GERMAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 20

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Volume 20

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 20 · 1977

founded by

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Institut für Internationales Recht an der Universität Kiel

DUNCKER & HUMBLOT / BERLIN

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This Yearbook may be cited:

GYIL 20 (1977)

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Olshausenstrasse 40/60
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Printed 1978 by Vollbehr u. Strobel, Kiel, Germany
ISBN 3 428 04158 5

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A New Theory of "Sources"

Maarten Bos

I. General Questions

Introduction

The undisputed *pièce de résistance* in the methodology of law is the theory of the "sources" of law. Yet, there hardly is another subject to be found on which such radically divergent opinions are being held, with regard to national as well as international law.

An analysis of existing doctrine on the "sources" of *international* law would certainly be an interesting exercise in international legal methodology. The question is whether, in the end, it would also be a fruitful one. For would not the only lesson to be drawn from it be that every author thinks out the matter for himself and, consequently, that the same has to be done by anybody else setting out on an intellectual voyage in search of these "sources"? At any event, a study of this magnitude would by far exceed the available space. It is, therefore, preferred to use the latter for a critical re-appraisal of the major aspects involved in the subject. References to doctrine will be limited to a small number of writers only — those, namely, whom the present writer happened to find on his path and to whom he owes a certain amount of food for thought, even if he does not in all respects share their views.

The meaning of "sources"

"Source" in its original meaning is a geological concept. It denotes a place on earth where water rises from the soil and comes to light. The term most certainly does not connote the subterranean sheet of water from where the rising starts, nor the further origin of that water: rain, melting snow, a melting glacier. Nor is the geological concept supposed to include the chemical process through which water is made, or the chemical elements of water, as little as it should cover the natural forces ultimately responsible for the hydrological world-situation. In law, however, one cannot escape the impression that the term "source" has been, and still is being, used to indicate all and sundry of these very divergent factors behind the real source, and even more than that. In order to avoid this confusion, the very first thing to be done is to limit the use of "source" to what corresponds to the geological concept, *i. e.*, to those places where law "comes to light". But confusion being so avoided, the term, as will be shown below, for other reasons yet should be thrown out altogether to be replaced by the expression "recognized manifestation of law". The expression is intended to cover all forms in which the normative concept of law[1] is "reflected and elaborated" in a given legal order, *i. e.*, those which may properly be described as "sources", and those which may not. The expression does *not* relate to what, instead of "reflecting" the normative concept of law, "represents" the concept of law, either general or normative: like the principle *pacta sunt servanda* and (possibly) the prohibition of a judicial *non liquet*[2]. "Representing" the concept of law, such phenomena together, so to say, constitute the "definition" of law, and since the definition of law must logically

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[1] On the normative concept of law, see the present writer's Legal Archetypes and the Normative Concept of Law, Netherlands International Law Review (NILR), 72—87 (82—83).

[2] *See infra,* 39—40.

precede the manifestations of law, the elements of the definition are not to be found in these manifestations. They stand by themselves. As a result, a certain relativity attaches to the theory of the recognized manifestations of law, enhanced still by the apparent existence of two approaches to it.

Two approaches to the question of "sources"

The next question to deal with, here, is the purpose of the quest for "sources". One of the functions of the manifestations of law recognized in a given legal order is their legitimizing *rôle* with regard to legal reasoning. No reasoning can purport to be a "legal" one unless it is borne out by one or more among the rules contained in one or more of those manifestations (the elements of the definition of law now being left out of consideration). The purpose of the quest for "sources", consequently, must be to know *where the law may be found* on the basis of which one should reason in case a "legal" reasoning is pursued. One stage further, one may say that the purpose of an enquiry as to what are the "sources" of law is to find out *what the law is*[3]. Both questions — where may the law be found? what is the law? — very clearly are "consumer's" questions, *i. e.*, questions asked not by the "producer" of the law, the legislator, but by a subject of the law, himself devoid of all law-creating power. The interest in "sources" of law hence is a "consumer's" interest — chiefly, at least, as will be seen. In the national legal order, the principal "consumers" of law are individuals and corporations under private law. In those national legal orders in which the State and the lower bodies corporate under public law are liable to appear in Court, they, too, in their capacity as defendants may be termed "consumers" of the law. In this capacity, indeed, they are not empowered to create law. Called upon to justify their acts according to law, they are not allowed to invoke any other rules than those appearing in the official "sources", exactly like their individual or corporate counterparts. This is why, before the Courts, the State and the lower bodies of necessity share the latter's interest in the "sources" of the law. But no sooner do they act as "producers" of law than they lose their interest: making the law themselves, how could they be interested in existing law, if not for purely informative purposes? The law-giver wants to be informed about the law so as to know what rules do exist, what rules not, where his action is desirable, what he should revoke, but not in order to gauge his own rights and obligations. For him, the law comes first, the "source" second, and if a rule of law would not fit into existing "sources", he is able to invent a new "source" in order to accommodate that rule. For it should be realized that the "sources", as much as the law, are of the law-giver's making.

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[3] Cf. *Clive Parry*, The Sources and Evidences of International Law, 1965, 7.

This being the situation in the national legal order, it should be clear from the outset that in the international legal order, too, both approaches — the "consumer's" and the "producer's" — may be recognized, though to different degrees. The origin of the difference is in the absence of obligatory jurisdiction and the ensuing circumstance of the State being all too often *iudex in causa sua*. International adjudication of disputes still is an optional feature of international relations. In the case of two States accepting it either *ad hoc* or more durably, they will, before the Court, be in exactly the same position as individuals and corporations acting as parties in a national Court, or as the State or a lower community defending themselves against a claim brought against them. Their interest in the "sources" of *international* law will then be as keen as that of the latter in the "sources" of *national* law. States before an international Court are, indeed, "consumers" of international law, not "producers" of it. However, being optional international adjudication is the exception rather than the rule. States, normally, settle their disputes out of Court, if they settle them at all. Out of Court, they are fully aware of their *rôle* as "producers" of international law, and as a result the "sources" of international law lose much of their meaning to them. For the sake of argument, they then may, nevertheless, have recourse to the "sources", but also may assert a "source" which in Court would stand no chance of being accepted.

The reason why the "consumer's" and the "producer's" approach to the question of the "sources" of international law should be distinguished is in the key to the literature on the subject of "sources" they provide one with. If a writer is very strict on the "sources" of international law, he, either consciously or unconsciously, thinks of the position States are in before Courts. His will be the "inductive" approach, and he will be a believer in *lex lata*. Professor Schwarzenberger is believed to belong to this category of authors[4]. Professor Jennings in his Lord McNair Memorial Lecture castigated "the present laxity and excessive flexibility in the limits of what may plausibly be alleged to be international law", and expressed his fear "that governments will be disinclined to litigate disputes so long as the tests of what is law and what is not are both uncertain, and themselves disputed"[5]. Much of the "producer's" approach, on the contrary, may be found in Professor Parry's study on *The Sources and Evidences of International Law* already quoted before. In his own words, "it is not wholly heretical to venture the suggestion that, in imaginable theoretical circumstances, the States might be wiser than the Court . . . And, if this be a true possibility, it provides a very profound ground for an appeal

[4] *Georg Schwarzenberger*, The Inductive Approach to International Law, London 1965, 4.

[5] *Robert Y. Jennings*, The Discipline of International Law, Lord McNair Memorial Lecture delivered in the University of Madrid on 30 August 1976 at the 57th Conference of the International Law Association, London, 12; and see his reference to *lex lata* at 4.