to Prof. Dachev, the study of language as a social practice shows that there is a dialectical relation between the language expression and the situations, the institutions and the social structure to which it refers. It is formed through them, but in turn also determines and shapes them (Dachev, 2009). A rule of law can only be applied only then, literally, when the legal relations which are placed before the judge's bench form a factual composition identical to that contained in the rule itself. We have said at the outset that these numerous instances perform the

judge's template work. In deciding according to the letter of the law, the valuation is not judged, the question of justice or utility is not raised, but only the actual factual composition is compared with that contained in the rule of law, it is subjugated one under the other and the legal consequences are drawn.

However, this does not end with the activity of the judge, because not all concrete factual chapters can be immediately submissive under the actual composition of a written or customary norm. When the law does not contain ready answers to the questions asked, and such can only be obtained through research, then the judge proceeds to another type of mental operation, namely to interpret the rule of law in order to discover its meaning and make possible its application. The meaning that words can have is always different for each person. Nonetheless, most of the words are roughly the same as the majority of people, which uniformity of understanding facilitates human understanding.

Out of the subjective sense that each word has for every speaker, the latter has its own objective meaning, or the meaning given to it by the majority. Every speaker assumes that this objective meaning is known to the listener, the listener proceeds from this objective sense and complements it with his objective one. However, the interpretation of the human speech is generally applicable in particular to the interpretation of the rule of law contained in a law, but with a very important clarification, namely that legal concepts are specific to law, not to any other sphere of social life, and again we come to the importance of legal science (the doctrine), whose task is precisely to fulfill these terms with content. The legal method of legal interpretation must obviously take account of both legal certainty and incompleteness in the law, and therefore it must synthesize in itself the methodological requirements of both rationalism and empiricism.

It is undisputed by anybody that any interpretation must have its starting point in the law itself, and that interpretation, through its mental work, must give life to the lifeless letters of the law. Science has worked out, and many legislators have reproduced these results in their codes of practice, a number of interpretative rules which, without being part of positive law, give guidance on how to interpret and apply separate norms or groups of such norms of this positive law. The study of these rules has long been completed and their exposure in this case would not be of any interest. On the contrary, we have interest in those moments that play a decisive role in interpreting, those factors that help in obtaining the final result in making the judging decision.

The motives of the court are legal norms, especially when there are no such norms in the whole legal system which, by explaining the arguments of the court, serve as a model for future cases. As an example we can say the following: if the Supreme Court of Cassation revokes the verdict and returns the case with specific instructions, then no matter how many times the case is returned and decided - the original decision (because it has not been canceled and contains conclusions that are in no way derogated ) will still be still judicious about these lessons and arguments that will make it unique. This is the special force and the unusual nature of the judicial norms. The motives

are logical, intellectual, mental, relational and semantic circumstances, which are normative to the existing legal order (Radev, 2017).

The purpose of any interpretation is to discover the objective meaning of the law, not the subjective will of the legislator. In today's constitutional state, with its complicated legislative apparatus, one cannot speak of a single will of the legislator, but of the will of this or other member of the legislative body. What, however, was the subjective will of this plenary member of the parliament, we do not care, because this or these parliamentarians are simply unable to have clear ideas on all future controversies. What is more, the legislator's will is nothing but a fiction.

With the argument that today's legislative apparatus is quite complex, we can only talk about the past. Let us also look at the future and see that if we are content with the subjective will of the legislator with what he has foreseen and desired, then we should freeze at the point of development that the legislature itself was, when it issued the relevant norm. On the contrary, we look for the objective sense of the law, the latter becomes more resilient to interpretation, more flexible and more adaptable to the new conditions in which it will be applied. Is it possible to speak of the will of for example of the French legislature, which was issued more than two hundred years ago by Code civil, a law which is almost literally valid in our country today when interpreting our civil and material laws when that same legislator neither had, nor could he have any idea of today's social fabrication and social layout of life?

On the contrary, looking for the objective sense, we will always come from the age in which we live, and we will take into account its needs. Only this way can the internal content of a law change, its external forms remain the same, a phenomenon that undoubtedly happened with the same Code civil.

To interpret a rule of law is to establish its meaning, that is, the sense that is relevant to legal life. It is necessary to establish the content of the will that has been expressed in this legal norm. To this end, we serve the materials of the legislative body that can give us valuable insights on the legislator's thoughts during the editing of the law itself, mainly on the purposes that he pursued with it. By themselves, however, these sources for the reasons outlined above are not able to give us everything we need to make a successful interpretation of a law. The grammatical and technical-juridical interpretation of the phrase must be added to this factor. The legislator uses his own concepts and terms, the content of which can be established precisely only after the place where they are used, their objective and subjective meaning and their relationship with other concepts used earlier. It is also important to keep track of the development of the law, to identify the needs that have been called up.

Finally, capital value is the value of the result to be obtained. The rule of law should, in case of doubt, be interpreted in such a way that the result obtained by this interpretation is useful, fair and responsive to the needs of legal life. Only this interpretation, in which all of the described factors

contribute, is able to give true and useful results, but it can only be called complete and all-round. To give preference to any of these factors would always lead to one-sidedness. However, both first and last, as the criterion used, must serve to respect the value and the benefit of the result.

When deciding on the basis of the letter of the law or by interpreting it, the judge remains subject to the law. As a principle, this thought is true and must remain in place. Because the law, the sum of the norms that form the law, serves the public order. This public order cannot be better guaranteed than with a clear, understandable and easily accessible law. Nothing better serves legal certainty. Such legal certainty would suffer, however, if the judge would not, at the outset, be obliged to obey this law and apply it. Whoever obeys the law must also trust that the judge will apply the same law well. A more distant goal of the law is to create equality between those on which it will be applied.

Formally, the equal rights for all, without distinction of personalities, is already acquired for today's result. One of the means to obtain this result is the law. Because nothing better serves the assimilation, just as a common law that is issued and applicable to all. The third advantage of the law is that it creates unity in legal life, unity that also directly serves legal certainty and facilitates legal relations. The customary law always has a tendency to differentiate according to the environment and the place where it is formed. A law, however, valid for all, deprives these separatist tendencies of the law and establishes unity in legal life and jurisprudence.

The citizen must not be subject to the whim of this or that judge, but to the previously known norms of a law. We will repeat, however: this obedience is accepted by us only in principle.

One group of authors have advocated the view of the absolute dominance of law in the lawful life of people, of its omnipotence to solve all possible problems that might arise from human relationships. This judgment rests on the premise that the law that a positive law is free of gaps, on the contrary, that it contains ready-made instructions on a case-by-case basis, or that it can give it after interpreting its legal norms or by analogy. These same theories rest on the second premise that the law never fails, it can never be unfair and is always be able to give a useful and equitable solution to every practical case. Let us examine whether these prerequisites actually exist, whether the starting points of these theories are correct, so that the theories themselves properly solve the problem of the essence of the case law.

Life requires every question that has arisen to be answered and the judge is the person who, when asked to do so by the law, must answer the question. In this sense, it can be said that the law itself is all-round and does not contain any gaps. However, this law, which is shaped by written law or customary law, is not without gaps, on the contrary, there are many unanswered questions that still need to be resolved. For example, we read in Iulian L. 10 and 12 D. de leg. 1, 3: *Neque leges neque senatus consult ita scribe posunt, ut omnis casus qui quandoque incidit, comprehendatur ...* The conclusion that the positive law, written and unwritten, contains gaps is

now definitively acquired result.

For example, when the Constitutional Court is referred to the request to interpret a concept of the Constitution, the view of the court will be developed entirely on the basis of legal doctrine - it will benefit from both the theory of law and the doctrine of the state in particular, of constitutional law, the philosophy of law and other legal scientific areas. What are the concepts of 'separation of powers', 'democracy', 'human rights', 'property rights', 'freedom of religion', etc. explains legal science, not a specific, substantiated legal source (Nenovsky, 1997)

To gain the latter, Professor Zitelmann cooperated with his remarkable rector's speech, held at the University of Bonn on 18.X. 1902. Very few can be added to the comprehensive studies made by Zitelmann, Ehrlich, etc. In this case our task will be to get to know these acquired results and to use them to obtain the new conclusions. Are there really gaps in the positive law, in the true sense of this word, because the above lies beyond any doubt, what these gaps consist of, what are the meanings we must grasp, and can we call them gaps, these are the questions one first asks and who are studied by Zitelmann. These issues are primary, and only after their permission can the problem be explored, how can these gaps be filled in the applicable law (Zitelmann, 1902).

However, the judge does not wish to apply these legal rules because he finds that the result to be obtained from this annex will be unfair and therefore leaves them aside by creating a new legal rule for the special case and deciding on it. In the present case, there is no gap in the true meaning of the word, but the gaps consist in the fact that an existing exclusive rule of law is not suitable to apply to emerging cases for which, if envisaged by the legislator, the latter would have issued other special norms. Naturally, these are not gaps in the sense that the actual factual composition cannot be subsumed under any rule of law but such that if the actual factual composition is submerged under the appropriate norm, the result obtained will be unsatisfactory.

However, there are also genuine, real gaps in positive law, gaps in the sense that the law does not give at all any answer to a specific question, nor is there an exceptional rule that indirectly governs it. In these real gaps the situation is the following: the law contains a rule of law according to which it is to be decided, but within the scope of this norm leaves some moments undefined. Or, in other words: the will of the law is established, so that certain legal consequences may occur as a result of some factual composition, but within this factual composition different combinations are possible and the law itself does not say which of them it has in mind and to what extent it wishes to attribute the legal consequences.

In the first category of gaps, the court practice has the character of a corrective activity; in the second, the judge, in fact, through creative work (the latter is disputed by Zitelmann but we use the word in the above-mentioned sense) fills the gaps existing in the positive law.

This concludes Zitelmann's teachings about the gaps in current law. The results obtained in these studies are almost conclusive and there is no other task except to fine-tune them. In the first

group of gaps we can find the following: The legislator often gives the judge a general directive explicitly or silently referring it to factual circumstances, to concepts or scales that are not individually defined, but which the judge should on a case by case basis define. In other cases, the law refers the judge to the common notions of fairness, good faith, etc. The legislator leaves at the discretion of the judge whether a certain act is an abuse of the law or not, that means whether the case does not coincide with the fairness of the law. Finally, the law leaves the judge to decide the case after he or she assesses the values or ascertains what may or may not be required by the person called upon to answer before the court.

Out of these cases there are indirectly expressed negative rules, which are sometimes not convenient for application and which are left aside, which is why these seeming gaps appear. In the second group of cases, the law is silent perfectly: Or, consciously, precisely when the issue is not yet ripe for authorization by legislative order, forcing it to theory and jurisprudence, they are looking for a response to each case. Or when the legislator did not foresee the same question and therefore did not issue any norms to resolve it. Finally, when there are two contradictory norms on the same subject, none of which have any advantage over the other, and in which case both norms mutually cancel each other, leaving the matter unchanged.

Analogy is called the mental operation that selects certain principles developed by the law itself to apply them to factual configurations not directly regulated by the law and which are insignificantly distinct from the regulated ones. The analogy of the law is based on a separate legal norm, it develops its basic thoughts, removing all minor and indispensable prerequisites, and so the cleansed legal rule applies to cases with homogeneous factual configurations. The analogy of law stems from a multitude of separate legal norms; it develops from them by means of inductive conclusions more general principles which apply to factual compositions which cannot be sublimated under any text of the law.

The legislative apparatus, as has already been pointed out, works alone quite sluggishly as long as it is set in motion, a considerable amount of time is going by, when legal needs remain unsatisfied. Furthermore, the occasional legislator does not always have a loose hand and the slim legal sense acquired through years of scientific research and experience of theoretician or judge, he is often able to do as a result of inadequate knowledge of the general system upon which positive law is based by accidental changes, even due to momentary moods, to disturb the unity of the already established legal concepts, to distort the acquired results, and to redraw the legalized systems.

Much easier and more careful is jurisprudence. In the research and in the practical application of positive law, the ideas of where and how to help are born and born in order to develop this positive law.

#### **4. CONCLUSION**

On the one hand, it is questionable whether the judge has the so-called free judicial law in the Bulgarian legal system. Free judicial law is mainly manifested when dealing with legislative gaps. The judge is always obliged to interpret the law even if it appears to him to be clear at first glance. We support the opinion that the judge has the power of freedom to create new legal norms in certain cases of legislative gaps. Thus the judge becomes a law maker, creating the rule of law necessary to resolve the specific case. In other cases justice itself is the kind of institutionalized general rule of law in which the judge must, through his creative work, bring forward a new individual rule of conduct that regulates the relations between the parties of the dispute.

On the other hand, interpretative acts of supreme courts contain legal rules and constitute a source of law. As has been emphasized many times in the law, it is not so much of importance the form, but the content. We cannot agree with the claim that case law has no legal obligation. Judicial practice and mainly the part of it, which contains general legal norms (the motives of the supreme courts and their interpretative rulings) gives rise to a direct legal obligation on the lower courts to apply them and to follow them accordingly in a way that are dealt with by any legal rule.

This is the purpose of all norms, and since we claim that the part of the case law that summarizes, analyzes and interprets the norms, also contains legal norms, it is undeniable that this part will be not only relative, but absolutely mandatory for legal entities. The interpretative rule itself has the qualities of validity and the obligation. State authorities and citizens cannot deviate from its binding action. That power is further reinforced by the fact that, in the present case, it is a rule of a public nature which is imperative. It is hardly a serious argument to the contrary that the interpretative decisions are not promulgated. Each separate legal rule rests on the validity of the rest of the system, that is, its meaning derives from the unity of the due, from a hierarchy not of competence but of norms itself. Thus the set of norms is revealed as a structure of levels, "steps", whose regression is interrupted by the so- "basic norm". It is preconditioned, similar to the axiom in mathematics.

In conclusion case law in the Bulgarian legal system is a source of law and not only subsidiary but a direct one. Naturally, the role of jurisprudence should not be exaggerated, but the principles of law must be respected. The judge has no right to amend the law.

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