

SOURCES OF LAW, SOURCES OF POWER

- Abstract -

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This contribution was part of a seminar in legal theory, which sought to renew the theory of the sources of law, analyzing in detail all the new modes of production of law, especially the use of them by the judge or equivalent institution. Guidelines of this research were based on a new classification of soft law and the theory of the rules of recognition developed by Hart.

In this context, from our historical point of view, we attempted to remind the importance of the actors involved in the formulation of the law, and to illustrate this idea : these actors are either interacting, challenging each other or even competing to conquer the capacity to formulate the law. We thus highlight the constant interaction that seems characteristic of the sources of law traditionally discussed: custom, legislation, judicial decision and legal doctrine. Our paper allows to show some interdependencies that bind these major modes of formulation of law, as well as changes that have affected their legitimacy. The presentation is limited to a relatively small geographic area, namely Franco-Belgian territory, but includes many references to the evolution of international law.

From the Middle Ages to the French Revolution, the sources of law are in effect competing and interacting with each other. Since the 19th century, the question of sources is formally asked, repeatedly, and his response was first "légicentriste", e.g. the hierarchy of norms, the rule of law and the central role of the State. At the same time, this ideal has been tempered both by commentators as practitioners. Global society of the 21st century has not finished questioning this dominant model.

In terms of power relations, the current trend raises questions. First issue of the relationship between population and its ruler, the theory of sources of law then reflected the outcome of the model of a democratic state, especially based on the separation of powers. However the contemporary evolution of sources of law promotes the emergence of non-State law, issue of power in a globalized world. States are now challenged by other actors, often transnational, mainly from worldwide economic associations or non governmental organizations (NGOs), which do not enjoy the same democratic legitimacy.

As a conclusion, the historical contribution will also be located throughout the reflections in legal theory to explain the place and the utility of the history of law in this theory, and in legal theory.