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THE RIGHT TO A HEALTHY ENVIRONMENT AND THE CONSUMPTION OF TOBACCO IN THE NATIONAL AND EUROPEAN LEGISLATION

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Abstract:

If in the past the quality of the environment was a non-relevant issue, nowadays the right to a healthy environment represents a fundamental right. Being part of the third generation of the human's rights, formed by the so-called "rights of solidarity", the subjective right to a healthy environment is particularized by a special evolution regarding its legal recognition and guaranteeing and finds its fundament in the social and economic realities of our days. Initially, it has been internationally proclaimed by the Stockholm Declaration of 1972, and subsequently stated constitutional and/or legislative by most of the states. In our country, the recognition of the right to a healthy environment as subjective right has been made relatively late, namely in 2003 through the revision of the Constitution in 1991.

The communitarian legislation does not expressly state it, but the Charter of the European Union on the fundamental rights indirectly protects it, dedicating a special article for the environmental protection. This right is also stated by the jurisprudence of the European Court for Human Rights, being considered as part of the right to private life stated by Art 8 of the Convention.

One of the factors that harm the right to a healthy environment is tobacco consumption, a habit as old as it generates serious consequences on the health of the population.

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Thus, both European, but national, for the guarantee of the right to a healthy environment, a series of legislative measures has been adopted for the prohibition of smoking in closed public areas, the prohibition of publicity to tobacco products, for warning the smokers about the danger represented by the tobacco for their health, for restricting the sale of tobacco in public buildings, schools, hospitals, universities, socio-cultural centres etc.

Key words: *right to a healthy environment; tobacco consumption; ECHR jurisprudence; Directive 2014/40/EU; Law No 349/2002 modified and amended in 2016.*

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1. THE RIGHT TO A HEALTHY ENVIRONMENT – A FUNDAMENTAL HUMAN RIGHT

1.1. Stating the right to a healthy environment both internationally and European

The issue of drafting certain provisions in the area of the right to a healthy environment emerged relatively late, more exactly in 1972 during the first United Nations Conference on the Human Environment held in Stockholm. During it was adopted the "Declaration of the United Nations Conference on the Human Environment", stating a set of rules regarding the rights and obligations of the states in this area, as well as the means for develop the international cooperation.

The importance of this document[1], as it has been already mentioned, is revealed by the fact that for the first time it is explicitly stated the connection between the environmental protection and the human rights, Art 1 stating that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations (...)".

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[1] Daniela Marinescu, *Tratat de dreptul mediului*, 3rd Edition revised and amended, (Buchrest: Universul Juridic, 2008), 18; Dumitra Popescu and Mircea Popescu, *Dreptul mediului. Documente şi tratate internaţionale*, 1st Volume, (Bucharest: Artprint, 2002), 62.

The right to a healthy environment did not enjoy an express regulation neither in the documents drafted during the Second United Nations Conference on the Human Environment held in Rio de Janeiro in 1992. But, the Rio Declaration stated a series seen as procedural rights deriving from the right to an environment: the right to have access to information regarding the environment, public participation in the decision making process and the access to justice for environmental issues.

The first legal instrument expressly stating the right to an environment is considered to be the "African Charter on Human and Peoples' Rights", which stated in Art 24 that "All peoples shall have the right to a general satisfactory environment favourable to their development". Though its feature is only regional, this document is important under the aspect of the evolution of the regulations in this area, all the more so since it comes from a cooperative structure belonging to the third world countries which, due to economic and social difficulties, did not give a significant place to ecological concerns[1]. Similar provisions are found in Art 11 Para 1 of the Additional Protocol[2] to the American Convention on Human Rights in the area of economic, social and cultural rights, stating that "everyone shall have the right to live in a healthy environment and to have access to basic public services".

Generally, after the Stockholm Convention on 1972, many European states have constitutionally state the right to a healthy environment[3] which led to the indirect recognition of the right to an environment as a fundamental human right to the level of the communitarian legal order through the Maastricht Treaty in 1995, which

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[1] Daniela Marinescu, *Tratat de dreptul mediului*, 393

[2] Adopted at San Salvador on 17 November 1998

[3] For instance, the constitutional statement of the right to a healthy environment has been made in Spain on 1978, in Turkey on 1982, in Croatia on 1990, in Germany on 1994, in Belgium and Sweden on 1994 and 1999, in France on 2005, in Montenegro and Luxembourg in 2007 etc. For a detailed presentation of the constitutional statement of the right to a healthy environment in the EU Member States, see also: Adrian Nedelcu and Oana Surdescu, "Reflecţii cu privire la constituţionalizarea dreptului la un mediu sănătos în Uniunea Europeană", *Sfera politicii* 7/149 (2010): 65-75

stated that "the Union shall recognize the fundamental human rights, as are guaranteed by the European Convention in Rome (1950) and as it results from the constitutional traditions, common to Member States, as well as from the general principles of the communitarian law". Subsequently, the right to environmental protection has been stated by the Charter of Fundamental Rights of the European Union[1] which, after the entrance into force of the Lisbon Treaty[2], on 1st January 2009, has received the mandatory legal force. This moment has represented a true revolution in the area of recognizing and guaranteeing the right to a healthy environment.

1.2. Stating the right to a healthy environment by the E.C.H.R jurisprudence

At European level, the European Convention on Human Rights, adopted in 1950, did not expressly state the right to a healthy environment. Neither the additional protocols concluded in time, including in the Convention other fundamental rights, did so. Only as effect of the extensive interpretation of the area of application for certain rights explicitly mentioned by the Convention, performed by the European Court of Human Rights (E.C.H.R), the right to a healthy environment was considered a part of the right to private life stated by Art 8 of the Convention, thus being protected.

The statement of this right has been performed by the European jurisdiction through ricochet, using the praetorian way, reason for which a violation of the right to a healthy environment cannot be invoked as such in front of the E.C.H.R, because it is not guaranteed in terminis by the Convention. Thus, the European Commission for Human Rights was the first one which stated that the violations brought to the environment

[1] The Charter of Fundamental Rights of the European Union has been proclaimed by the European Commission, the European Parliament and the Council during the European Council held in Nice, on 7 December 2000

[2]The Lisbon Treaty has been signed on 13 December 2007 in Lisbon and has been ratified by Romania in 2008, by the Law No 13/2008

through certain harmful activities may affect the quality of life of a person and, by that, affecting his private life[1].

Also, in 1990, the Court has considered that in the case Powell and *Rayner v The United Kingdom*[2] that the strong sound emanations generated by the operation of an airport near the applicants' homes may affect the physical condition of the individual and may therefore harm his or her private life. Moreover, the E.C.H.R has stated that the plane noise has diminished the quality of the private life and the comfort of the house and has mentioned that the sound pollution generated by planes, very important from the perspective of its level and frequencies, may affect the value of the immovable assets or even turn them into unsellable assets, thus representing a partial expropriation[3]. As it was already mentioned[4], the case *Lopez-Ostra v Spain* (1990)[5] marked the moment in which the right to a healthy environment has entered the area of action of the Convention, as effect of the interpretation of Art 8. In solving this case, the Court has considered that the serious environmental damages may attempt to the welfare of a person and deprive her of the use of her domicile, endangering her private and family life, without seriously endanger the health and for most cases must be considered a fair balance between the private and public interests. The Court has ruled that the state did not succeeded in maintaining the balance between the interests for the welfare of the community claiming the establishment of a wastewater treatment plant and the interests of the persons consisting in

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[1] Corneliu Bîrsan, *Convenţia Europeană a Drepturilor Omului. Comentariu pe articole*, *Drepturi şi libertăţi*, 1st Volume, (Bucharest: All Beck, 2005), 622

[2] E.C.H.R, Decision of 21 February 1990, case file no 9310/81 A172, available at http://www.echr.coe.int/Pages/home.aspx?p=home

[3]Michele de Salvia, „Mediul înconjurător şi Convenţia Europeană a Drepturilor Omului", *Pandectele Române* 6 (2003): 165

[4] Doiniţa-Luminiţa Niţu, „Dreptul la mediu", *Themis – revistă a Institutului Naţional al Magistraturii* 3 (2005): 48; Petrică Truşcă and Andrada Truşcă-Trandafir, "Dreptul fundamental al omului la un mediu sănătos în jurisprudenţa CEDO", *Revista Transilvană de Ştiinţe Administrative* 1/23 (2009): 107-108

[5]E.C.H.R, Decision of 9 December 1994, case file 16798/90, available at http://www.echr.coe.int/Pages/home.aspx?p=home

the right to enjoy respect for their domicile and for their private and family life.

Regarding Romania, it has been convicted for the first time by the E.C.H.R for non-complying with the right to a healthy environment in the case *Tătar v Romania*[1] referring to the negative consequences for the environment of the use of Cyanide-based gold extraction technologies. In motivating the decision, the Court stated that Art 8 of the Convention is applicable for the cases referring to the environment, regardless if the pollution was generated directly by the state or if this liability results from the absence of a proper regulation of the activity in the private sector. In other case in which Romania was convicted by the Court[2], the plaintiff claimed that, because of the proximity with the former rubbish pit and the authorities' passivity towards neutralizing it, was forced to breathe a pestilent air and was subject to a real risk of contracting diseases, by invoking Art 8 of the Convention. The E.C.H.R has considered that, given the conclusions of the studies performed and the duration for which the plaintiff has been exposed to those emissions, the quality of life and the comfort of the interested party were affected in a way which endangered his private life and which was not a simple consequence of the regime depriving of freedom to which the person was exposed at that time.

Thus, regarding the jurisprudential statement of the right to a healthy environment, it can be concluded that the jurisprudence of the European Court guarantees the protection of this right as an individual right under 3 aspects: its belonging to the content of the right to private life, guaranteed by Art 8 Para 1 of the Convention; the existence of a right to information on environmental quality and environmental hazards and the existence of a right to a fair trial in this matter[3].

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[1] E.C.H.R, Decision of 27 January 2009 in the case *Tătar v Romania*, case file 67021/01, available at http://www.echr.coe.int/Pages/home.aspx?p=home

[2] E.C.H.R, Decision of 9 July 2009 in the case *Brânduşe v Romania*, published in the Official Gazette of Romania, Part I, No 326/11 May 2011

[3] Ramona Duminică, *Introducere în dreptul mediului*, (Bucharest: Universitary Press, 2015), 81

1.3. Recognizing and guaranteeing the right to a healthy environment as fundamental right in Romania

As already mentioned in literature[1], the process of recognizing and guaranteeing the fundamental right to a healthy environment has known in Romania an evolution whose moments were significantly influenced by the ratification of the international documents in this area, by the preparation of the adhesion to the European Union and subsequently by the adhesion to it. The constitutional statement of this principle was made relatively late, namely in 2003 through the Law for the revision of the Constitution. Until that moment, the Constitution of 1991 did not expressly stated the fundamental right to healthy environment, but there were provisions equivalent to an indirect recognition of it, stating the obligation of the state to protect the environment. The express statement, as subjective right, of the right to a healthy environment was made by the Law No 137/1995 on the environmental protection and the G.E.O No 195/2005 on the environmental protection, which replaced the framework law[2].

The revision of the Constitution in 2003 inserted in Title II – "Fundamental rights, freedoms and duties", Chapter II – "Fundamental

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[1] Mircea Duțu, „Recunoaşterea şi garantarea dreptului fundamental la mediu în România", *Dreptul* 6 (2004): 99–101; Livia Mocanu and Olivian Mastacan, „Constituţionalizarea dreptului la un mediu sănătos în România", *Studii de Drept Românesc* 3 (2009): 219–225

[2] Art 5 of the G.E.O No 195/2005 on the environmental protection states that „The state shall recognize the right to every person to a healthy and biologically balanced environment, by guaranteeing to this purpose:

a) Free access to information concerning the environment, in compliance with the conditions for confidentiality stated by the current legislation;

b) The right to associate in organizations for environmental protection;

c) The right to be consulted in the decision-making process for the development of the environmental policy and legislation, in the issuance of regulation acts in this area, in drafting plans and programs;

d) The right to address, directly or through organizations for environmental protection, the administrative and/or judicial authorities in environmental issues, regardless a prejudice has occurred or not;

e) The right to compensation for the damage suffered".

rights and freedoms", Art 35 titled "Right to a healthy environment". According to the constitutional provisions, the state recognizes the right of every person to a healthy biologically balanced environment and provides the legislative framework for the performance of this right. Also, the natural and legal persons have the duty to protect and improve the environment.

Therefore, the fundamental right to a healthy and biologically balanced environment is recognized for every natural or legal person, its performance taking place individually or collectively. It has content and nature original by the fact that the constitutional provisions state both the right of every person to a healthy and ecologically balanced environment, as well as the right of every person to protect and improve the environment. Thus, the obligation to protect and improve the environment has a collective feature, being stated as a special guarantee of the fundamental right to a healthy environment, the environmental protection being seen as a fundamental obligation.

The constitutional statement of this right represents the result of the assimilation of a new fundamental right, included in the "third generation", the one of "the rights of solidarity" and characterized by a special dynamics in the area of its legal recognition and guarantee. As such, if the environmental law derives from the humanity's common interest, it is considered that this interest is reflected in the rights recognized for the individual[1].

Also, the right to a healthy environment can be included in the category of the personality rights, stated by Art 58 of the Civil Code.

From a legal perspective, the notion of personality rights refer to those rights exercised over some attributes inherent in the human being, which belong to any person since their birth. As the doctrine states[2], the personality to which these rights refer to, is not limited to the technical

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[1] Mircea Duţu, *Dreptul internaţional şi comunitar al mediului*, (Bucharest: Economic Press, 1995), 66–71; Livia Mocanu and Olivian Mastacan, „Constituţionalizarea dreptului la un mediu sănătos în România", *Studii de Drept Românesc* 3 (2009): 219–225

[2] Ovidiu Ungureanu and Cornelia Munteanu, *Drept civil. Persoanele*, 2nd Edition, (Bucharest: Hamangiu, 2013), 44

notion of the legal personality, in the meaning of being a subject of law. It aims to express more, namely: the human person as a whole, in their biologic, psychological and social reality.

There is not yet a single agreement in the Romanian and in the foreign doctrine on the rights that are part of the category of personality rights. Starting from the provisions of the current Civil Code dedicated to personality, which are divided into 4 sections ("Common provisions", "Rights to life, health and integrity of the natural person", "Respect for the private life and the dignity of the human being" and "Respect owed to a person after their death"), the recent doctrine[1] classifies these rights in relation to the moment in which they protect the values related to the human being: during life or after the death of the natural person. Practically, it is impossible to achieve an inventory of the personality rights, the list being always opened. Moreover, the French doctrinaires[2] consider that currently we are facing a true inflation of the personality rights. Even if the Romanian legislator, by Art 58 of the Civil Code states the personality rights, this enlistment is exemplary and not limitative[3], supported by the marginal name of the article "Personality rights", but also by the end of the article using the wording "…and other similar rights recognized by the law".

Therefore, the right to a healthy environment is part of this category and, having the legal nature as non-property right, has the following legal features: inalienability, insensibility, personality, imprescriptibility, erga omnes opposability and universality.

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[1] Eugen Chelaru, *Drept civil. Persoanele*, (Bucharest: C.H. Beck, 2012), 21

[2] Xavier Pradel, *Le prejudice dans le droit civil de la responsabilite*, (Paris: Librairie Générale de Droit et de Jurisprudence, 2004), 123

[3] Eugen Chelaru, in *Noul Cod civil, comentariu pe articole*, (Bucharest: C.H. Beck, 2012), 63

2. LEGISLATIVE MEASURES IN THE AREA OF THE TOBACCO CONSUMPTION – GUARANTEES OF THE RIGHT TO A HEALTHY ENVIRONMENT

2.1. The health of the environment reflected in the human beings' health condition

Regarding its health condition, civilization has brought on the one hand, remedies to cure many diseases and, on the other hand itself it represents a favouring source or factor for the development of many maladies. This is precisely why today "we are in the presence of a true pathology of the civilization which, if not prevented and countered in time, it will bring great harm to the health condition of the members of the contemporary and future society"[1]. A serious problem for modern society is the pollution, in its different forms of manifestation, starting with the air pollution (physical and chemical), of the soil, water, food pollution, sound pollution and even moral or demographic pollution.

As a socio-medical problem, the pollution is met both in civilized countries, as well as in the poorly developed ones. By referring to the pollution as a global matter, Jonathan Raban has stated a phrase of an amazing truth: "In a poorly developed country is preferable not to drink water, and in a super-developed country would be ... breathe"[2]. The interdependence of the natural phenomena is also confirmed by the causality relation proven to be between harming the human environment and their health condition[3].

Both life and health represent biological, but also legal notions, protected by the national legislations, as well as by the international or regional treaties. The rights to life and health are in a tight connection with the human right to a healthy environment. Every person must be aware of the fact that the right to a healthy environment also refers to the

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[1] Irina Moroianu-Zlătescu and Octavian Popescu, *Mediul şi sanătatea*, (Bucharest: Romanian Institute for Human Rights – I.R.D.O Press, 2008), 10

[2] Moroianu-Zlătescu and Popescu, *Mediul şi sanătatea*, 10

[3] Octavian Popescu, *Dreptul la sănătate şi sănătatea acestui drept*, (Bucharest: Romanian Institute for Human Rights – I.R.D.O Press, 2007), 40

obligation of protecting this environment, which may offer a proper health condition for human.

However, the environmental quality is challenged, under various forms, by many of our fellowmen.

2.2. Air pollution with tobacco smoke. Effects over health

In Europe, the habit of smoking cigars, though relatively recent, had a rapid development during the first half of the 20th century. The new cigarettes, more accessible for consumers of all ages, of all social areas and with varied incomes, have triggered a true "boom" on the market becoming a danger for everybody's health. In Romania, the first information have been provided by the Ion Ionescu de la Brad with more than 150 years ago, the habit being much older, as attested by a series of archaeological discoveries dating from the 16th century. With the acceptance of this habit, the first rudimentary tobacco processing factories appeared in 1812 in Moldavia and 1821 in Muntenia.

Regarding the cigarette composition, it currently contains over 4000 compounds, some with iritative characteristics, and others (over 50) being labelled as carcinogens. These substances are released in the air as particles and gases[1].

Various studies have shown that cigarette smoke, tar and all other toxic chemicals resulting from tobacco burning, produce numerous and severe aggressions on vital organ functions and systems, being associated with damage to the eyes, teeth, skin, olfactory sense and taste, diminishing the weight of the foetus at birth and affecting various functions of the new-born's body, premature birth to pregnant smoker women, etc.

Both active and passive smoking (involuntary) are very harmful because of the risk of their most feared consequence, namely the lung cancer, which annually kills more people than any type of cancer (90% being caused by smoking). This finding is even more alarming as Romanians are recognized as big smokers, despite the smoking reduction measures adopted in the European and even world context. Tobacco

[1] Cristian Vlădescu et al., *Fumatul şi sănătatea publică în România*, (Bucharest : Center for Health Policies and Services Press, 2004), 2-4

smoke is present in smoking rooms (dwellings), but also in places where smoking is prohibited, such as restaurants, hallways and waiting rooms of institutions, cultural and educational buildings. This phenomenon is so spread and often times so intense, that tobacco smoke pollution has become the most powerful and noxious circumstance of air pollution. Therefore, it is hoped that this emission will be at least diminished, as a result of the recent measures to ban smoking in enclosed public, sanitary, educational institutions etc.[1].

2.3. Union and national legislative measures against smoking

The studies dedicated to this area[2] have emphasized that the strategies against smoking must occupy two levels: individual and social. Beyond the individual decision, legislative, economic and educative actions are necessary – all corroborated in the meaning of influencing the individuals' behaviour towards smoking. The international experience in the legislative area has proven that the control of the tobacco consumption must approach three main directions: reducing the accessibility to smoking products, informing the smokers regarding the risks to which are exposed by adopting this habit, protecting the health of non-smokers.

One of the most important legislative measures adopted in the European Union against tobacco consumption is the Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC[3].

Art 3 Para 1 of this Directive established that "the emission levels from cigarettes placed on the market or manufactured in the Member States ('maximum emission levels') shall not be greater than: 10 mg of tar per cigarette; 1 mg of nicotine per cigarette; 10 mg of carbon

[1] Moroianu-Zlătescu and Popescu, *Mediul şi sanătatea*, 19-20
[2] Vlădescu et al., *Fumatul şi sănătatea publică în România*, 6-8
[3] Published in the Official Journal of the European Union, L127/29 April 2014

monoxide per cigarette. Also, it stated that each unit packet and any outside packaging of tobacco products shall carry the health warnings in the official language or languages of the Member State where the product is placed on the market. The Member States have the obligation to insure that the health warnings on each unit packet and any outside packaging are irremovably printed, indelible and fully visible, including not being partially or totally hidden or interrupted by tax stamps, price marks, security features, wrappers, jackets, boxes, or other items, when tobacco products are placed on the market. Each unit packet and any outside packaging of tobacco products for smoking shall carry one of the following general warnings: "Smoking kills – quit now" or "Smoking kills" or the following additional information message: "Tobacco smoke contains over 70 substances known to cause cancer", as stated by Art 9 Para 2.

The communitarian provisions in this area have been transposed in the national legislation by Law No 349/2002 on preventing the consumption of tobacco products and combating its effects, modified and amended in 2016[1]. As mentioned in Art 1 by the legislator, "this law sets forth certain measures on preventing and combating the consumption of tobacco products, by completely prohibiting smoking in all enclosed public spaces, enclosed spaces at the place of employment and children's playgrounds, by means of labelling the packages of tobacco products, by carrying out public information and education campaigns, informing consumers about tobacco products they are about to purchase, by indicating on the final product the tar, nicotine and carbon monoxide content, and by certain measures relating to the use of ingredients in tobacco products, with the goal of protecting the health of smokers and non-smokers from the harmful effects of smoking, preventing the spreading of smoking among minors and ensuring an adequate quality of life for the population of Romania".

[1] Published in the Official Gazette of Romania, Part I, No 435/21 June 2002, modified and amended by the Law No 15/2016 published in the Official Gazette of Romania, Part I, No 72/1 February 2016

The most important measure created to guarantee the right to a healthy environment established by Art 3 of this law is represented by the total prohibition of smoking in all enclosed public spaces, enclosed spaces at the place of employment, public transport, and children's playgrounds, sanitary and educational units, as well as in those for child's protection and assistance. Inmate cells in maximum-security prisons are exempted from these provisions. Also, smoking is permitted in specially designated rooms only in the transit area of international airports, provided the following requirements are met:

a) the space is used exclusively for smoking;

b) is not a passageway or access to enclosed public spaces;

c) is equipped with working ventilation systems that ensure that smoke is exhausted by negative pressure;

d) is equipped with ashtrays and fire extinguishers and set up in compliance with the legal provisions in force regarding fire prevention and fire fighting;

e) is marked in a visible place by signs reading: "Smoking room", "Smoking area".

The sale of individual cigarettes, cigars and cigarillos and the sale of tobacco products to youth under 18 years of age shall be prohibited, as well as the sale on the premises of state-owned or private health care and education facilities shall, representing other important measures stated by the Law No 349/2002 for limiting the tobacco consumption.

The provisions of this law also refer to the obligation of the Ministry of Education and Research, the Ministry of Health and the National Youth Authority to develop and implement national education programs, as well as the obligation of the national radio and television stations to make available a broadcasting slot of minimum 30 minutes weekly, for the broadcasting of promotional materials to prevent and combat the consumption of tobacco products.

CONCLUSIONS

The introduction of serious legislative measures to control the tobacco consumption has joined the other legal provisions aiming to

guarantee the right of each individual to a healthy environment, as well as his right to health. Simultaneously, it has been showed that the "legislation represents the essence of an efficient control for tobacco consumption. It reveals the deep values of society, institutionalizes its engagement, creates a concentration of the activity and controls the private behaviour in ways unavailable for the informal measures. But, the adoption of a powerful legislation entails serious difficulties. Among them we can mention the limited understanding of the issue by the public, as well as the need to develop the national "capacity" – infrastructure and resources for a critical mass of supporters, while the largest barrier for success is the extraordinary opposition of the tobacco industry and its allies"[1].

If until 2016 we visited a local public food space, we had the opportunity to inhale a lot of tobacco smoke, regardless of our table seat, now things have changed in a radical manner, which proves that a well shaped legislation is useful when respected, either voluntarily or as a result of coercive measures.

If this state of things could be improved by an effort of effective application of all legal provisions above mentioned, there is still an area in which the tobacco pollution has remained unsanctioned. We have in mind the millions of cigarette leftovers that are thrown at random after they were smoked. The harmful contained substances which often reach the ground and the groundwater, which they pollute.

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CITIZEN'S TRUST IN PARLIAMENTS – SOME CONSIDERATIONS

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Abstract:

Today we see very often that the limits of social trust is expressed by the lack of presence to vote, among any other used tools. In this case, we should think where the fracture between citizens and public institutions is, because in all democratic states, only the vote offered the perfect "social mirror of society on a specific moment". What is the real relation between citizens and parliaments on these years and what kind of future we can predict is the main topic of this text.

Key words: *Citizen; trust; parliaments; good governance; loyalty; protests.*

INTRODUCTION

Parliaments are – or should at least be – the central rule-making institutions in democratic countries. If people do not have faith in the institution making the rules, it is less likely that people live by them. Consequently, it is beneficiary if trust in parliament is high. But it is also a normative good in itself. If the people do not trust the key institution whereby they can exercise "rule by the people over itself," democracy itself is endangered. Secondly, trust levels should be reasonably even spread among relevant social and political groups in a society because parliament should ideally be a nonpartisan level playing field. However, because the majority in parliament typically chooses and sustains the

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acting government, one could say that legislatures in parliamentary democracies should not be level playing fields. According to this argument, there should be differences in trust in parliament between groups of individuals with varying political affiliations. Supporters of the majority in parliament should be expected to have higher trust in the legislature compared to citizens who voted for the opposition[1].

This is just the theory. Unfortunately, in the last decade we have noticed a big fall of the voters' number at the parliamentary elections, which is accompanied by a lack of trust in the legislative institutions (national and local ones). In fact, the last years become an argument for executive institutions; for their power and possibility to have a stronger role in daily life of societies. There is a balance - executive win, but legislative loose. Predicts this a good future for governance and for mutual trust between citizens and public institutions?

1. The study of trust as a political phenomenon or cause of concern runs back over two millennia. "When Tzŭ Kung asked what were the essentials of government, the Master replies: "Sufficient food, sufficient forces and the confidence of the people." (Confucius, c. 500 BC, p. 571)[2].

190 of 193 countries now have some form of functioning parliament, accounting for over 46,000 representatives. The existence of a parliament is not synonymous with democracy, but democracy cannot exist without a parliament. Although varying hugely in power, influence and function, almost every political system now has some form of representative assembly. A global opinion poll in 2008 found that 85 percent of people believed that the 'will of the people should be the basis of the authority of government'[3].

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[1] Soren Holmberg and Staffan Lindberg and Richard Svensson, "Trust in parliament", *Journal of Public Affairs*, 1 – 2 February – May (2017): 1.

[2] https://parliamentsandlegislatures.files.wordpress.com/2015/04/psa-paper-8.pdf, p.1, accessed on 16.07.2017

[3] Global Parliament Report 2012, http://www.ipu.org/pdf/publications/gpr2012-full-e.pdf, accessed on 16.07.2017

In this paradigm, we must underline that just some dictatorial regimes refuse to create any form of national representing institution, because even for the most brutal leaders there is necessary to "obtain some clothes of social agreements for their legal projects". A great assembly – no matter as is its name – exists almost in every state, because public servants are recruited from the people and their legitimacy cannot exist is there are no links between them, their institutions and citizens.

These links are considerably developed during the electoral procedures (on campaign and election day), because in that moment everyone can see the real dimension of administrative involvement in politics, but also the social attitude about this process. In fact, these links represent the source for some mass protests which are able to change the result on the election's day.

2. In a perfect society, Parliament should ideally be a nonpartisan level playing field, not perceived as being partial in support of any special political, economic, or social groups. Parliaments should in the best of all democratic worlds inspire the same amount of confidence across the whole society[1].

However, because many parliaments in reality functions as the support base of governments – the majority in parliament chooses and sustains the acting government – there is a clear partisan element. And it could be argued that this partisan function is one of the constitutive functions of a parliament, at least in a parliamentary democracy[2]. It is obvious that the separation of people between parties means in fact that unanimity is hardly achieved. Great majorities can be obtained just as coalitions, but not as a result of vote, because in this second case we should have doubts about the correct elections. Of course, there are some special moments when a party can win in a tremendous way, but in a democratic system this is just an exception.

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[1] Holmberg and Lindberg and Svensson, "Trust in parliament", 2.
[2] Ibidem.

Separation between citizen's political options is just natural in a free world and it has two moments, ante and post-elections.

In the first case, citizens look carefully to the politicians and program proposed. This analyse fundament the decision on the Election Day, and in many cases the vote option is clear before the voting day. Here the recruitment of new politicians is important – without them, a party collapse and the participation to elections is weak.

The second moments represent the analysis of "what politicians do with the power received from the elections". In this case, citizens watch more or less carefully (depending by their level of education and social conscience, of course) the way how politicians act daily.

3. Political obligations, as these are commonly understood, are general moral requirements to obey the laws and support the political institutions of our own states or governments. There is a moral obligation, because in no legal system electoral promises are guaranteed by the force of law.

The requirements are *moral* in the sense that their normative force is supposed to derive from independent moral principles, a force beyond any conventional or institutional "force" that might be thought to flow from the simple facts of institutional requirement (according to existing rules) or general social expectations for conduct[1].

Only the good execution of political attributions receives the trust of citizens. Trust is created maybe by elections, but it should be defended and extended every day, by actions and good results. After a while – years of good governance / good administrative practices – this trust is transformed into political legitimacy, presented also as political authority.

The most common understanding of political authority or legitimacy sees it as a state's moral *right* to act in the ways central to the conduct of actual decent states, and particularly a right to perform the

[1]A. John Simmons, "Political obligations and authority": 1, https://is.cuni.cz/studium/predmety/index.php?do=download&did=121846&kod=JPM323, accessed on 16.07.2017

principal legislative and executive functions of such states. States with legitimate authority possess the "right to rule": the right to make law (within tolerable moral limits) for those in their jurisdictions and to coerce compliance with that law by threatening and (if necessary) applying legal sanctions. The dominant philosophical view of political authority takes the rights in which it consists to be still more extensive. Legitimate states have not only the right to command and coerce; they have the right to command and be obeyed. A legitimate state has not only a claim to discharge its legislative and executive political functions, but also a claim to obedience and support from its subjects. Understood in this way, the rights in which political authority consists are taken to be just the logical correlates of subjects' political obligations (i.e., of their general moral requirements to support and comply with valid laws and political institutions). The justifications for political authority and for political obligation are on such accounts at least in part identical[1].

4. Effective and efficient public administration, ruled by skilful politicians, promotes and strengthens democracy and good governance. An effectively functioning civil service is essential in order to ensure that democratically elected leaders are able to protect the rights of citizens and mobilize resources through taxes and other sources in order to pay for police, judges, and the provision of services. A consolidated democracy requires administrative capacity of the state to maintain law and order, and to promote and protect public goods such as environment.

Public confidence in the political system – and subsequently the political legitimacy of the government – is increased where the public service delivery system is effective, where the public officials are accessible to local citizens, and where government agencies and departments work together in well coordinated, complementary ways. Equally important is the "capacity to govern" – to make important policy choices, design and implement programs and actions to achieve policy objectives, and anticipate emerging trends and challenges.

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[1]Simmons, "Political obligations and authority", 2 – 3

In this paradigm, citizens start to pressure the politicians and state institutions for effective results. Where citizens fail to support an institution, because of the lack of good governance, they may see no reason to voluntarily comply with its edicts. A failure to comply with it either leads to the requirement for coercion, either violent or legal.

Public pressure on parliaments is greater than ever before. The growth in the size of government has increased the responsibilities of parliaments to scrutinize and call to account. The development of communication technology and saturation media coverage of politics has increased the visibility of parliaments and politicians. The expansion in the number of parliaments around the globe has been accompanied by increased public expectations of what they can and should deliver.

5. We can talk now about the democracy of communication, but not by the perfect answers of national politicians inside national parliaments.

Facebook and Tweeter are the most recent and the most innovative means of mass communication. Its implications for the parliamentary sphere are as a means to foster a more participatory type of democracy by increasing the *responsiveness* of parliamentary decision making and the *transparency* of the parliamentary process. Elected representatives will take the opportunity to connect directly with citizens now that every politician can have the means to distribute unmediated messages at low cost. E-mail will be used extensively and there will be filtering software so that messages from constituents can have priority over those from lobbyists. More members of parliaments will begin to conduct cyber-surgeries, allowing their constituents as well as local interest groups to meet with them via video-conferences[1].

Making Parliament and representatives more transparent has not resulted in greater public affection for them. Jeremy Paxman observes that in much of the popular mind, politicians are all the same. They're a bunch of egotistical, lying narcissists who sold their souls long ago and

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[1] Stephen Coleman, *E-Guide for Parliamentarians. How to be an Online-Representative*, (London: The Hansard Society, 2001), 26.

would auction their children tomorrow if they thought it would advance their career. They are selfish, manipulative, scheming, venal. The only feelings they care about are their own. They set out to climb the greasy pole so long ago that they had lost contact with reality by the time they were in their twenties. You cannot trust a word any politician says and if you shake hands with them, you ought to count your fingers afterwards[1].

In the same time, young people are perceived to be particularly disenchanted with the political process and - as they are the most internet and e-mail literate section of society – many have expressed the hope that the adoption of e-democracy may re-engage them with the political process. Their lack voting participation is not totally joined by a lack of interest for public sphere. It means they understand the public sphere, but don't accept former traditions of parliaments – mainly, the negotiation practices. Internet transparency is not favorable for negotiations and young generation expresses perfectly this paradigm of interpretation.

The generation conflict also brings a lot of pressure for the future of parliaments, because it will be the worst conclusion to consider the national forum of democracy as "victory of gerontocracy against youth". In that moment, the social links between society and politics will collapse and internal national conflicts will rose everywhere.

CONCLUSIONS

In the last decades internet and social media change politics and mostly the politician's behaviour. In this paradigm, there is some "fortress of not-changing". These positions belong to parliaments and to the city councils, because legislative institutions have some specific tools of using, no matter the public pressure are.

Of course, the main institution of democracy is parliament, which is accepted by everyone as a purpose and also as a need of competence, ethics and efficient functioning. Those characteristics are understood by everyone, but the last years shown in the same time in many countries the low level of politicians. As result, there is a crisis of trust and of

[1] Jeremy Paxman, *The Political Animal: An Anatomy, (*London, Penguin, 2002), 14

legislation in almost whole world; bad examples are easy to find and this is not offering a good way for reform of the politics.

Without good practices, we'll have bad predictions for future; young generation is not happy to grow in a society created by others, but not for their habit. In this dissatisfaction, parliaments should be the first to be reformed, but the main question is: how and starting from what point?

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BRIEF CONSIDERATIONS ON THE HISTORICAL EVOLUTION OF JURISPRUDENCE AS SOURCE OF LAW

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Abstract:

The legal practice, also known as the jurisprudence (Lat. jurisprudentia) represents all decisions ruled by all the courts. It is the science of the law[2] *or, in other words, the knowledge of the divine and human things, the science of what is fair and unfair (Ulpian). The jurisprudential law or the common law system (from the English common law, case-law, judge-made law) represents the legal system developed based on the jurisprudence of the courts, auctoritas rerum perpetuo similiter indicatum. In the common law systems, the law is drafted and/or modified by judges, who have the authority and responsibility to create law using the case law*[3].

Key words: *law; jurisprudence; legal norm; source of law; case law*

INTRODUCTION

From the perspective of the way in which the law is born, one can differentiate between the *ius scriptum* and the *ius non scriptum*[4].

Ius scriptum is stated by the public organisms, invested with the power to establish compulsory legal norms for the citizens, who have

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[2] *Dicţionarul Explicativ al Limbii Române*, Romanian Academy, "Iorgu Iordan", Institute for Linguistics (Bucharest: Univers Enciclopedic, 1998), 551
[3] *Marbury v Madison*, 5 U.S. 137 (1803)
[4] *Dig.*, 1.1.6 § 1

entrusted them with this power. It can be the creation of the legislator, which is rarely happening, or, may establish norms previously established as customs. Ius non scriptum includes the norms, arising imperceptibly, through the long-term exercise of the same practice, supported by the knowledge that what it is practiced corresponds to the law in force. In reality, it is a creation of the common good sense. This law so-called *consuetudo, mos maiorum* refers to two elements: a) *usus*, endless and long lasting repetition (duiturna, inveterate consuetudo) of the same actions; b) *opinio necessitatis*, the faith that what is practiced, is in accordance with the legal provisions.

The unwritten law may be based on an error; in this case, the norm established by error cannot extent by interpretation to similar cases[1]. Considered as consuetudinary, it sources from customs, as it is not only resulted from Latin expressions, but also from modern terms: *coutume, Gewohnheitsrecht, practices*, the custom of the place[2].

For the legal science, the notion "source of law" has two meanings: a material and a formal one. In the material meaning, the source of law refers to the social aspect, the factors configuring the law, which determine the action of the legislator[3], and by source of the civil procedural law, in the material meaning, the social actions generating the norms of this branch of law[4].

In the formal meaning, the source of law refers to the means by which the material source is expressed, the form of the *law* in all its norms, to have mandatory powers. Therefore, the specific form of expression of the norms of the civil procedural law is called the source of civil procedural law[5].

The case law is one of the concepts of the science of law to which the most contradictory opinions are related. Two of the largest systems of law, the Roman-Germanic and the Anglo-Saxon ones, traditionally have

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[1] *Dig*., 1.3.39
[2] Andreea Rîpeanu, *Drept roman* (Bucharest: Pro Universitaria, 2008), 17-18
[3] Irina Grigore-Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2010), 117-118
[4] Maria Fodor, *Drept procesual civil* (Bucharest: Universul Juridic, 2014), 38
[5] Fodor, *Drept procesual civil*, 39

separate opinions on the recognition of the jurisprudence as source of law.

The term of jurisprudence is a creation of the Roman law, though the seed of this phenomenon has emerged in the Ancient East (Assyria, Egypt etc.) on the base of that law, which had a sacral feature. In Rome, the jurisprudence defined the activity of the jurist-consults (especially their practice). In time, the term would have to define both the legal decisions, as well as the theoretical knowledges[1].

For the Roman law, the case law was recognized with the condition of its undertaking and confirmation through court decisions. The fact that the courts have used for a determined period, the case law that they created, strengthen then belief that they soon will follow it. The challenge of time represented the best proof in justifying the introduction of the case law and a guarantee for its stability. Such approach meant that only few legal decisions could have established a case law. Therefore, the concept of *constant legal practice* was based.

The Roman-Germanic legal system[2], by declaring the continuity of the Roman law, has waived the active casuistic, in favour of the written law. It has recognized the concept of *res judicata*, according to which the legal decision is mandatory only for the parties who have participated in the examination of the case. Thus, the legal decision has been recognized as legal fact. The echoes were different in the continental European states. The case law in the legal system of the northern European states traditionally has a value that high that certain jurists came up with the proposal to include those legal systems in the family of the common law. Among the states of Western Europe, France had the strongest attitude, the *Code of Napoleon* consecrated the fact that the judge cannot refuse to examine the case under the pretext of the inexistence, uncertainty or insufficiency of the legal norm (Art 90 of the

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[1] S. Neculaescu, *Introducere în dreptul civil* (Bucharest: Lumina Lex, 2001), 137

[2] *The Roman-Germanic law system was crystallized in the 13th century, when the European states received the Roman law and mixed it with their own customary law*. Irina Grigore-Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2014), 39

French Civil Code), but neither can he rule a decision as a general regulation. These two initial conditions have determined the evolution of the legal case law. Though, initially, in Germany and Austria, at legislative level, it has been stated the fact that the law is not created through legal decisions, later the attitude towards the case law has changed. The Swiss Civil Code states that in the case of ascertaining a gap of the law, the judge must act as legislator, following the dominant doctrine and customs. In Southern European states it is recognized the statute of secondary source of law for the case law (Italy). The Spanish Civil Code proposes to judges, for the gaps of the law to consecutively appeal to customs, legal decisions and the general principles of the law. Thus, in the contemporary law of the states belonging to the Roman-Germanic system it is shaped the trend to form the judicial law and the possibility for judges to verify the result of the constant practice.

In the common law states, the concept of constant legal practice has been completely received. It is a paradox the fact that the technique created by the common law judges is very close to the Roman law: *the jurist of the common law, as well as the Roman jurist avoids generalizations and, as far as possible, the definitions. Their method is the active casuistic. They move from a specific case to another and aim to create a valid mechanism for solving each of them*[1]. After a century, the English law intuitively reached the technique of the Roman law[2]. The active casuistic has influenced the particularities of the common law systems (legal continuity, the specificity of the concept of norm, the structure of the law and the system of the sources).

In the literature of the common law states traditionally it is considered that the case law is created by a few judicial decisions. In the process of counterbalancing different judicial decisions by comparing them was shaped a common norm which needed to be developed[3].

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[1] S. N. Milson, *Studies of the History of Common Law* (London: Historical Foundations of the Common Law, 1985)

[2] Milson, *Studies of the History of Common Law*

[3] Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Law School, 1967), 595; Rupert Cross, *Precedent in English Law*. 3rd Edition (Oxford: Clarendon Press, 1977), 261

In the current jurisprudential law, a special attention is paid to single cases, containing the case law (the precedent). The norm, thus recognized has a mandatory feature. According to the most spread conception in the legal literature of the common law states, the judicial law of the case law (precedents) represents the law formed by norms and principles created and applied by the judges in the decision-making process.

To a certain extent, the judicial law is contrary to the case laws. Thus, the judicial case law is the traditional source of law in the common law states. Having this quality, it faced a difficult evolution, its creation lasting for centuries, being finalized by the recognition of the case law (*stare decisis*) in the 19th century, by differentiating the law of the precedent from the judicial law. The principle of the case law has stated that the judges are compelled to follow the decisions of the courts which, according to the law, are placed on a hierarchic superior scale (*the vertical action of the principle of the case law*). The superior courts are compelled to follow their own previous decisions (*the horizontal action of the principle of the case law*). The principle of the case law has proven the general mandatory feature of the legal decision, not only for the parties involved in the case examination, thus permanently shaping the denial in the application of the principle of *res judicata*. The fact that the judges are compelled to consult the case laws and to find the logical connection between cases; the doctrine has examined it as the domination of the law, the limitation of the legislation by the courts, the inner will of the judges. The principle of the case law has permanently recognized the creation of the legal norms by the courts, though subsequently it has been subjected to several modifications[1].

The written form has widened the perspectives of the law, thus contributing to its highlighting among other social norms. The written norms had more advantages (precision, clarity and determination in exposure, the possibility of formulating abstract norms). In the unwritten law is more difficult to determine the content of the norms and to identify the mechanism for its creation.

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[1] Llewellyn, *Jurisprudence: Realism in Theory and Practice*, 595

The jurist has the task to analyze a court decision in order to draft a general norm (*ratio decidendi* and *obiter dictum*). According to the definition of R. Cross, *ratio decidendi* represents a legal norm directly or indirectly examined by the judge, as a necessary step in drafting a conclusion corresponding to the arguments prior adopted by him[1].

Ratio decidendi is a fundamental step in the process of stating the norm of the case law. But, the doctrinarian analysis of this process has not established univocal conclusions until now. As an unwritten norm, the case law has certain particularities for its application. The multitude of the judicial case laws offers to jurists the possibility to select the case law according to their case file. The selection is based on the comparison of the facts grounding the examined case file and of the cause based on whose examination the case law has been issued. The case law has a series of particularities. Thus, it is not possible to determine the moment of its entrance into force because the unwritten form is stated during an undetermined period of time. It is only at a certain stage that we can safely speak of the existence of the norm.

The unwritten feature of the judicial case law makes more difficult the decision to publish them. Publishing the reports which refer to case laws remains an activity of a limited number of commercial entities, the consequence being the publication of certain unofficial editions. These are useful for judges in stating their opinions, without giving them a legal norm. In the same time, such editions cannot objectively comprise all case laws. This is why, in practice, there are controversies regarding the application of unpublished case laws.

For the purpose of exercising the control over the existing situation in the common law states, there were created special councils[2].

Substantial changes in the systematization of the judicial case law have been introduced through informatics. The constant evolution of the case law with the intent of preserving the traditional structure of the

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[1] Cross, *Precedent in English Law*, 261

[2] For instance, in New Zeeland are members of such council (New Zeeland Council of Law Reporting): the General Prosecutor, the General Solicitor, five representatives of the community of jurists and a judge from the Supreme Court.

system of law has generated a series of consequences in the states of the common law[1].

In the virtue of the particularities for its establishment, the case law is retroactive. Thus, although the US Constitution forbids the occurrence of the effects on the past (*ex post facto*), the courts have reached the conclusion that it refers to the statutory law. For the judicial case law, we ascertain the occurrence of the consequences, even if at the moment of the offence there was no legal norm. A less critical evaluation of the retroactive effect is made by the followers of the natural law school. They start from the fact that the judges do not create, but only proclaim a right existing before the adoption of the case law. In this way, judges appeal to the principles of the law to enforce the judgment, which allows a fair precedent to be formulated. In practice, the common law states have initiated multiple attempts to overcome this shortcoming. Thus, it has been solved the question whether such case law shall be established by the judges or it is necessary the normative statement of the action of the case laws, because the law's force is superior to the case law's. Also, the statement of the action for perspective of the case law is connected with the judicial law making, with the attempts to equate the judicial case law with the law.

JUDICIAL PRECEDENT AND THE COMMON LAW

The role of the judicial precedent derives from its contribution to the creation of the single common law, both nationally, as well as at the level of the branch of law. The analysis of this process allows the identification of the connection created between the case law and the courts. Also, it can show us how the case law can contribute to the

[1] First of all, in the law of those certain states was established a different relation between the fact and the law. Thus, the judge by examining that case and ascertaining a gap in the law shall create and apply a new norm. He shall appreciate the factual circumstances, determining their legal value; also, he shall analyze if they condition the occurrence of the legal effects and if they generate a legal norm.

removal of the contradictions between different judicial cultures (states with joint jurisdiction).

Thus, in Great Britain the single common law was formed through legal decisions. This fact has a historical explanation, but not logical[1]. For the English law it is applicable the use of the terms common and case law (precedent)[2]. The establishment of the single law (common) has begun after the Normand conquest. According to English scientist P. Stein, the English law represents a species of the German law, in which the two currents were formed (Anglo-Saxon and Normand). The Normand kings had more success in establishing a centralized governing, managing to maintain the noblemen in a state of dependence, offering the English law a series of specific features[3]. In the creation of the law, a special role was played by the royal courthouses. In case of litigation, the person was entitled to address the local courthouse (the customary law); the church judges (the canonical law); the city court (the commercial law); the baron's court or the royal court (active throughout the country). Initially, the royal courthouses followed the king, settling the litigations. Later, the judges settled in a London's neighbourhood from where they moved for examining the cases. Because in every locality there were a series of customs, the judges tried to take them into account. This situation has been determined by the fact that in the royal courts was used the institution of the jurors, who were locals and in their personal assessment of the litigation were using the local customs known to them. Also the parties had the right to bring witnesses to confirm the existence of a certain custom. Thus, the judges moving around the state became aware of different customs. Returning to London, knowing each other and having the opportunity to communicate intensely (by living in the same neighbourhood), they debated the cases handled and compared the

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[1] A. K. Kiralfy (British journalist), *The English Legal System* (London: Sweet & Maxwell, 1983), 309

[2] The common law was formed both in the courts of common law, as well as in those of the law of equity. In its turn, the contemporary law was established based on the law of precedent and the law of equity (British judicial dictionaries).

[3] Peter Stein, *Legal Institutions. The Development of Dispute Settlement* (London: Butterworths, 1984), 236

judgments handed down in similar cases. The common debate of the practice has eased the establishment of a common position of the judges for similar cases. E. Jenks stated that: "*it is not possible the precise determination of the means for establishing the common law. By means which cannot be established, the royal judges, meeting in London after returning from the territory, for the purpose of examining the cases in centralized courts... and Westminster, have agreed upon the need to merge different local customs in a common or single law, which shall be applied throughout the state*".

Even if the judicial precedent suggests the existence of a certain judicial hierarchy, differentiated by a superior and inferior statute, the British legal system has been fundamentally reshaped and reformed in the past two centuries. The reform did not stop the development of the law of precedents, but has had a significant influence. The unification of the courts of common law with those of the chancellor during the reform of 1873-1875 has conditioned the unification of the precedent law with the law of equity. Because the law of precedents is understood as the law of the jurists, a determinant factor was the qualification made by the jurists. It was supported by the professional corporations existent in the 16th century, establishing certain requirements for the persons applying for membership. They have contributed not only to the maintenance of a high professional level and the prestige of the judicial profession, by guaranteeing continuity in the approach of the law, thus contributing to the development of the single national law. In order to be a good jurist, to build a career in the legal area, was necessary the detailed study of the principle of the precedent. This is the reason why, in many common law states, there has been a stage in which the teaching in legal education institutions was insured exclusively by jurists. They combined the theoretical knowledge with practice. The fact that the teaching was pointed in the direction of the practice and especially towards the law of precedents generated a series of consequences. This gave rise to the method of legal thinking and culture, especially directed towards the precedent. In England, for centuries, schools near professional unions have thrived (*Inns of Court*), where the teaching was insured by lawyers and judges. In the same time, universities like Oxford or Cambridge,

until mid 19th century, were specialized in the teaching of the Roman and canonical law.

One of the forms of the scientific activity consisted in the comment of the judicial precedents. In this meaning, the comments of Brakstone and Coke were noted. Nowadays, the science of the law continues to be developed by judges.

Starting from the premise that the law of the precedents has contributed to the establishment of the single national law and that a series of institutions specific to the common law were created by judicial precedents, the British provincial law finds itself in statutes (written laws), as well as in the unwritten law; but just because the unwritten law finds itself in the decisions of the courts and judges, the latter ones being permanently subjected to the legislation activity; also they must relate to the authority of their predecessors[1].

THE LAW OF PRECEDENTS AND THE COMMON LAW

Beside the fact that the law of precedents has contributed to the creation of the British common law, it has had a significant role also in the family of the common law. Simultaneously with the expansion of the British Empire, the English model has spread on other continents, thus guaranteeing its continuity.

In this context, the Australian scholar A. Castles stated that "*for centuries the method, practice and style of the judicial thinking, which were developed using and around the unwritten British law, have created a specific judicial culture. This was the culture in which the judges, same as the legislator, were recognized as spokesmen of the law...*"[2].

Nowadays, the common law is one of the largest families of law, of which there are states whose population represents 1/3 of the world population, but which are economically, culturally and traditionally different (Great Britain, Ireland, USA, Canada, Australia, Oceania, New

[1] Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului* (Bucharest: IRI, 1996), 208

[2] Alex Castles, *Australian Legal History* (Sydney: Law Book Co, 1981), 553

Zeeland, Nigeria, Ghana, Kenya, Uganda, Tanzania and Zambia). The common element of these states is that in the past they all were under British ruling, which also determined the direct action of the British law, including the jurisprudential one, thus the reception of the principle of precedent

In the national systems of law two stages are to be emphasized: the stage of the active reception of the British jurisprudential law and the acceptance of the principle of precedent and the stage or the establishment of the national jurisprudential law. In addition, simultaneously with the legal norms were created the judicial thinking, technique and the educational system. In other words, *the entire factory of the common law has been transported by colonists in the new territories*[1].

But the question on how the law of the metropolis has influenced the social progress, the social structures, the socio-professional climate and the culture in the colonies arises. The development of the common law was tightly connected with the judicial professionals. Only that their limited number represented an obstacle in the way of the independent development of the jurisprudential law. Neither the colonists had a clear image of the concept of the British common law. They trusted the laws and the legislative organisms, considering that the wide discretionary powers of the judges may be used for the creation of the arbitrary norms. Thus, they appealed the British jurisprudential law associated with the symbols of the natural rights, equity, reasoning, but not with specific norms, established by judges in the process of examining the litigations. It was well known the fact that the common law follows the colonists.

As a result, the common law (jurisprudential) was seen as a natural law, which eased its spreading. In this context, the French scholar R. David stated that "*the thought that the law represents the reasoning, causes for British, according to tradition, a feeling of supranational. The term of common law is usually used without a national label. The*

[1] Castles, *Australian Legal History*, 553

common law is not intended as a supranational law; it is the legacy of all nations of English language"[1].

The French and Italian literature still continues the disputes on the possibility of using in relation to the common law of the masculine or feminine article (*le common law* or *la common law*). In other words, the notion of common law refers to the notion of the right (*ius, droit, diritto, Recht*) or the law (*lex, loi, legge, Gesetz*). In the specialized contemporary English language, the term of law is used both for the right and for the law.

An important element in the creation of the family of the common law was the fact that for the colonial courts, and later for the dominion ones, the common superior court was the Judicial Commission of the Secret Council, which contributed in the uniformity of the national legal systems in the process of establishment. During the examination of the complaints against the judicial decisions from the Community's states, it has been ascertained the fact that at the base of the law of the member states of the common law system were common approaches and principles: "*no matter the differences between the law of the South-African states, the law of the United States, of New Zeeland, most of the fundamental principles have common roots*"[2].

The purpose of the Judicial Commission was to bring the law of the community states in accordance with the British law, so that *the law from the north to the south of the borders to develop as uniform as possible*[3]. Nevertheless, while the national systems were established, the role of the Judicial Commission diminished and even it began to attach more importance to national specificity in the decision-making process. The Judicial Commission has recognized the fact that the force of the common law does not lie in uniformity, but in its capacity of adjusting to the particularities of the national law.

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[1] René David, *Le droit comparé. Droits d'hier, droits de démain* (Paris: Economica, 1982), 182

[2]Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

[3]Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

The jurisprudential law has contributed not only to the uniformity of the national legal systems, but also to the adaptation of the western culture to the local conditions and traditions. In this way was achieved the development of the diversity of the national legal systems.

Also, the jurisprudential law has become the base of all legal systems found under British influence. The long-term domination of the British law over the law of the Community, the particularities of the development of the common law have conditioned a special judicial culture developed on different continents, but which received a determinant unity, supported by the attention paid by every state to the judicial precedents from other states. Such borrowed precedents were called *convincing*. The practice of invoking such convincing precedents has contributed to the creation of a single judicial culture in that family. The jurisprudential law acts as the liaison within this family.

For the common law systems, the process of borrowing the precedents is very active. Thus, 50% of the New Zeeland's jurisprudence is borrowed from Great Britain, 10% from Australia and a very small amount from Canada. In Australia, 30% of the jurisprudence is borrowed from Great Britain and 1% from New Zeeland. Even Great Britain borrows approximately 1% from the judicial precedents of Australia, Canada and New Zeeland[1].

The proof of the fact that the judicial precedent allows the unification of different judicial cultures is represented by the joint jurisdictions. Their specificity results from the fact that the jurisprudential law coexists either with the Roman-Germanic law (French, Roman-Dutch) or with the religious law (Muslim, Hindu). From the category of the states with joint laws are part Scotland, Quebec, Louisiana, India, Pakistan, Israel, Philippines, Trinidad and Tobago and the South-African Republic. For certain law systems, the judicial precedent is placed in second plan, in other, on the contrary it has a new development, because its flexible feature allows it to adjust to different conditions and therefore in a legal system certain branches are formed

[1]Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

based on the common law, while in others on the fundament of the Roman-Germanic law (see Louisiana, Quebec).

In India, the courts have succeeded to merge the jurisprudential law with the religious law (Hindu and Muslim). In fact, the judges not being knowers of the religious norms have managed to find the appropriate solution by attracting consultants. Therefore, in courts the norms of the Hindu and Muslim laws have been subjected to a series of changes, and as result were created the Anglo-Hindu law and the Anglo-Muslim law.

Currently, the law of precedents contributes in solving the Europeanization of the British law or, in other words, the development of the process within which takes place the ascertainment of the European Union standards by the national law. Within the European Union are dominant the states whose legal systems have Roman-Germanic roots, which is reflected in the features of the European law. In its turn, the experience of Great Britain and Ireland is relevant only under the aspect of the mechanisms used for the purpose of adjusting the common law to the European law.

THE EVOLUTION OF THE JURISPRUDENCE IN CONTINENTAL EUROPE

In the Roman-Germanic law system it is accepted the reference to the solutions given in similar cases[1], for the solving and reasoning of certain jurisprudential solutions, even if this legal system does not consider as source of law the precedent. The same phenomenon happened with the Praetorian law over the Roman law[2]. The Praetorian law was formed by the creative solutions of magistrates for the purpose

[1] Neil MacCornick, *Interpreting Statutes, A. Comparatives Study* (Hanover: Neil MacCornick, 1991), 567

[2] All these measures, stated by time, represented *ius praetorianum*, creation of two praetors: urban and pilgrim, established in 242 BC to preside the division of justice between the Romans and the pilgrims (*qui inter cives et peregrinos ius dicit*), Andreea Rîpeanu, *Drept roman. Noţiuni fundamentale. Persoanele. Bunurile*, 1st Volume (Bucharest: Cermaprint, 2015), 65

of supporting, amending and correcting the civil law (*adjuvandi vel supleandi vel corrigenda juris civilis gratia*). Also, the civil and the Praetorian law, often through the abolition of customs, of the judicial practice and the legal experts' opinions influenced each other to such an extent that it could no longer be said whether a norm was of civil or Praetorian origin[1]. Regarding the means in which the praetor reacted to the slow modification of the private law, it must be said that the *ius civile* stated norms mandatory for all citizens (as well as for magistrates). At first the praetors facilitated the application of the civil law, to help it through factual measures[2].

The creative solutions offered by the praetors have represented an importance source of inspiration for the legal norms and institutions of the Roman law.

The legal precedent, as source of law, has played a considerable role also during the feudal age, especially between the 15th and 17th centuries. The centralization of the state power and the establishment of the absolute monarchic regimes have increased the importance of the normative acts issued by the monarch, which has determined the gradual diminution of the judicial value of the precedent. The bourgeois revolutions have created legal systems different regarding its place and role and the recognition of the jurisprudence as source of law.

In its turn, the judicial precedent did not receive the recognition as source of law for the bourgeois continental law. The French civil code of 1804 has prohibited for the courts to rule based on general provisions. This normative act, with considerable influence, has dictated directly the non-application and non-recognition of the jurisprudence as source of law in the legal system of the continental Europe. It is the case of the Austrian Civil Code of 1811 (Art 12) and of the German Code of 1794 which stated that for the decisions to be rendered under no circumstance shall be taken into consideration neither the scientists' opinions nor the

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[1] Andreea Rîpeanu, *Drept roman* (Bucharest: Pro Universitaria, 2008), 47; Kipp, *Geschichte d. Quellen des r. Rechts*, 2nd Edition, p.60; Lévy-Bruhl, "Prudent et Préteur", *Reva historique de droit français et étranger* (1926): 56

[2] Digeste, I.1, *Lex*, 7§1 and *Lex*. 8.

precedent decisions ruled by other courts. As result, with the emergence of codifications, the main source of law has become the law itself, drafted and adopted by the legislative organs. The precedent, though a subsidiary source of law, continued to hold an important role in that particular legal system.

CONCLUSIONS

Both norms, the written and unwritten law, emerging from the same popular will it is natural to have an equal mandatory force. The difference refers only to the means of creation. In the written law, the popular will is manifested, directly or by delegates and expressly, while in the consuetudinary law the same will makes a path, as *tacitus consensus populi*[1].

It results that the norm originating from a custom can abolish a rule belonging to the written law by the fact that is no longer applicable (*desuetudo*), as a new norm, of the written law, can abolish a rule of the consuetudinary law.

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ROLE OF AGENCIES OF EUROPEAN UNION IN PROTECTION OF HUMAN RIGHTS

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Corina Florenţa POPESCU [2]

Abstract:

The orientation in the field of human rights represents a solid regional frame for EU activity in promotion and protection of human rights within overall external policy. By such orientations, the European Union outlines the importance of main European and international legal instruments, norms and standards in the field of human rights.

Key words: *Human rights; European agencies.*

INTRODUCTION

The sources of establishment and guarantee of human rights in European Union[3] have an interesting legal status to the extent that the European Union has a legal nature including an autonomous legal purpose, principles and values, both for existence of individual, and for member states. The concept of protection of human rights in European

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[3]C. F. Popescu and M.-I. Grigore-Rădulescu, *Legal protection of human rights* (Bucharest: Universul Juridic, 2014), 70-72; O.M. Salomia, „Autonomy of Charta of Fundamental Rights of European Union”, *Law* 2 (2013): 254

Unions taken over from constitutional traditions of member states, but it is adjusted to the scopes and objectives of the Union.

The preoccupation of European Union for promotion and observance of fundamental rights is emphasized by the fact that the policies of Union focus on securing the fundamental rights[1]. In this respect, the recent preoccupation of European Union are to encounter a fair and satisfying balance for the member states between protection of fundamental rights and the security of the citizens of Union, including through the agencies incorporated on the level of the union.

EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS

The Agency follows, legally, the European Observer of Racist and Xenophobe Phenomena, created in 1997. Its main objective is to provide to the European Union and member states objective, reliable and comparable information on European level related to the phenomena of racism, xenophobia and anti-Semitism, with a view to help it to take measures and conceive relevant actions. The Agency has been incorporated based on a regulation of the Council from February 2007[2].

The Agency started the activity in March 2007, with the seat in Vienna. The objective of agency is to provide to the institutions of European Union and member states the support and expertise in the field of fundamental rights. The Agency is not entitled to deal with individual claims and has no decisional skills in the ruling field; in addition, it is not entitled either to supervise the situation of fundamental rights in the member states in terms of article 7 of TUE. A multiannual frame of five years defines the fields towards which it has to direct the action of agency. Its duties consist mainly in collecting, analysing, spreading and evaluating the pertinent information and data, elaboration of scientific searches and investigations, preparing studies and studies of feasibility

[1]M.-B. Marian, „*Social contract andissue of humanrightsoppositeto post-modernity",*I, IRDO, *Magazine of Human Rights* 1(2016): 51.
[2]See (EC) Rule no. 168/2007, 15 February 2007, JO L 53, 22.7.2007.

and publishing an annual report related to fundamental rights and thematic reports.

EUROPEAN AUTHORITY FOR DATA PROTECTION

The actuality of the operations of this agency is related to the continuous evolution of technology and includes the paradigm of providing security to European citizens and securing right to private life[1].

According to European Convention of human rights, the states must take the measures necessary to provide for the legal frame[2]for the exercise of the rights and liberties stipulated by convention and efficiency of interdictions related to the occurrence of some immixtures in private life[3]. In this respect, the disposals of fundamental law in our country are subject to the Convention. Therefore, art. 11 par. (2) corroborated to art. 20 of Romanian Constitution, republished, set forth two principles that provide expression to the report between the internal and European legal order[4]. On the one hand, it is emphasized the principle of direct effect by including in Romanian law the international treaties ratified by Romania and, on the other hand, it is noticed the principle of priority of international rules related to human rights opposite to internal law sin case of discrepancy. The constitutional disposals determine a high level of protection of the right to private life.

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[1]Related to the new technologies in the field, their high degree of risk, see C.F. Popescu and M.-I. Grigore-Rădulescu, „Legal aspects of cloud computing services", *National Strategies Observer* 2 (2015).

[2]The legal frame includes the constitutions of states, the laws, normative acts of central or local public administration, international conventionsenforceable in internal law, and the jurisprudence solutions. In this respect, see D. Bogdan and M. Selegean, *Fundamental rights and obligations in jurisprudence of European Court of Human Rights* (Bucharest: All Beck, 2005), 481.

[3]A se vedea C.F Popescu and M.-I. Grigore-Rădulescu, „Aspecte privind respectarea dreptului la viaţă privată de către mass-media" , *Pandectele Române* 10 (2014): 17-28; A. Rîpeanu, „The vocational training of teachers – fundamental component of the processes of redefining the european cultural", *Supplement of Valahia University Law Study* (2016): 281-289.

[4]I. Boghirnea, *General theory of law* (Craiova: Sitech, 2013), 96.

According to art. 26, „public authorities observe and protect the intimate, family and private life", and art. 30 par. (6) stipulates that „the freedom of expression cannot affect the dignity, honour, particular life of an individual or the right to personal image". Complementary, the new Civil Code stipulates that „any natural person is entitled to be protected the intrinsic values of human being, such as life, health, physical and psychical integrity, dignity, intimacy of private life, freedom of conscience, scientific, artistic, literary or technical creation"[1].

On level of European Union, the European Authority for Data Protection must assure that the institutions and bodies of European Union observes the right to private life of citizens when processing personal data[2]. During their activities, the institutions and bodies of European Union process personal data of citizens, in electronic forma, written or visually. Processing includes collecting, registration, storage, recovery, transmission, blocking and delete of data. The European Authority for Data Protection has the mission to secure the observance of strict norms related to protection of private life, governing such activities. The main activities include:

- Supervision of the manner how the administration of European Union processes personal data, in order to secure the observance of the norms of protection of private life.
- Counselling the institutions and bodies of European Union related to all issues concerning personal data processing and related legislation and policies.
- Management of complaints and organisation of investigations.
- Collaboration with national authorities from the countries of European Union in order to provide consistency in the field of data protection.
- Supervision of new technologies with may have an impact on protection of data.

For quotidian operations, there are two main entities:

[1]Art. 58 par. (1) Civil Code.
[2]It was incorporated in 2004.

- The entity „Supervision and enforcement”[1]assesses the observance of data protection by the institutions and bodies of European Union;
- The entity „Policy and consulting” offers to European legislators consulting for data protection in different fields and in the context of elaboration of new legislative proposals.

The institutions and bodies of European Union are not allowed to process the following personal data:

- Racial or ethnic origin;
- Political opinions;
- Religious or philosophical opinions;
- Trade union membership.
- Health and sexual orientation if these are necessary due to medical reasons

The stages to follow by citizens in order to notify that their right to private life have been breached by an institution or body of European Union:

- To contact the staff of European Union dealing with the process of data on the date of claimed infraction;
- To contact the persons in charge with data protection[2]from the institution or body of European Union committing the infraction;
- Submitting a complaint using an online form;
- Starting an investigation and, if it deems the complaint grounded, it will be communicated the manner of ratifying the situation;
- Appeal at the Court of Justice.

In the year 2016 it was published in the Official Journal of European Union the new rules of data protection. The legislative pack related to data protection on European Union level contains the (EU) Rule 2016/679 on protection of natural persons related to processing personal data and free circulation of such data and abolishment of Directive 95/46/EC (General rule on data protection) and Directive (EU)

[1]It was incorporated in 45/2001.

[2]By (EC) Rule 45/2001 it was instituted the obligation of every communitarian institution to appoint a person in charge with data protection.

2016/680 on personal data protection within specific activities carried out by the authorities of law enforcement.

The (EU) Rule 2016/679 updates the principles set forth in the field of protection of private data. The General Rules of Data Protection entered in force on the date of 25 May 2016 and will be directly enforceable as of the date of 25 May 2018.

EUROPOL

The Mission of European Police Office (Europol) is of enforcing law and deal with the increase of safety level in Europe, by granting specialized support to competent authorities from the member states.

Europol is an entity of Union supporting and consolidating the activity of cooperation of competent authorities of member states with a view to prevent and combat organised criminality, terrorism and other serious forms of criminality affecting two or more of member states[1]. The decision 2009/371/JAI substituted the Convention in terms of article K.3 of the Treaty of European Union related to the incorporation of European Police Office (Europol Convention). Europol offers support to member states to face the common challenges in the fight against terrorism. As agency of Union of law enforcement, Europol acts to combat the forms of criminality affecting the interests of the Union and for the protection of fundamental rights of European citizens.

The activity of Europol is guided by the Strategy 2016-2020, as well as by the annual work programme. In 2010, EU elaborated a multiannual cycle of politics in order to secure an effective cooperation between the national agencies of law enforcement and other bodies (of EU and not only) related to international infractions and organised criminality. This cooperation tries to prevent the threatening represented by organised and serious criminality (SOCTA).

[1]Related to the main activities and attributions of police on the level of some states of European Union, of other European states and other states of the world, see M.-I. Grigore Rădulescu, *Attributions of Romanian Police* (Bucharest: Universul Juridic, 2015), 324-385.

EUROJUST

EUROJUST was incorporated based on the Decision of Council 2002/187/JAI, amended by Decision of Council 2009/426/JAI dated 16th December 2008, in charge with increasing the efficiency of national authorities of criminal search and investigation when facing serious forms of organised and cross border criminality. EUROJUST represents a centre of judicial expertise for activities of effective combatting of the forms of organised and cross border criminality within the European Union.

Its mission is to support and consolidate the coordination and cooperation of national authorities in the fight against serious forms of cross border criminality affecting the European Union.

Each member state detaches to Hague a superior representative, to work at EUROJUST. The national members are of profession prosecutors, judges or police officers with equivalent competence, with a rich professional experience.

They coordinate jointly the activity of national authorities, in every stage of investigation and criminal search. It also deals with solving the impediments and practical issues generated by the differences between the legal systems of member states.

The national members are helped in their labour by deputies, assistants and national experts detached. If EUROJUST concluded with a third party a cooperation agreement, such state may detach to EUROJUST a connection magistrate. Currently, connection magistrates from Norway and USA are working at EUROJUST. Also, according to more recent European disposals, EUROJUST may send connection magistrates to third states.

Also, the secretary of European Judicial Network, the secretary of European network of contact points related to individual in charge with genocide actions, crimes against humanity and war crimes as well as the secretary of the Network for common teams of investigation have the seats within EUROJUST.

EUROJUST supports the transmission of a prompt answer to the demands of support received from the national authorities or other bodies

of European Union[1]. The meetings of coordination, organised by EUROJUST, gather the judicial, search and criminal investigation authorities, from the member states and, if any, from third states. In this environment, one solves the problems specific to such cases and are elaborated the plans of operative action related for instance to simultaneous imprisonments and inquisitions.

The coordination meetings target mainly certain forms of criminality defined as priority by the Council of European Union: terrorism, drug traffic, traffic of persons, fraud, corruption, cyber criminality, money laundering and other activities related to the presence of organised criminality in economy.

EUROJUST holds a range of attributions and competences, provided to it by the Decision of EUROJUST, with further amendments and completions, among which the fact that it is liable for the petitions of support submitted by competent national authorities from member states. On its turn, EUROJUST may ask the member states to perform investigations or criminal investigations related to some issues.

Also, EUROJUST contributes to solving jurisdiction conflicts if, for a certain file, there are several national authorities competent to perform the criminal investigations or search. EUROJUST facilitates the implementation of some international judicial instruments such as the European arrest warrant. Also, it provides financing to create common teams of investigation and in order to cover their operative needs.

EUROJUST relies, in the activity carried out, on close relations with partners. It refers to both national authorities, and the bodies of European Union, such as the European Judicial Network, Europol, OLAF (for financial crimes within the European Union), FRONTEX, SITCEN, CEPOL and European Network of judicial formation, as well as any other competent body based on the disposals adopted under the Treaties[2].

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[1]Eurojust interferes in approximately 2000 cases per year. It also organizes annually arround 200 meetings of coordination.

[2]Grigore Rădulescu., *Attributions of Romanian Police*, 390-401.

CONCLUSIONS

The orientations in the field of human rights represent a solid regional frame for the activity of European Union in promotion and protection of human rights within global external policy. By such orientations, the European Union outlines the importance of main legal European and international instruments in the field of human rights, as well as of agencies specialised in human rights' protection.

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ACHIEVEMENT OF INSTITUTIONAL BALANCE IN DISPARITY OF COMPETENCES OF THE EUROPEAN UNION INSTITUTIONS

Akbar ISMANJANOV [1]

Abstract:

Post-Lisbon initiatives to address the democratic deficit that attempted to reach greater institutional balance was not synchronous with overall legal framework, and coexistent with the provisions that are reminiscent of the diminished role of the European Parliament in the past. Fostered intergovernmental drift lead to the weakening of the Commission vis-à-vis the Council and the European Parliament. Progressive loss of supranationalism tends to shift to another end of this process, entailing the deminishing the viability of the union and its integrative role. This is specially detrimental at the time of challenges to the unity and principles of the union which necessitate reinstating the stronger role of the Commission. This can be done by providing the right of legislative initiative to the Parliament, preventing it from further encroachment to the competences of Commission, and by integration of the Council. Integration of the Council formed of executives with the executive Commission allowing to reach traditional separation of powers and potentially mitigate the union's intergovernmental drift.

Key words: *EU institutional balance; EU subsidiarity; EU intergovernmentalism and supranationalism; EU competence drift*

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Post Treaty of Lisbon the balance of powers aimed at eliminations of democratic deficit in the European Union has endeavored to enhanced enablement to the principle of subsidiarity, rendering equal regard to the interests of the member states and its representatives in EU bodies. However, the quest for the balance does not signify its completion and fostered traditional concerns on potential overreliance on the EU institutions in either intergovernmental or supranational form. This is followed by the persistence of underlying debates on further reshuffling the inter-institutional and intra-institutional balance of powers within the EU.

From the perspectives of American constitutional doctrine institutional balance is "based on overlapping jurisdictions: the legislative, executive, and regulatory powers are shared by many institutions, so much so that the distinction itself between legislative and executive acts is blurred…".[1] Arguably divergence in perceptions of European integration and sovereignty are based on varying secular histories, institutions, wars and differences in views of the European integration between *dirigiste* inherent to the Southern and Continental Europe and a more Anglo-Saxon *laissez faire* approach.[2] However the obvious distinction of the EU institutional balance seems to be more influenced by continued attempts to align the multiple interests in ever evolving structural complexity. Considering institutional balance from the viewpoint of division of powers, it's possible to define that in the legal context it's inherently refer to the separation of powers. Jean-Paul Jacqué acknowledges that "from a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences".[3] This was supported by statutory position of Art 7(1) of EC Treaty defines that each institution acts within the limits of the powers conferred upon it by the

[1] Alberto Alesina and Roberto Perotti, "The European Union: A politically incorrect view", *Journal of Economic Perspectives* 18(4) (2004): 27.
[2] Ibid
[3] Jean-Paul Jacqué, "The Principle of Institutional Balance", *CML Rev.* 41 (2004): 383–391

Treaties, and lays the ground for the legal meaning of the separation of powers.[1] However, there is range of disparities of the constitutional structure of EU with the traditional model of republic under the separation of powers. For instance Council that is somewhat outlandish in the triad of powers, made of executives but performing the legislative role. Consecutively the obvious distinctive feature of EU is in the power of legislative initiative given to the Commission as the essentially executive body. However, it is arguable that originating legislative proposals from the executive institution is completely alien to contemporary legislative practices. Designing the law by the authorities possessing the expertise on the subject matter is a popular practice in the parliamentary practices in both Common Law and Civil Law states.

Delegating legislative initiative to the body that is responsible for its subsequent implementation also adds persuasion to this state of affairs.

Recent rebalancing of competences, preceded by supranational course is evolving from the emergence of the union, and initially was prerequisite for giving necessary impetus to its establishment as a fully-fledged union. From this regard the initiatives to address the democratic deficit was reasoned by supranational move in balance of powers of the union and its institutions. The trend can be exemplified by expansion of the matters under the exclusive competence of the Union, adoption of double majority voting system that allows to surpass the national vetoes, and most prominently by extension of the European Parliament competences. Formal co-decision procedure introduced by the Treaty of European Union giving the European Parliament the right of amendment of the law and veto power in the second reading became the default ordinary legislative procedure. "Each successive treaty amendment has transferred further powers to the Union, with a corresponding loss of sovereignty in those areas as agreed by the member states".[2]

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[1] Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37

[2] Nigel Foster, *Foster on EU Law* (5th edn, OUP, 2015), 72

The status of the Commission, as essentially EU institution, is aimed at the alienation of it from the member states, that was ensured by exclusion of holding any other position by the Commissioners (Art 245 TFEU),[1] in contrast to the Council and European Council, where member state affiliation is factually necessitated. One of the legal mechanisms enabling that alienation is the mutual responsibility of the Commissioners for pursuing the national interests (Article 17(3) TEU),[2] as well as the member states for influence on their Commissioners (Article 245 TFEU).[3] Arguably, the independence of the European Commission is necessitated by the concentration of exorbitant executive functions on this particular union institution, supported by necessary enforcement mechanisms provided by the constitutional treaties. However, conversely the alienation from the member states may itself be a rational basis for the extended power of this particular institution, as independence of the Commission through the distancing from influence of the member states, necessary prerequisite of the performance of extended power, inherent to the role of this supranational entity.

The monopolistic power of legislative initiative that rests with the Commission alone is based on Article 17(2) TEU,[4] however without a viable enforcement mechanism can be considered to be an exaggerated reliance on the executive bodies in the legislative process. "The Commission possessed the right of legislative initiative, which enabled it to function as an "engine room" of the Community, and to set its agenda."[5] Allegedly the power of the Commission and the Council was balanced by the freedom of the Commission to modify the original proposal anytime before the vote for approval originated in the Treaty of Rome.[6]

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[1] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

[2] Consolidated version of the Treaty on European Union, OJ C 326/13-47

[3] Supra note 1

[4] Supra note 2

[5] Paul Craig, "The Community Political Order", *Indiana Journal of Global Legal Studies*, Volume 10, Issue 1, Article 5 (2003): 79

[6] Ibid

Despite the substantial reduction of supranationalism of the Commission and elevated status of the European Parliament, there are still discrete relics of previous state of affairs. For instance in the approval of the amendments proposed by the Parliament, the rejected amendments can still be adopted by the Council acting unanimously (Art 294(8) and 294(9) TFEU.[1] Absence of response of the European Parliament at the commencement of the second reading leads to the adoption of the measure in question, that are reminders of insignificant role of the European Parliament (Art 294(6) TFEU).[2] In the case of adoption of the law with participation of the Parliament, under Art 64(3) TFEU the possibility to override the opposition of the European Parliament by unanimity of the Council,[3] is also a symbolism of disequilibrium of the powers of the Parliament in relation with the Council established in the past. Herewith the initiatives to equilibrate the competences of the EU institutions, necessitates to be synchronous with overall state of the competences of the EU institutions, based on the holistic view of its statuses.

Arguably the monopolism of the Commission to some extent can be relaxed by with the special legislative procedure, allowing adoption of the law by the European Parliament with the Council's involvement, or by the Council with European Parliament's participation (Art 289(2) TFEU. However the limited scope of these procedures indicates the discrete occasion of the application of these procedures. When adoption of the law by the European Parliament with the Council's involvement in the special legislative procedure require the act to be adopted jointly by the European Parliament and the Council, the procedure of the Council with participation of European Parliament requires ordinary consultation with the parliament (Art 289(2) TFEU.[4] The consultation right of the European Parliament was emphasized in *Isoglucose* case as essential

[1] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201
[2] Ibid
[3] Supra note 1
[4] John Fairhust, *Law of European Union* (11th edn, Pearson, 2016), 144

element of the institutional balance,[1] along with requirement for genuine cooperation with the parliament emphasized in *Roquette Freres v Council.*[2] However, non-binding effect of the Parliament's opinion on the Councils seems somewhat an illusory incentive. "In general, when controversial issues need to be resolved by the consultation procedure and unanimity voting in the Council, the preferences of the Commission and Parliament are of limited relevance in determining the final policy outcomes".[3] "…Parliament cannot demand that its amendments be accepted. The Parliament ultimately either has to accept the proposal in totality or reject it in totality. It is therefore a negative power rather than a true (positive) legislative power".[4]

Monopoly of the Commission in the legislative initiative is institutionally diminished by the number of contra factors. Legislative role of the Commission can be limited by initiating the proposal rather than its complete elaboration, which requires listening at the many other actors, with subsequent detailed scrutiny of the proposal in the Council and European Parliament. "In large part, the legislative process was one in which the Commission proposed, and the Council disposed."[5] The only mechanisms to ensure the forthcoming effect of the Council was in setting the obligation on the Commission to state the reasons of non intention to follow a Parliament's request to submit a legislative proposal adopted in Treaty of Lisbon under Art 225 TFEU,[6] that is also doesn't seem to be viable instrument. There are also inner factors having effect in increasing the view that the power of the Commission is being sourced from the Committees consisting of representatives of the member states that forms the Commission. External factors suggests that the power of

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[1] Joined cases 138 & 139/79, *Rocket and Maïzena* [1980] ECR 3333.

[2] Case 138/79 Roquette Frères v Council [1980] E.C.R. 3333

[3] Robert Thomson and Madeleine Hosli, "Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision-making", *JCMS*, Volume 44, Number 2 (2006) :391–417,414

[4] Fairhust, *Law of European Union* ,143

[5] Craig, "The Community Political Order", 80

[6] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

the Commission in legislative initiative overall can be diminished by the policy making role of European Council, giving the general political impetus to the Union and settling the legislative direction and priorities. Maintaining its own course by the Commission remains rare and can be susceptive to criticism from the Council for not fulfilling its obligations.[1]

Delegated power of the Commission to adopt non-legislative acts under Art 290 TFEU,[2] can be considered as laying the ground for the encroachment of the executive institutions into legislative. However the ante and post conditions are narrowing down the application of this power in practice. Ante condition requires that it shall be applicable when legislative act envisage that in question, obviously to achieve the flexibility required for the purpose of regulation. In terms of post condition, application of the delegated power is being jointly monitored by the Commission and Parliament, and can potentially be revoked under the conditions given in act Art 290 2(a) TFEU.[3] However there is a popular belief that delegated power is entitling the European Parliament with the limited legislative function, balanced against the power of the Commission to initiate the law. However, the skepticism on this regard concerns the ability of the Parliament to fully utilize this tool in policing role of the Commission over the delegated power.

Supranational role of the Commission can also be diminished by the constitutional grounds over its formation, as principle of representation 'one commissioner per member state' cannot exclude the national interests in decision making. "From a political point of view, one cannot prevent the Council from withholding its support from proposals made or decisions taken by an institution which are composed intergovernmentally, when – in the Council's view – that institution's majority does not reflect the general interest, but reflects a compromise

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[1]Lucia Serena Rossi, "A New Inter-institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty", *Global Jean Monnet- ECSA WORLD Conference The European Union after the Treaty of Lisbon Brussels 25-26 May 2010*

[2] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

[3] Ibid

between national interests reached without the weighting (demographic or otherwise) in the Council."[1] In this regard, formation of the Commission with overall number less than amount of member states, envisaged in original treaties, was aiming at the stronger Commission less dependent on the member states.

Accountability of the Commission to the Parliament and its formal approval, also becoming the point of influence on the Commission towards limitation of its role, due to formal election of the Commissioners by the European Parliament, despite of the assignment of the Commissioners by the member states. In intra-institutional level, marginalization of the Commission is going on through the proliferation of the agencies performing the competences of the Commission that have external accountability, which is leading to the dispersion of its functions.

Reduced supranational role of the Commission, resulted in power struggle between the Council and the Parliament over its control, is also symbolism of the struggle between supranational and intergovernmental methods. "Two different ideas about the role of the Commission are evident: the latter can be conceived as an independent and strong proactive institution or, on the contrary, as a sort of Super-secretary of the European Governments.[2] "If one regards the relations within the institutional triangle, the history of the Community is marked by the progressive growth of the powers of the Parliament to the detriment of those two other institutions."[3] "The Commission, considered in the original EEC system as the pivot of the Community method, has along the years progressively lost its political leadership, becoming an eminently technical institution."[4] Herewith the post Lisbon shift of the competences towards the intergovernmental institutions can be associated with the movement to another end of this modality. Weakening the

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[1] Jean-Paul Jacqué, The Principle of Institutional Balance, 41 CML Rev. 2004.

[2] Rossi, "A New Inter-institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty"

[3] Jacqué, "The Principle of Institutional Balance", 383–391, 387.

[4] Rossi, "A New Inter-institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty"

supranational role of the union and the Commission threatening with the loss of its viability that is especially detrimental in inner and external challenges that union is facing as refugee crisis and limitation of freedom of movement and threats of member going out of the union post Brexit, that needs to be mitigated.

Relations of the law making trio Council, Parliament and Commission is often known by the competition going out of the constructive. "The draft Agreement already negotiated between the European Parliament and the Commission seems to very much trouble the Council, according to which it tries to modify the institutional balance between the institutions, by giving prerogatives to the European Parliament that are not provided in the Treaties. Furthermore, it tries to affect the autonomy of decision of the Commission".[1] In paving the ways to compete with each-other, Council and European Parliament seemingly finding more unregulated or broadly formulated grounds, evidencing that constitutional treaties are still leaving broad space for maneuvers. As a response to this contradictions in *Wybot* case Court of Justice is ought to note that "in accordance with the balance of powers between the institutions provided for by the treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the treaties themselves".[2]

One of the concepts, the breadth of which is giving a way to compete is the subsidiarity" which ... is hard to clearly operationalise and scrutinize. Due to its narrow legal dimension, the decision on who should do what in the EU is ultimately left to the political arena."[3] The balance of power scheme in European concept is seem to be designed to be best worked for the cooperation instead of contradiction due to not completely immunizing the institutional encroachment. In contrast with contradictory interaction by limiting the encronchment of concurring

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[1] Rossi, "A New Inter-institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty"

[2] Case 149/85, *Roger Wybot v Edgar Faure* [1986] ECR 2391.

[3] Simona Constantin, "Rethinking Subsidiarity and the Balance of Powers In the EU in Light of the Lisbon Treaty and Beyond", *CYELP* 4 (2008): 152

institutions envisaged in the doctrine of separation of powers, the cooperation schemes in EU proved to be indispensable. Specifically exemplary here are the joint delegations from the Commission and Councils secretary for the conclusion of the agreements for international cooperation. "At the inter-institutional level, the Council and the European Parliament, despite their different representational roles, are interacting intensely through a variety of fora such as trialogues, the conciliation committee and many other forms of informal cooperation".[1]

Presence of general residual powers (Art 352 TFEU) and specific residual powers (Arts 114, 115 TFEU) of EU in enacting the law was widely replicated as a reserving by the Union of the pathways to encroachment in the interests of member states. The legal inconsistency concerns the possibility of enacting the law in the absence of competences on the areas concerned in the constitutional treaties. In imbalance signifies the ordinary consent of the parliament necessary when the Council is acting under the agenda of approximation of the laws under arts 114, 115 TFEU. This led to finding the decisions of the European Parliament and the Council lawful in the tobacco advertisement ban as a measure adding uniformity to the national laws. This is sparkled controversies on reasonableness of application of this measure in *Swedish Match* case,[2] and *Tobacco Advertisement* case,[3] while the measure factually concerned different grounds as the protection of human health.

The earlier emphasized key role of Council and the Commission in the legislative process is not free from criticism. The law making process in these bodies is being subject to the extensive reliance on the ministerial bureaucracy of the Directorate Generals in the Commission, and the COREPER in the case of the Council. "Directorate-General,

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[1] Sophie Vanhoonacker and Christine Neuhold, "Dynamics of institutional cooperation in the European Union: Dimensions and effects. An Introduction", *Dynamics of institutional cooperation in the European Union: Dimensions and effects, European Integration online Papers (EIoP)*, Special issue 1, Vol. 19, Article 1, (2015) :9, Accessed April 14, 2017 <http://eiop.or.at/eiop/texte/2015-001a.htm>

[2] Case C-210/03 *R v Secretary of State for Health, ex parte Swedish Match* [2004] ECR I-11893

[3] Case C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573

assisted by a large number of specialist advisory committees drawn from the appropriate industrial, commercial and other sectors in the Member States that take an active part in drafting new provisions".[1] While it is crucial that the law is subject to wider discussions with the access of every person affected by the decision pursuant to the principle of subsidiarity. Actions of the national parliaments upon attainment of one third threshold to instigate redrafting of the law is often being futile. Herewith the law making is being widely left to the bureaucracy of the COREPER and Directorates, and significantly shaped by the executives of the consecutive ministries. Perhaps this was the reason why the laws bearing the executive mark, are often tend to be overregulated and encroach in wider aspects of life of EU citizens.

The Robert Thomson's answering the question of who has the power in the European Union, has found the Council-centric view in the balance of powers among three institutional actors in legislative decision making as the more relevant.[2] However rising influence of the Council can also be regarded as a victory of the European Council, as the former is considered to be working on its political leadership. "Furthermore the European Council plays an increasingly influential role in policy formulation and overall steering the Union, in particular now very formally following its elevation to a full EU institution by the Lisbon Treaty"[3] Without prejudice to the expert capacity of the Council, the justification of its legislative role is in rendering legitimacy to the Union decision from the competent authorities of the member states, and balance it with the alleged super power of the Commission. On the way towards the further integration and rising competence of the union, potential elimination of this body is possible, which would signify the return to the conventional tripartite structure of separation of powers.

Post Lisbon initiatives to address the democratic deficit, the balance of powers of the union institutions is still widely challenged and

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[1] John Fairhust, *Law of European Union* (11th edn, Pearson 2016), 102

[2]Thomson and Hosli, "Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision-making", 391.

[3] Foster, *Foster on EU Law* , 72

disputed and considered to be to be incomplete. The spread of influence of the European Parliament seems to attempt to compensate discomfort over the lack of legislative initiative by extending the control over the Commission, including its attempts to over-influence on the legislative initiative itself. While the Commission has control over the form, Parliament is still lacking the power over the substance. Herewith elimination of the democratic deficit still leaves the question about political deficit.[1] The essential nature of this power for the European Parliament rests on its representation of people of the member states and the union, without prejudice to separate European citizen's initiative.

Rendering the legislative initiatives to the European Parliament though can lead to reconsideration of the powers, previously given to the European Parliament on the way to progressive elimination of the democratic deficit. "The European Parliament needs to share not only the legislative role (with the Council) but also the political impetus and the setting of priorities (with the European Council). At this stage of the European integration the European Parliament does not need more powers; it needs to develop a vision of Europe which also offers to the EU citizens the ground for a European identity."[2]

CONCLUSIONS

Post-Lisbon balance of competences clearly signifies the union's intergovernmental drift, whereas the extension of the European Parliament powers lead to the reduction of it in the Commission. Political dynamics showing the change of the legal disposition setting the priority of political agenda over the legal disposition, resulting in attempts to further rebalance the status quo. In this regard the legal institutional balance is subject to the persisting political dynamic fostered by rigorous debate. In contrast with the doctrine of separation of powers, the model of EU law that also disregards the traditions of European

[1] Rossi, "A New Inter-institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty"
[2] Ibid

Parliamentarism, was reasoned by representation and aligning the multiple interests. This is fostered proliferation of the sub-institutions and committees, which are adding overall complexity to the system. No matter to the shape that the institutional balance takes, it's always possible to argue that European Union is *sui generis* formation and in a state of flux, striving to achieve higher concordance with the democratic principles. However in reality the institutional balance is often seem to be more concerned with necessity of settling the contrasting interests and as a result of it conflict prevention between the institutions. In expanded union the ultimate challenge is in reaching the genuine institutional balance with proper regard to the interests of the member states in lowered institutional complexity. Preservation of subsidiarity without overreliance on the officials of the member states, with maintaining the autonomy and operability of the union are the ultimate goals in the contemporary shape of the union.

Institutional balance ideally aimed at the continued dialogue often take the forms of institutional struggle over the influence and control. In this regard the institutional balance may not be a very good substitute for the separation of powers, evidenced by never ending dissatisfaction of the institutions with the balance of competences. Extension of Parliamentary powers and elimination of democratic deficit turned the institutional balance at the another end of the pendulum, on progressive weakening of the Commission and strengthening the intergovernmental bodies over the supranational. Overturning the equilibrium away from the Commission can lead to the weakening of the Union's functionality, in attainment of its goals and diminishing its role to an interstate organization.

Dependence on the authority of the member states is an essential feature of the European Union, and important symbolism of non-federalist nature of the European Union. However whenever the dialogue turns into non-constructive forms and confrontation, it harms the operability of the union, which requires to retain supranational role of the Commission. Presumably legislative initiative of the Commission held by supranational institution is acting in detriment to its role and being point o the conflict. Currently Commission is between two encroaching

institutions, the Council and the European Parliament, and post-Lisbon calls of institutional rebalance reappeared in the contrary form. Without prejudice to the importance of linking by the Council with the authorities of the member states, its role may be seen as transitional and can be eliminated at the higher level of integration. The special value of the Counselors, possessing expertise of their respective national legal frameworks can be substituted by non-governmental think-tank groups not represented by any jurisdictional principle.

Merging the Council with the Commission cannot lead to the substantial political vacuum due to similarity in the nature of these bodies, as the executive role of the Commission can correlate with the subsistence of the Council represented by executives. Integration can be seen in combination of senior level executives in the Council with lower level executives in the Commission, in a chamber structure without principal hierarchy. This can lead to inter-institutional balance and mitigation of the political influence of the European Council on the Council, and preclude struggle between European Parliament and Council regarding the control over the Commission. This could also prevent the tendency of the Council to unite with national parliaments against the European Parliament for the purpose of influence over the Commission.

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JUDICIAL AUTHORITY - EFFECT OF THE COURT DECISION

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Abstract:

The judicial authority is the most important effect of a court decision that totally or partially solves the substance of the case, but also when it comes to a procedural exception or procedural incident, as well as to a litigious matter.The safety of the civile circuit would be jeopardized if a solution given by a court could be reconsidered whenever a party deemed it necessary. In essence, the authority of a court decision means that an application can be judged definitively only once (bis de eadem re ne sit actio), and the decision is presumed to express the truth, so it is not necessary to be contradicted by another decision. (res judicata pro veritatehabetur).

Key words*: the judicial authority; procedural effect of the court decision*

The court decision, judicial act through which ends the judgement and which founds the court's release of the case produces a range of effects with important implications for the legal relationships between the parties.

The most important effect of a court decision that totally or partially resolves the substance of the case, or its ruling on a procedural

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exception or any other incident, has as a result of the pronouncement, the judicial authority on the issue settled.The safety of the civil circuit would be jeopardized if a solution given by a court could be reconsidered as many times as a party would deem necessary.[1]

In essence, the authority of a court decision means that an application can be judged definitively only once *(bis de eadem re ne sit actio),* and the decision is presumed to express the truth, so it is not necessary to be contradicted by another decision (*res judicata pro veritatehabetur*).[2]

The decisions courts that have the force of res judicata must be given in contentious matters and come from a Romanian court. At the same time, since a procedural exception, a procedural incident or a litigious matter can also be resolved through an interlocutory sentences, the effect of the res judicata also operates with regard to them, the sentences being latosensu decisions of the court, as provided by Article 424 paragraph 5 of the new Civil Procedure Code and, on the other side, Article 235 of the new Civil Procedure Code expressly provides that the court is bound by the interlocutory sentences.[3]

Not only the final decision (irrevocable in the previous regulation), but also the decision of the substantive courts has the judicial authority, but the judicial authority of these decisions is relative because it depends on the solution which will be given in the appeal. According

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[1]The Commercial Company "Maşinexportimport Industrial Group" SA" v. Romania case, the judgment of the European Court of Human Rights of 1 December 2005, final on 1 March 2006, published in the Official Gazette no. 682 of August 9, 2006, and the High Court of Cassation and Justice, Civil and Intellectual Property, Decision no. 5834 of 19 September 2007 in Tabacu Andreea, *Drept procesual civil* (Bucharest: Universul Juridic, 2013), 314

[2]Tăbârcă Mihaela, *Exceptiile procesuale in procesul civil - Editia a II-a revazuta si adaugita* (Bucharest: Universul Juridic, 2006), 347

[3]Boroi Gabriel and Spineanu Matei Octavia et al., *Noul Cod de procedură civilă, comentariu pe articole, volumul I, ediția a II-a revăzută și adăugită* (Bucharest: Hamangiu, 2016), 950

to the provisions of Article 430 paragraph 1 of the Code of Civil Procedure, when the decision is subject to appeal or recourse, the judicial authority is temporary.

The concept of judicial authority has always presented two valences, a material one - an irrefutable legal presumption of judicial truth, and a procedural one - a substantive procedural exception that prevents the same cause from being re-judged between the same persons.

In the regulation before the new Civil Procedure Code and the new Civil Code, the judicial authority is provided by the provisions of Article 1201 Civil Code of 1864 and the provisions of Art. 166 Code of Civil Procedure.

In the Civil Code of 1864, the judicial authority was regulated as an absolute and irrefutable legal presumption of the decision conformity with the truth and in the Code of Civil Procedure as a substantive, absolute and peremptory exception.

In the new regulation, the judicial authority is no longer treated as a legal matter of substantive law, but is found only in procedural law, as a substantive procedural exception, within the section dealing with the effects of the decisions.

The legal philosophy principle non bis in idem is applied, rather than that of *res judicat pro veritatehabetur*, while the justification of the existence of the power of judgment does not lie in the truth revealed by the previous trial, but in the prohibition of resuming the same dispute between the parties.[1]

The judicial authority is not subject to the legality or soundness of the decision itself. Since it has not been changed in appeals, the decision - even if it has been given in breach of jurisdiction, of rules of form or substance, including public order - benefits from this effect. Therefore, if the interested party has remained passive and no longer has any legal remedy to invoke the nullity, the sanction is permanently covered.[2]

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[1]Vasile Andreea, *Excepțiile procesuale în noul Cod de procedură civilă* (Bucharest: Hamangiu, 2013), 391

[2]Tăbârcă Mihaela, *Drept procesual civil, vol. II* (Bucharest: Universul Juridic, 2013), 584

A theoretical problem with special practical implications is that of the correlation between the notions of judicial authority, judgment power and lispendens.

Regarding the two notions of judgment power and judicial authority, it was originally considered that these syntagms are only different forms to designate the same notion.

Subsequently, a theoretical distinction was made between the two notions, depending on the effects of the final decision, as follows: the first effect is the positive effect, which is the legal basis for the execution of the ruling decision (active efficiency), expressed concisely by the power of judgment, the power which confers to the persons in favor of whom the provisions of the judgment have been given the right to use the legal means to enforce those provisions; the second effect is the negative effect, which is expressed by preventing a new trial for the facts and claims settled by a decision, expressed by concept of judicial authority, against this authority operating the exception of the trial.[1]

In previous case law of the new Code of Civil Procedure, it was decided that the judicial authority had two procedural manifestations, the procedural exception (according to Article 1201 of the Civil Code and Article 166 of the Code of Civil Procedure) and the presumption, a means of proof capable of demonstrating something In relation to the legal relationship between the parties (according to Article 1200 (4), Article 1202, paragraph 2 of the Civil Code). If in its manifestation of procedural exception (which corresponds to a negative, extinctive effect, capable of hindering the second trial), the judicial authority implies the triple identity of the elements provided by Article 1201 Civil Code (object, parties, cause), not all This is the case when this important effect of the decision is positive, demonstrating the way in which some litigious issue in the relations between the parties was previously unrelated, without the possibility of a different statute. In other words, the positive effect of the trial is imposed in a second trial, which is related to the previously disputed questionable issue, without the possibility of

[1]Vasile, *Excepțiile procesuale în noul Cod de procedură civilă*, 394

contradicting it. This rule of judicial authority in the form of the presumption comes to ensure, from the need for legal order and stability, the avoidance of contradictions between the considerations of the decision. How, according to Article 1200, paragraph 4, with reference to Article 1202, paragraph 2 of the Civil Code, in the relationship between the parties, this presumption is absolute, it means that no new action can be instituted in order to claim the opposite of what the status judges previous. The principle of judicial authority corresponds to the need for legal stability and social order, since it is forbidden to resolve the disputed question before the courts, and does not undermine the right to a fair trial under Article 6 of the European Convention on Human Rights, since the right of access to Justice is not an absolute one, he may know limitations, deciding from the application of other principles.[1]

Currently, the positive effect of the judicial authority is governed by Article 431 paragraph 2 of the new Civil Procedure Code. Under these legal provisions, either party may oppose the earlier judgment in a dispute, if it is related to the latter's settlement.

In this case, for a decision to be res judicata, it does not concern the existence of the triple identity of parties, object and cause between the two disputes.[2]

In judicial practice it was note that the positive effect of res judicata acts as presumption, as evidence capable of proving something about the legal relationship between the parties, coming to demonstrate how were released previously certain contentious issues in relations between the parties, without the possibility of being different. In other words, the positive effect of res judicata is required in a second trial that has no triple identity with thefirst, but is related dispute, previously solved without the possibility of being contradicted. This regulation of the power of trial in the form of presumption comes to ensure, from the need for legal order and stability, the avoidance of contradictions

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[1]The High Court of Cassation and Justice, Civil and Intellectual Property Division, Decision No. 995/2009, Bulletin of Cassation no. 2/2009, 37 in Tăbârcă, *Drept procesual civil,*589

[2]Tăbârcă, *Drept procesual civil,* 590

between the decisions. The presumption does not stop the judgment of the second trial, but only eases the burden of proof, the court making findings of legal relations, made during previous judgment and can not be ignored. How pursuant to Article 1200 paragraph 4 with reference to Article 1202 paragraph 2 Civil Code, in the relationship between the parties, presumption of res judicata is absolute, means that what was loosed review in the first issue will be opposite parties in that dispute and their successors rights, without the possibility of proof to the contrary, in a subsequent process that relates to the issue of law or the legal relationship already settled.[1]

As a result, in a subsequent trial, the party who has won the proceeding can rely on the law recognized by the decision in the previous trial, which is endowed with res judicata, without the court or adversary in the subsequent litigation being able to submit the debate the existence of the right.[2]

The negative effect of the res judicata consists in preventing a second trial between the same parties, with the same subject matter and the same cause, provided by the provisions of Article 431, paragraph 1, of the new Civil Procedure Code, as the exception of the competent authority.It should be noted that the effects of court proceedings confer enforceability on the judgment (in the case of an admissible court order), but also the incontestability of the judgment, ie a final judgment can not be called into question by the parties or the prosecutor, only through appeals provided by the law.[3]

Elements of the res judicata when seeking to paralyze a second request in the way permitted by Article 431 paragraph 1 of the Code of Civil Procedure are the parties, the subject matter and the cause, which must be the same in both procees.

As a novelty, the new Code of Civil Procedure makes a distinction between the provisory judicial authority from the delivery of

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[1]High Court of Cassation and Justice, Civil Division I, decision no. 3028/2012 in the Cassation Bulletin no. 2/2013, 40-43 in Tăbârcă, *Drept procesual civil*, 590

[2]Boroi et al, *Noul Cod de procedură civilă*, 955

[3]Boroi et al., *Noul Cod de procedură civilă*, 955

the decision to the review of appeals and the judicial authority which characterizes only final judgments.

Thus Article 430, paragraph 4, of the new Civil Procedure Code establishes temporary judicial authority when the judgment is subject to appeal or recourse, and it works until the expiry of the time limit for appeal or recourse, as the case may be, for the hypothesis in which, although subject to appeal or recourse, the right of appeal was not exercised, or until these legal remedies were dismissed when it was the case. Where the right of appeal is admissible and the judgment is wholly or partly changed or amended, the provisory judicial authority shall be terminated with retroactive effect for the part of the judgment which has been rectified in appeals.

The final decision enjoys res judicata, which will not be affected by the extraordinary appeal.

According to the provisions of Article 430, paragraph 3 of the Code of Civil Procedure, the court decision to take a provisional measure has no judicial authority on the substantive examination.

An application of this rule is found in the matter of the presidential ordinance, which shows that the decision on the substance of the law has the judicial authority on a subsequent request for a presidential ordinance.

Also, the court decision by which a request possessory has been resolved does not have the force of res judicata in a subsequent application to the substantive of the law.

There is no judicial authority in matter of sustentation pension decisions, decisions on the exercise of parental authority or determination the domicile of a minor child, as well as decisions to prohibit them.

As regards lispendens, it was stated that lispendens anticipate the judicial authorithy.[1]

If there have been field several requests summons, characterized by the triple identity referred to in Article 431, paragraph 1 of the Code of Civil Procedure, multiple decisions may be brought before the court of first instance by invoking the exception of lispendens.

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[1]Vasile, *Excepțiile procesuale în noul Cod de procedură civilă,* 397

Where two identical requests by parties, object, cause are one in front of the court of first instance and the other in appeal or recourse, the judgment of the request in the first instance shall be suspended until the appeal has been solved, in order to avoid contradictory decisions.

In order for there to be res judicata, the civil law requires that there be a triple identity between the two requests: the parties, the object and the cause (Lugoci v. Romania, the decision of the European Court of Human Rights of 26 January 2006, published in the Official Gazette no. 588 of 7 July 2006).[1]

The parties must participate in both processes in the same quality.

To have the same quality means to appear in both requests either as a rightholder or as a mandatory in the legal report inferred from the court, no matter how the person participates in the trial personally or through a representative.

In other words, the legal identity of the parties is taken into account, not their physical identity, and it is not obligatory for a person to have the quality of a claimant in both cases, and his opponent to be the defendant.

On the other hand, if in the first trial a person participates as a lawyer, respectively bound in the legal litigation, and in the second trial as the representative of a party, there is no identity required for the trial.[2]

In judicial practice, it was decided that the claimant in the first request could successfully oppose the judicial authority by the defendant in the second request, other than in the first case, if the second defendant had the same legal status as the first defendant.

Any of the joint debtors may invoke on the court's the judicial authority resulting from a final decision previously obtained by a joint debtor in contradiction with the common creditor, even if those co-debtors did not participate in that process.[3]

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[1]Tabacu, *Drept procesual civil*, 316

[2] Tăbârcă, *Drept procesual civil*, 591

[3]Supreme Court, Civil College, decision no. 1094/1963, New Justice no. 3/1964, pp. 134-136 inTăbârcă, *Drept procesual civil*, 591

The notion of parts will situate not only the parties themselves, but also their universal successors and successors with universal title, and in certain situations also the chirographic creditors and the private successors. In this case, the particular successor will bear the effects of the decision obtained against the person who handed him the good before his acquisition by the respective legal act of the same good.[1]

There is an object identity if the two requests relate to the same right and the same good as the respective right.

By the subject of the request for a summons, we understand the claim made, namely the benefit sought by the applicant by introducing the request and the subjective right that relates to the alleged material object.

There is no judicial authority if the first request claims the restitution of movable assets held by one part and the second one claims the payment of the value of the works which, although they were the subject of the first request and there was a decision, were not surrendered, alienated to a third part.[2]

In the case-law before the new Code of Civil Procedure it was decided that there was no judicial authority when a person requested the administrative court to order the City Hall and the Prefecture to issue the title to a land plot on which he built a garage , and thereafter the same person notifies the court requesting the annulment of the prefect's order approving the assignment of the same land to the ownership of another person. The two requests are different in nature and are not based on the same cause.[3]

The third aspect on which there must be identity between the two requests is the cause, in the sense of issue of the alleged right to trial (causa debendi), and not the cause of the action (causa petendi), which consists in the defendant's attitude contrary to the content of the

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[1]Tabacu, *Drept procesual civil,* 317

[2]Constanta Tribunal, Civil Decision no. 190/1992 in Law 5 (1992):85, in Tabacu, *Drept procesual civil,* 317

[3]Supreme Court of Justice, Administrative Litigation Division, Decision no. 367/1994 in the Jurisprudence Bulletin / 1990-2003, p.326 inTăbârcă, *Drept procesual civil,* 592

subjective right of claimant. For example, if the first application claims recognition and respect for the property right acquired through an authentic act of sale and purchase, and in the second request it is claimed that the defendant is obliged to respect the property right following usucapio, the cause of the law is different so that there is no judicial authority.[1]

The case is the basis of the legal relationship inferred to the court, the legal basis of the request. It is not confused with the cause of action, nor with the evidence, the same cause can not be preserved and only other evidence is presented, because there is judicial authority.

In the case-law before the new Code of Civil Procedure it was decided that there was no identity in the present case, because in the first case the claimant (the defendant in the present case) based its action on the title of property issued under Law no. 18/1991, the defendants (the claimants in this case contesting a testament), and in the present case the claimants based their action on a sale-purchase contract authenticated after the first decision.[2]

The judicial authority is also very important in terms of the relationship between contractual and non-contractual civil liability that is the basis of civil actions. After the old doctrinal and jurisprudential dispute, it was concluded that there is no possibility of choice between the two types of liability that can be invoked, elecat une via non datur recursus ad alteram, unless the act is also an infraction and in front of criminal court the civil action shall be initiated ex officio.

Currently, the new Civil Code regulates the obligation to follow the rules of contractual liability if applicable, Article 1350 final paragraph Civil Code, stating that unless otherwise provided by law, neither part can override the application of the rules of contractual liability to opt for other rules which would be more favorable to them.

The importance of this issue of res judicata emerge in the fact that if a court has ruled on a case based on contractual civil liability, an action

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[1]Tabacu, *Drept procesual civil*, 317

[2]Bucharest Court of Appeal, Civil Section IV, Decision no. 714/2000, not published, in Tăbârcă, *Drept procesual civil*, 593

based on tort civil liability can no longer be brought, although the two grounds are different, as in the case contrary to the principle of full reparation, but one-time damage (non bis in eadem).

The same implications also imply the judicial authority of the criminal decision on civil matters, in terms of the civil aspect, because the judicial authority between the criminal decisions follows other rules, without the need for the triple identity of the parties, the object, the cause.

The Code of Criminal Procedure states that the final decision of the criminal court has the force of res judicata before the civil court that is considering the civil action regarding the existence offence and the person who committed it, but the civil court is not bound by the decision to pay or to termination of the criminal procees in respect of the existence of the damage and the guilt of the author of the illegal act.[1]

As regards the part of the decision which passes on the power of the trial, the previous regulation states that only the device of the decision has the power of trial, because it alone has the rights of the parties to the judgment.

According to the provisions of Article 430 (2) of the Code of Civil Procedure, the case-law and the grounds on which it is based, including those which have been settled by a litigant.

The part of the decision that interests the res judicata is the court decision device, because the device is the solution and the device is the one that is enforceable. However, this effect has also been recognized in the considerations, but only to those decisive considerations, which explain, support and reflect in the device.

If the court resolved the case without going into the fund's research, the doctrine of the old regulations considered that its act did not enjoy the power of the trial, so that the admissibility of a new request was not excluded.

The new regulation brings an essential change to Article 430, paragraph 1, to the effect that there is authority also when deciding on a procedural exception or any incident.

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[1] Tabacu, *Drept procesual civil,* 318

It has the judicial authority on the issue it solves, both the decision on the substance of the case and the decision given on the basis of a procedural exception.[1]

In complying with the phrase on the issue will resolve, there will be judicila authority only when the procedural irregularity that led to the admission of a procedural exception persists in the second case. On the other hand, if the irregularity was covered, a new request could be formulated without opposing the judicial authority.[2]

As I have previously pointed out, the judicial authority referred to in Article 431 (2) of the Code of Civil Procedure may be opposed as a substantive defense.

The judicial authority referred to in Article 431, paragraph 1, of the Code of Civil Procedure is invoked by way of exception.

The exception of judicial authority is the main means of capitalizing on the negative effect of the power of trial.

The negative aspect of the res judicata presupposes that an action can not be judged definitively only once, and it is forbidden to resume the same judgment in the identity of the parties, the object and the cause;[3]Therefore, the part who lost the case can no longer challenge the same claim against the same part and invoking the same legal basis.

It is an exception to merit, peremptory and absolute, which may be lifted by the parts, by the judge, even before the courts of recourse.

An issue raised in the doctrine before the new Code of Civil Procedure was whether the interested part could give up the benefit of the power of judgment. It has been consistently decided that the part may renounce this benefit and that the principle of the power of trial is not public order.

In an opinion, it was shown that such a practice is questionable because, taking into account the negative effect of the power of judgment, namely the proper administration of justice and the prevention

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[1]Vasile, *Excepțiile procesuale în noul Cod de procedură civilă*, 402

[2] Tăbârcă, *Drept procesual civil*,588

[3]High Court of Cassation and Judiciary, Civil Division I, Decision 2664/2012, not published inBoroiet al, *Noul Cod de procedură civilă*, 954

of contradictory decisions, the principle of the judicial authority is beyond the private interest of the parts. The court may of its own motion raise the exception if it found the triple identity and reject the petition.

The current Code of Civil Procedure decisively addresses this dilemma; the exception can not be waived because it is the nature of public policy which requires verification of that exception, even of its own motion and even, if appropriate, with the worsening of the part's situation in the appeal.[1]

It is noted that in the contest between the judicial authority and the principle of non-aggravating the situation in their appeal (non reformation in peius), priority was given to the judicial authority, precisely because it is based on the assumption that the d ecision expresses the judicial truth.

Consequently, following the admissibility exception of res judecata invoked by the part or of the court may formally be allowed the appeal by the part who acted in disregard of the provisions of Article 431 (1) of the Code of Civil Procedure and, finally, the request will be dismissed in its entirety, even though, in the decision under appeal, the request had been admissible in part. In other words, as a result of the appeal, the part will not be able to keep what he had obtained in the decision under appeal.[2]

Exceptions of the authority of res judicata can not be upheld if the prescription of the right to obtain enforcement of the previous decision has been fulfilled.

The provisions of Article 706 paragraph 2 of the Code of Civil Procedure state that the prescription waives the right to obtain enforcement and any enforceable title loses its enforceability. In the case of court and arbitral decisions, if the right to obtain the defendant's obligation is imprescriptible or, as the case may be, has not been prescribed, the creditor may obtain a new enforceable title by way of a trial, without being able to oppose the exceptions of the res judicata.

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[1]Vasile, *Excepțiile procesuale în noul Cod de procedură civilă*, 415

[2]Tăbârcă, *Drept procesual civil*, 594

CONCLUSIONS

The safety of the civil circuit would be jeopardized if a court decision could be reconsidered whenever a part considered it necessary, thus by regulating the principle of the res judicata, the legislator strengthens the primacy of the civil circuit stability, while ensuring good administration of justice and prevention of contrariety of decisions.

In essence, the judicial authority of a court decision means that an application can be judged definitively only once (bis de eadem re ne sit actio), and the decision is presumed to express the truth, so it is not necessary or contradicted by another decision (res judicata pro veritatehabetur).

The positive effect of the res judicata presupposes that either part may oppose the previous res judiciata in a litigation if it relates to the resolution of the latter.

As a result, in a subsequent trial, the part who has won the lawsuit may rely on the law recognized by the previous decision, which is endowed with res judicata, without the court or adversary in the subsequent dispute being able to submit the debate the existence of the right.

The negative effect of the res judicata consists in preventing a second trial between the same parts, with the same object and cause.

The effects of judicial authority give to the decision enforcement (in the case of an admissible request), but also the incontestability of the decision, ie a final decision can not be called into question by the parts or by the prosecutor, only through the means of appeal provided by law.

The judicial authority concerns the device and the considerations on which it is based, including those in which a litigious matter has been resolved.

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GUIDELINES REGARDING THE BANK RECOVERY AND RESOLUTION DIRECTIVE AND RESPONSIBILITY IN THE BANKING ACTIVITY (II)

Adriana PÎRVU[1]

Abstract:

The financial support from the state in the banking sector should be limited, should resume to the minimum required, in order to diminish the impact on the competition in the internal market. It is considered that the state support may lead to the subversion of discipline and responsibility of subjects on the banking market. At the same time, such a support may create a state of moral hazard.

The internal recapitalization is a necessary and reasonable measure. The entire procedure of internal recapitalization must be completed observing the principle „no creditor will sustain losses greater than those they would have sustained in case the institution in resolution would have been liquidated through the usual insolvency procedure according to the safety mechanisms".

Key words: *banking sector; internal recapitalization; financial support; insolvency; creditors*

Internal recapitalization is considered to be the main element of the form of the management system for banking crises at European level.

Internal recapitalization was not created by Directive 2014/59/UE, being applied in different forms in the European states before the Directive's coming into force. The directive only introduced

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this measure in the modalities of banking resolution that are going to be applied to credit institutions starting January 1st, 2016.

Internal recapitalization is the instrument through which the resolution authority exercises its competence of reducing the value and/ or conversion into capital titles of certain debts of the credit company under resolution, in order to absorb the losses and to recapitalize the institution enough to be compliant with the authorization requirements and to continue the activities for which it was authorized, as well as maintaining the market's trust (bail-in – article 43 of the directive).

Internal recapitalization is considered to be the main element of the form of the management system for banking crises at European level.

Within the internal recapitalization, there should be observed, among other things (article 34 of the directive enumerates a series of general principles that regulate the resolution), two principles:

- The principle according to which the losses should be firstly sustained by the shareholders and secondly by the creditors of the institution in resolution, in order of preference (article 44 paragraph (9) letter a) of the directive);
- No creditor will sustain losses greater than those it would have sustained in case the institution in resolution would have been liquidated through the usual insolvency procedure as per the safety mechanisms; no creditor should be disadvantaged (article 34 paragraph (1) letter g) and article 73 of the directive).

Regarding the creditors of the institution, they can be holders of securities or depositors. They will participate in the internal recapitalization process according to a hierarchy, on the „cascade principle".

The adequate division of costs is done between the shareholders, the holders of hybrid capital and the subordinate creditors. The hybrid capital instruments, including the preferential shares, are titles that reflect both the capital and debit characteristics. The subordinate creditors are the ones that accept that their rights will not be prevalent in relation to other debts. Since „in case of insolvency or liquidation of the issuing entity, the holders of these instruments are paid after the holders of

common bonds (classic), but before the shareholders, in exchange of the financial risk thus undertaken by their holders, these financial instruments, that represents investments and not deposits, benefit from a higher performance" [1].

Those creditors that invested in higher-risk instruments (with higher performance) will firstly partake in the absorption of the losses of the bank.

In the reduction of losses, the covered deposits cannot be used, respectively the ones protected by the Bank Deposit Guarantee Fund, with a limit of 100,000 EUR equivalent in Romanian currency, per depositor and per bank.

In the case of deposits that are above 100,000 EUR, it is considered that their holders benefit from an „additional protection", since they will be involved in the internal recapitalization only if the contribution of the other creditors will be considered as insufficient to resolve the difficult situation the bank is experiencing[2]. In exchange for their participation in the losses of the institution, such an affected creditor will receive, according to the conversion rate, a number of the institution's shares.

In this context, we remind the fact that the entire procedure of internal recapitalization must be completed observing the principle „no creditor will sustain losses greater than those they would have sustained in case the institution in resolution would have been liquidated through the usual insolvency procedure according to the safety mechanisms". In case the losses sustained by the affected creditors become greater, they are entitled to an appropriate compensation on behalf of the Resolution Fund, administered by the Bank Deposit Guarantee Fund, based on an assessment performed by an independent valuer.

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[1] C.Bichi, „The truth regarding the recent decision of the Court of Justice of the European Union regarding bail-in", accessed September 30, 2011, http://www.bursa.ro/bail-in-adevarul-despre-recenta-decizie-a-curtii-de-justitie-a-uniunii-europene-referitoare-la-ba...&s=banci_asigurari&articol=303647.html.

[2] Bichi, „The truth regarding the recent decision of the Court of Justice of the European Union regarding bail-in".

The internal recapitalization is a measure that refers to sustaining the losses of a credit institution, measure on which the European Commission expressed its view during one of its communications regarding the banking sector, in 2013. Points 40-46 of the communication are meant to justify undergoing a measure of internal recapitalization.

Thus, it is considered that the state support may lead to the subversion of discipline and responsibility of subjects on the banking market. At the same time, such a support may create a state of moral hazard, for which reason it is preferable that losses be sustained by the market investors, in the first place.

The communication regarding the banking sector made by the Commission and, subsequently, the Directive 2014/59/CE indicate and determine the restrictive conditions when state help is required. The help is conditioned by the foremost implication of the shareholders and of creditors subordinated in sustaining the reorganization and recapitalization cost of the institution. The message transmitted by the Commission and by the Directive is that the financial support from the state in the banking sector should be limited, should resume to the minimum required, in order to diminish the impact on the competition in the internal market. Limiting access to state financial aid is aimed at making banking institutions more responsible, and to discourage them from resorting to high-risk financial instruments.

The Court of Justice of the European Union was recently forced to answer some questions phrased on the internal recapitalization procedure, as it was presented in the Communication and subsequently regulated by the Directive[1]. Among these, there is also the one referring to the breach of the right of property in the case of internal

[1] The Court of Justice of the European Union was asked by the Constitutional Court of Slovenia, in its term notified by private investors, to pronounce itself regading the validity and interpretation of certain articles of the European Commission Communication from 2013. The Court's Decision is available on http://curia.europa.eu/juris/document/document.jsf?text=&docid=181842&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=91948, accessed September 30, 2016.

recapitalization. The Court considered that the measures to divide the losses (the burden-sharing measures) between the shareholders and their subordinate creditors does not represent a breach of the property right of neither one of the two afore-mentioned categories. Thus, the quality of shareholders of a limited liability company (joint-stock company, in our country), imposes on them to sustain the losses of the institution, within the margin of their contribution to the registered capital. Regarding the subordinate creditors, they are in possession of financial instruments that mean taking certain risks. For that reason, should the common law procedure of insolvency be applicable, the holders of said instruments would be paid before the shareholders, but after the holders of common bonds. Also, these creditors benefit from a rather high protection, as we were mentioning before.

As a conclusion, by resorting to internal recapitalization, as it is set up by the Directive to institute a framework to redress and resolve credit institutions and investment companies, the following aspects are of interest:

- maintain financial stability;
- avoiding to use public funds to salvage banks;
- complete protection of deposits under 100,000 EUR, regardless of who the holder is;
- that the loss of the banks be sustained primarily by the shareholders, then by other creditors, including key depositors (for the part exceeding 100,000 EUR) and the holders of financial instruments;
- ensuring the functioning of essential banking services, such as: access to accounts, use of credit lines and the use of cards[1].

[1] B.Olteanu, „Internal recpitalization – preferred alternative to bankruptcy or to using public funding", accessed September 30, 2016 http://www.opiniibnr.ro/index.php/macroeconomie/88-recapitalizarea-interna-alternativa-de-preferat-falimentului-sau-folosirii-banului-public.

CONCLUSIONS

As a conclusion, by resorting to internal recapitalization, as it is set up by the Directive to institute a framework to redress and resolve credit institutions and investment companies, the following aspects are of interest:

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- that the loss of the banks be sustained primarily by the shareholders, then by other creditors, including key depositors (for the part exceeding 100,000 EUR) and the holders of financial instruments;
- ensuring the functioning of essential banking services, such as: access to accounts, use of credit lines and the use of cards.[1]

We disagree with the fact that internal recapitalization leads to the infringement of the depositor's right of property, as long as these measure, the conditions and means to apply it are public and the depositors are informed regarding the risk they are exposed to.

The measures within the resolution process are exceptional measures. They are created with the purpose of protecting public interest. In any state the public interest is protected, when need be, even by using exceptional measures. The public interest we make reference to is, on one side, connected to the limitation of situation in which the state could offer support to banking institutions who are in difficulty, the public finances being thus protected, and on the other hand some banking institutions have become, with or without our desire, subjects „to big to fail", subjects whose „fall" would dramatically affect the entire financial system of a country.

We agree with numerous critics addressed to the current banking system, however we consider that the shortcomings of the system could be and they must be corrected. For this reason, in our opinion, the

[1] Olteanu, „Internal recpitalization – preferred alternative to bankruptcy or to using public funding".

Directive analyzed accentuates an increase of the responsibility of the entities in the banking system. In this context, we remind the fact that the resolution, as well as the internal recapitalization, respectively, these so controversial mechanisms, are solutions applied only when all other measures of recovery failed.

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RELIGIOUS TERRORISM

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Abstract:

Fear is the most powerful weapon of all times, because you can hardly win a fight with your enemies as long as you are weakened by the fear, even more when you do not know how exactly your enemies look like. Those arguments are the centre of this paperwork and the main idea of terrorism: fear and the impossibility to know exactly your foe.

Religious terrorism is the terrorism that has as main influence the religious fundamentalism, but not any kind of religion, especially Islamic fundamentalism. The principle that make Islamic fundamentalism the main source of religious terrorism is the idea of jihad, – known as holy war undertaken by Muslims.

The dangerous idea of believing that you are empowered with the right to kill in the name of God is a very dangerous dogma owing to the fact that a man who is convinced that in the afterlife will be rewarded for his acts of murder, will not bend the knee in front of the law or in front of the idea of mercy for the religious enemy. This strong belief in their right to kill is seeding the fear in the soul of the enemy, because we do not know until now, how to make terrorists to have fear for any punishments or consequences of their actions. Taking everything into account, we ascertain that the hardest fight is against terrorism because the terrorists may very easily look normal, and may stay beside you not even knowing it.

Key words: *religious terrorism; international terrorism; the origin of religious terrorism.*

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INTRODUCTION

Terrorism is etymologically speaking, derived from terror having origin in Latin. Terror is an extreme state that disturbs, frightens and paralyzes. It also has the sense of collective fear, which is designed to dominate a group in order to crush its resistance. Terrorism is considered to be a method of action characterized by three fundamental elements: the decision to end terrorist acts with a systematic weapon; threatening or committing acts of extreme violence; the effect of this violence on the victims, the opinion that emerges from such acts.

Terrorism is a product of fanatical violence generally made to achieve political goals for which human – orethical beliefs – aresacrificed. Certain individuals or groups become violent from fanatical hatred or consuming a desire for revenge.

1. TERRORISM

The terrorist phenomenon in the Middle East and Near East region is also maintained and exacerbated by the fundamentalist-Islamic movement, which can be judged as not based on any left, right or centre ideology, and simply Islamic religious perceptions that, adapted to the interests of the movement, are aimed at destroying current civilized societies and returning to Islamic conquests. From the Middle East, terrorism has continuously expanded, with increased violence.

At the beginning of the '95s, terrorism finds itself in an ever-changing way, which directly affects peace and security. The origins of the factors that have led to the great amplification of this truth of the modern age are international rather complex and complex circumstances, among which the military conflict in the Gulf area.

International terrorism is now known, not only for evolving into political circumstances that existed at the end of the 1960s, but also reflected the technological developments of the world society that indirectly led to diversifying the use of terrorism methods, means and techniques. The current international situation demonstrates that terrorism is in full swing, owing to the fact that there is an increasing

intensification of cooperation between different groups and organizations in different parts of the world, making specialists suggest that it is the internationalization of the phenomenon[1].

The increased support that terrorism received from some states, governments and other interested circles is another argument in support of the proliferation of international terrorism, causing different experts in the field to say that this phenomenon is becoming increasingly institutionalized. From this point of view, researches and analysis of the international terrorist phenomenon has already led to the crystallization of the opinions of some military specialists, according to which "the little insensitivity conflict" – as they called at that point terrorism – could be used in the future for carrying out specific military actions, with a special achievement. In this way, it is appreciated that the use of terrorist groups or the creation of special forces of the army, properly formed and coached, in the manner of overcoming the opponent by the speed and accuracy of the blows, can solve many diverse missions as: triggering tensions, attacking the social climate, in an enemy country; the destruction of morals and the creation of a psychological imbalance, acts of sabotage, destruction, fires and other such actions that may enhance the possibilities for self-protection and reduce the offensive capacity of a state. The idea is taken even further, appreciating that governments, being tools that wield the power, could use these forces to annihilate their opponents, therefore assuring them the chance of resisting attempts by the opposition forces to take power.

As a result these views lead to the idea of using terrorism as a future way of military action as it ensures rapid success by engaging in the struggle a relative small part of the state's ability to repel, requiring a much lower investment than conventional war[2].

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[1] R. Duminică and A. N. Dascălu, „Religious terrorism – a major threat to international security", in the *Conference Proceedings 1, The 17 th International Conference The Knowledge - Based Organization* (Sibiu: „Nicolae Balcescu" Land Forces Academy, 2011), 355-360.

[2] Gh. Bica and M.T. Burduşel, *Suportul financiar al terorismului international*, (Bucharest: Eficient, 2001), 6-19.

Islam is an Arabic word meaning obeying, listening and being docile. Because it is based on a full submission to Allah it is calledIslam. From the European perspective, traditional Islamic civilization appears as an exotic space, enclosed by a refractory tradition of human rights, possibly a frightened civilization (or, if you want, in clash with the Western civilization). However, beyond a different culture, Islam must be seen as the result of the evolution of a fundamentally different population than ours, due to its own way of life and a hostile area. Legal thinking, this civilization, must be understood by reference to the whole phenomenon that gave birth to it.

The space in which Islam appeared – the Arabian Peninsula – was religiously, politically and socially unorganized until Mahomet. Though some tribes have been Christianized, the Arabs in the peninsula have preserved their religion, a primitive polytheism.

2. QURAN

The founder of the religion of Islam is the Prophet Muhammad. In the Quran, the holy writing of Muslims, there are many of the rules that guide the Muslim community, including the fundamental notions of the future Islamic law. That is why the Quran was one of the most important and necessary sources for deciphering the juridical-religious principles that will rule the relations between Muslims and non-Muslims. There are hundreds of editions of the Quran[1].

The Quran is considered by the Muslims to be the word of God. For them, saying "Muhammad said" by quoting the Quran would be a blasphemy. Indeed, the correct expression to introduce references to the sacred book is "God said, He is the One".

[1]Viorel Panaite, *Pace, razboi si comert in Islam*, (Bucharest: All, 1997), 22.

At this point of our exposure, we have to open a bracket on the importance of the concept of "revelation" and the text that is the expression of it.

Addressing Mahomet, the holy book is as follows: "It is truly a descent from the Lord of the Worlds. His faithful spirit has descended upon her on your heart, that you may be a preacher in an Arabic language" (26, 191-195).

The Quran represents the message of God in Arabic language for the Arabs. It makes part of a sequence that has a single meaning: Moses gave the Jewish people the Torah, the Law; Jesus gave Christians as a people, the Gospel, that is the New Testament; and Mahomet gave the Arabs the Qur'an. Mahomet, as he has always said, is just the Messenger of God, only the one who sends this message, a man among other men. The first fragments of this message coming from heaven were heard only by his wife, Khadija, then gradually by others. Only when the Prophet began to be heard increased the number of those who could hear the message, often very short.

As it is presented to the Western reader, the Quran is not easy to read. Indeed, our translations reproduce the original chapters' layout, which seems to be designed precisely to discourage the unbelieving reader therefore it is hard to understand the ecstasy that the recitation of these words provides to believer.

The text is divided into more than a hundred chapters, or Surah, whose length is extremely variable: the longest has about 300 verses and the shortest four-five. After a short opening, even called "Opening", come the others whose length is getting smaller. The longest chapters the reader first encounters are those in which a very varied material has been found. Indeed, here are the great precepts, such as: "The doctrine is not to turn the faces to the sunrise or to the sunset, but it is the right the one who believes in God in the Last Day, in the Angels, in the Book and in the Prophet, for His sake he gives from his own property to his relatives, orphans, poor people, drummers, beggars" (2,177).

The idea of a definitive drafting of the text is due to the central power, who understood what an excellent tool to dominate it is. Obviously, the political interest prevailed and passed to the establishment

of a sort of drafting committee, the precedent of the responsibility of an announcement by which anyone who held fragments of the revelation was invited to surrender to the former secretary of the Prophet of Islam, and a call to the daughter of the prominent Umar, the second caliph, who was required to hand over the partial collection of the texts he had received from his father.

Collation work seems to have been done with care. But it is almost certain that some of the ambiguities mentioned above could not be avoided. We should not neglect the possibility of inserting certain verses in a different context, as a consequence of the fact that in the final drafting the verses written on the surface of a clay piece were copied, but the ones from the back were not transcribed and they were subsequently copied to another place.

Although the text has been established by this unusual organizational effort, for centuries a codex continued to circulate with the discrepancies in a certain order and writing variants. But it was finally put in order an almost definitive text, with some verbs allowed in the writing and reading.

One thing is for sure: because of the Quran, the Arabic language became the common language by which Muslims expressed themselves in various origins, and precisely for a better understanding of the Quran saved from oblivion the pre-Islamic Arab poetry and the Quran is not just the basis of the religion of the Islamic state but also of the entire Arab-Islamic culture.[1]

3. THE ORIGIN OF RELIGIOUS TERRORISM– (THE HOLY WAR – *JIHAD)*

What is war? How many definitions are issued by authorities in the field are absolutely necessary? First of all, let Hugo Grotius say: "In pursuing the right of the war, it is proper to first examine what is the war

[1] Giovanni Filoramo, *Istoria religiilor. Religii dualiste, Islamul*, 3rd Volume, (Iasi: Polirom, 2009), 123-129.

is and what is the law we are dealing with. Cicero defies war as a violent confrontation. But he gained a greater passage of the habit that this name is not the action, but the state and so the war is the state of those who face a violent face".

The famous jurist referred to several ancient authors, according to whom the notion of "war" should be understood not only by the hostilities (the army), but also the pre-prepared preparations or the consilium agreements. War is a political tool. War is not an end in itself, it is not an "independent phenomenon" – after Carl von Clausewitz's famous discourse (1780-1831), "War is merely the continuation of politics by other means," continues Clausewitz – That war is not only a political act, but a real political tool, a continuation of political relations, a realization of them by other means. What remains specific to war refers only to the nature of its means.

Military art can generally claim, and that it is not small reaction; but a strong one, in some cases, on political intentions, this reaction must in some cases be thought of as a change in place, because the political intention is the goal, the war is the way that lead to that goals, and the way can never be thought of as a goal.

The notion of religious war, which legitimizes conquest and prey that are made in the name of God, is as old as the notion of divinity in humans.

Usually – excluding the pure patriot usage here – theterm "holy war" – means a warexclusively for religious reasons. However, we were wondering whether such belligerent activities were based only on purely religious reasons? No, not even in Islam, without discussing the case of the Crusades. Historically speaking, the armed conflicts triggered between Islam and Christianity had, first of all, political-military and economic-financial causes, religious ones falling second, being used only as pretexts. Therefore, in translations, jihadis "war against the unbelievers" it does not mean that such a war was led only from religious reasons. We will also use the translation of "holy war" for the bellicose activities carried out by the Muslims against the unbelievers, as it has started in the literature. But we'll fix the shades immediately.

Jihad

The birth of the idea of jihad occurred in the time of Muhammad, in the process of passing from the warning Prophet (in the Mechanic period 617-622) to the armed Prophet (from the Medieval period 622-632). In Mecca, in order to make proselytes, Muhammad practiced exclusively the method of persuasion by means of religious arguments "the indulgences to them (the followers) to withstand with patience and indulgence in the violence of the enemies, almost revalidating with the gentle perception of our Saviour: *If they hit you on a cheek, turn the other over*".

The emergence of the idea of "holy war" will take place in Medina, the place where the struggle against the people from Mecca was organized and was defined as the duty to combat all those who did not attend to Islam until they attend or consented to pay tribute, sign of their obedience.

Now after Hegira, the jihad was becoming a "propaganda means", as well as a political and military instrument by which Islam could affirm its claim of universality, of the Muslim religion. Now the jihad (= the effort on Allah's path) dressed semantically – meansthe coat of war fought against the unbelievers who did not accept the conversion or at least the domination of Islam.

Muhammad himself defined his mission and place among the Prophets sent by God: "Various prophets were sent by God to illustrate his attributes: Moses with his gentleness and providence; Solomon with his wisdom, his greatness and his glory; Jesus Christ with his righteousness, knowledge, and strength ... None of these qualities was yet sufficient to impose faith, but even the wonders of Moses and Jesus were treated with mistrust. For this reason, I, the last among the Prophets, I am sent with the sword! It's not about those who spread my faith; but kill those who reject the obedience to the law. Anyone who fights for the true faith, whether he is sacrificing or conquering, will definitely receive a glorious reward" (Irving, Mohamet, p. 87-8)

The verses of the Quran reflect this duality of Muhammad's methods of spreading the Woed of God in Islam: a "peaceful" one, that

crystallized in the MeccaPeriod, but continued by the other one, the "warrior" structured after Hegira at the Medina.

Behind the idea of jihad, as a military expedition, there was a strong warrior tradition.

Practically, the jihad replaced the pre-Islamic raid, channelling all the internal destructive energy to the outside of the fresh community, in the interest of the new Islamic state being born. "In this context," said two American innocents, "one can speculate that jihad is partly an ideological rationalization of racketeering".

We emphasize, however, that Muhammad did not slip into the extremist ideology that he spread and even allying himself with the non-Muslims (even in relations with the Meccans) whenever it was needed[1].

4. MARTYRDOM

The issue of martyrdom has been extensively discussed in Islamic law book, since, along with the rule of the prey, it was one of the most important aspects of the jihad doctrine.

Martyrdom: the purpose and incentive of the "holy war", according to legal tests, for Muslim workers one of the purposes of participating in the "holy war" was to win the divine reward that Allah and His Messenger promised to those who would fight for the cause of God. And in the Ottomans, in addition to the material reward (prey), the spiritual reward was promised by the fighters from the beginning of the holy expeditions, often by the sultan or the great visionary himself.

To express the concept of the martyr, the Quran used the phrase: "The one that is slain in the way of Allah". Following the definition of Ibrahim of Halebi, martyrs are those believers do not die from natural death, but who die from another's hand. In his system of drafting the Muhammadan religion, Dimitrie Cantemir consented to seven steps of

[1] Panaite, *Pace, Razboi si Comert in Islam*, 82-87.

“martyrdom”, while Mooraged'Ohssonclassify the “martyrdom” in only two categories: military martyrs and civil martyrs. Military martyrs were those Muslims who were killed during the battles that Allah, both at sea and on land. If they were killed in the fight with the infidels, they would once again have enjoyed this spiritual reward, becoming martyrs. From the second category belonged those Muslims who would have lost their lives because of rebels, thugs or simply because of another Muslim[1].

5. SHORT CONSIDERATIONS ABOUT SYRIAN WAR AND THE EMERGENCE OF ISIS

The first fires were fired in Syria in March 2011 by Syrian dictator Bashar-al-Assad against the peaceful demonstrations of the Arab Spring.

In July, the protesters began to turn fire and some Syrian troops deserted from Assad's army to join protesters. The rebel troops have self-titled the Syrian Liberation Army, and the retaliation has turned into civil war. Extremists in Syria and the whole region begin to travel to Syria to join the rebels. Assad, in fact, encouraged this trend by releasing the jihadist prisoners to accuse the rebels of extremism and to put the strangers who kept their backs in an impossible situation.

In January 2012, al-Qaeda formed a new division in Syria, Jabhat al-Nusra. During the same period, the Kurdish groups in Syria, who longed for much autonomy, put their hands on arms to escape the Assad regime in the north. That summer, Syria became a hotbed of war. Iran, the most important ally of Assad, intervenes in his support. At the end of 2012, Iran shipped daily cargo and has hundreds of ground officers.

At the same time, the Persian Gulf oil-rich Arab states are sending money and rebels (especially through Turkey) to counter Iran's influence. Iran is increasing its influence -2012 when Hezbollah – aLebanese-backed militia run by Iran – invadedthe country to fight Assad's side. The Gulf – especiallySaudi Arabia – respondsby sending more money and

[1]Panaite, *Pace, Razboi si Comert in Islam*, 144.

weapons to the rebels, this time through Jordan, which also opposes of Assad.

Until 2013, the Middle East was divided between the Sunni forces, on the one hand, supporting the rebels and the Shiites, on the other hand, assisting Assad. In April 2013, the Obama administration, which is terrified of Assad's atrocities, signs a secret order authorizing the CIA to train and equip a billion Syrian rebels. But the program gets out of control from the start.

The US also cautiously warns the Persian Gulf countries to stop supporting extremists, but the demand is ignored. In August, Assad uses chemical weapons against civilians.

On September 6, Obama in a public speech affirmed: It is not in the national interest of the US to ignore the obvious violations of what Obama has defined international rules on the use of chemical weapons.

In this way, Obama told journalists that, although he did not make a final decision, he is considering a military action. The action would be subject to Congress approval.

Three days later, on September 9, 2013, Secretary of State John Kerry, responding to a journalist's question, announced that the US could give up military action if Syria dropped a chemical weapon within a week. Russia proposes that chemical weapons be placed under international control, Syria's idea (although until then it did not admit that it owns chemical weapons).

The alleged US attack is defused. The United States is back, but there is already a dispute between the great powers - America against Assad and Russia which on the contrary, supports it. A few weeks later, the first US weapons and training (through the CIA program) reach the Syrian rebels. The US becomes a participant in the Syrian war.

In February 2014, something is happening that turns the war: an al-Qaeda affiliate staged in Iraq breaks out of the group because of internal misunderstandings over Syria. The group calls itself the Islamic State of Iraq and Syria, which becomes the al-Qaeda enemy. ISIS does not fight Assad. Instead, the struggle against the other rebels and the struggle against the Kurds, forming a mini-state, which they call the Caliphate of the Islamic State. That summer, he arrives in Iraq

confiscating territories and drawing the attention of the whole world against them.

Then, in September 2014, exactly one year after it was one step to bomb Assad in Syria, Obama held a new speech: "we will go further with the fight against terrorists".

"I will not hesitate to intervene against ISIS in Syria", Obama said, announcing the launch of air strikes against ISIS in Syria, and 475 troops to help Iraqi army.

That summer, in July, the Pentagon launches its own program to train the Syrian rebels, but, unlike the CIA program - only rebels fighting against ISIS, not Assad, are being prepared for this program.

The program also shows failure, pointing out that America now opposes ISIS more than Assad, but that there is not really a land similar to ISIS in Syria.

In August, Turkey begins bombing Kurdish groups in Iraq and Turkey, although Kurds are fighting against ISIS in Syria. Turkey does not bomb ISIS in Syria.

All these deep tensions, the US oscillating position - especially on the question of who is the number one enemy, Assad or ISIS? –It creates a lot of confusion. – Assadis losing ground to ISIS and the rebels.

In September 2015, Russia intervenes on its own. Russia officially declares that it is there to bomb ISIS but, in reality, it bombs the anti-Assad rebels, including some backed by the US. As it is now prefigured, there are many different groups and outside states involved in the war in Syria, and even among the allies there are many disagreements as to who the enemy is, who to support and how. All these contradictions make for this war no end[1].

[1] http://www.euractiv.ro/

6. INTERNATIONAL TERRORISM AND OTHER ACTS OF VIOLENCE

Since the first half of the 20th century, there have been more and more criminal offenses against heads of state, governments or other political people, or against groups of people or institutions. When the aims pursued by the terrorist act affect international relations, being directed against a state or persons or foreign interests, the crime acquires international character. To combat terrorism in 1937, the Convention on the Prevention and Suppression of Terrorism was signed in Geneva. Through this convention, states have committed themselves to punish those guilty of the following terrorist acts: attacks on state bosses and other state officials; diversionist acts against private state assets; deeds endangering more human lives; manufacture, stockpiling or supplying weapons and other terrorist means; falsifying, introducing, instigating and disposing of passports and other false documents; the preparation of terrorist acts, the instigation of terrorism and the reception of terrorists in any form.

After World War II, the gravity of terrorist acts, especially those with political motivation, has led to the adoption of a large number of international conventions whereby States have committed themselves to punish such acts and to cooperate for that purpose. In response to a series of theoretical acts directed against civil aviation, the 1963 Tokyo Convention on Crime and Other Acknowledgments on Aircraft was concluded. The 1970 Hague Convention on the Suppression of Unlawful Acts of Aircraft, the 1971 Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation; they impose the obligation of States to punish the crimes as any other acts committed on board aircraft against persons and goods on board, against aircraft and navigation installations, or interference in the communications system.

A new generation of conventions in this area includes the Convention adopted by the UN General Assembly in 1997 for the Suppression of Terrorism with Explosives, the Convention adopted by the General Assembly in 1999 for the suppression of terrorist financing

and the Convention adopted by the UN General Assembly in 2000 against Transnational Organized Crime[1].

CONCLUSIONS

Fear is the most powerful weapon of all time, because you can hardly win a fight with the enemy as long as you are weakened by the fear, even more when you do not know exactly what it looks like. These arguments are the centre of this work and the main idea of terrorism: fear and the impossibility of knowing the enemy.

Religious terrorism is the terrorism that has the primary influence on religious fundamentalism, but not on any religion, especially Islamic fundamentalism. The main idea that lead fundamentalist Islamism to be the most important source of religious terrorism is the idea of jihad, known as the Muslim war against unbelievers. The idea of thinking that you are empowered with the right to kill in the name of God is a very dangerous dogma because a man who believethat in his after life will be rewarded for his crimes will not bend the knee before the law or on the idea of mercy for the religious enemy.

This strong belief in their right to kill is the root of fear in the soul of the enemy. Therefore, this devotion for the holy war of Muslim people can make them to be easy to manipulate by their political powers that can use this unbounded devotion for religion to create anxiety and panic within the rows of the political enemy.

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WORLD WIDE WEB – WIDER THAN THE LONG ARM OF THE LAW CAN REACH

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Abstract:
This paper aims to realise a short analysis regarding the problem of cybercrimes, focused especially on the crimes committed on the "Dark Web", the ones taking place on social networks, and the reasons why most of the time it is hard for the law to be enforced, and the criminals punished.

Key words: *cybercrime; the Dark Web; the Blue Whale; cyberlaw.*

INTRODUCTION

"World Wide Web" is the name the Internet is also known as, and the one we come across on a daily basis under the acronym "WWW". Even though at the beginnings of the Internet the idea of a network that can connect the entire world seemed to only bring benefits, time has proven that alongside the numerous advantages, just as great a number of disadvantages can and will present themselves. The almost universal spread of the Internet represents, in our opinion, the biggest benefit and the greatest weakness of the Network. This weakness comes from the

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fact that The Internet has become such a vast network that creating a legal framework in order to properly regulate it is a task of outmost difficulty. Moreover, if the problem of creating a legal framework could be solved, or at least diminished in time and with the cooperation of the states where The Network is available, bringing it into operation in order to completely eradicate cybercrime is practically impossible due to the existence of numerous ways of hiding the "traces" left in the cyberspace. However, in order to analyse the problems the Internet has risen, we firstly have to attempt a short review of the existing regulations regarding the matter.

1. CURRENT REGULATIONS REGARDING THE ONLINE ACTIVITY

As of right now, in Romania, as well as internationally, there are a series of regulation that attempt to draft a legal framework with the purpose of bringing cybercrime to a stop. In our country there are approximately 100 normative acts that contain regulations of the cyberspace in fields such as: e-commerce, copyrights, online documents, online payments, online advertising, the right to privacy, cybercrime, pornography, electronic communications, electronic government, online video services.

Examples of such regulations are: The Law of E-Commerce 365/2002, The Law Regarding Copyrights and Related Rights, The Law of Electronic Signature 455/2001, etc.

In addition to these national regulations, there are also a number of international ones, such as: The Convention on Cybercrime drawn up by The Council of Europe on 23/11/2001 and The Declaration on freedom of communication on the Internet, also adopted by the Council of Europe.

Despite the fact that this is merely a short, exemplary, list, and that the number of existing regulations in the field is quite great, these are far from being sufficient, in number and efficacy, in order to prevent the vast number of crimes that damage the lives of Internet users on a daily basis. Out of these crimes, we are going to focus upon the problem of the criminal groups constituted on The Dark Web and the problem of the

influence groups that, through social media, managed to kill hundreds of teenagers, as well as on some of the technical aspects that make the stopping of these criminals by the legal forces almost impossible.

2. DARK WEB – HEADQUARTERS OF ORGANISED CRIMINAL GROUP.

2.1 *Short introduction into The Deep Web*

Even though The Internet is a visibly vast network, even for the regular user, the content that the latter sees represents, in fact, only 4% of the data in The Network. The other 96% are data stocked on the Deep Web. This is a portion of The Web that has not been indexed by regular searching engines, and can only be accessed through special browsers. The Deep Web contains a large amount of information, from data bases that are not to be accessed by the regular user, to highly classified information stocked by the World's governments. The reaspn for such information being stocked on this portion of the Web is the fact that it is not only harder to access than the "Surface Web" (the sector of The Internet that the regular user sees), but the user himself is hard, almost impossible to identify, his traces being covered by proxy servers, through which the user can simulate the information being transmitted from somewhere else (usually thousands of kilometres away). The Deep Web is approximately 400-500 times bigger than the Surface Web It is estimated that only the biggest 60 sites on The Deep Web contain 40 times more information than the Surface Web.[1]

The Deep Web is extremely useful for stocking classified intelligence and other similar data that have been mentioned. Unfortunately, it offers the same protection and anonymity to users with criminal intent. Thus, inside the Deep Web, a new section of The Web has been created, known as The Dark Web.

The Dark Web is a portion of the Internet that can be accessed through the same methods as The Deep Web. However, its content does

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[1] Daniel Sui, James Caverlee and Dakota Rudesill, *The Deep Web and Darknet:A Look Inside The Internet's Massive Black Box* (Washington: Wilson Center, 2015), 6.

not resume to data bases and useful information; here, an immense black market for criminals has evolved. From drug trafficking to trafficking in weapons, or even human organs or persons, anything can be bought by someone who possesses the right resources. The currency used in these transactions is the Bitcoin, an electronic, extremely volatile coin whose value fluctuates constantly. As of right now, 1 Bitcoin is worth 2113 euros.

These black markets are coordinated by organised criminal groups on different sites that can be accessed on The Dark Web. Apart from selling illegal goods or even people, these sites offer other services such as: child pornography, pornographic materials that show acts of incredible violence or even murders, espionage services, money laundering, identity theft or paid assassins. [1]

2.2 *The Dark Web and The Helplessness of The Law*

In spite of the horrors that take place on this dark side of The Internet, and despite all the existing regulations, the law frequently loses its power in this field. Even though more often than not the legal framework does exist, as it is the case for child pornography (art. 374 Romanian Penal Code), aggravated murder (art. 189 Romanian Penal Code) – and so on, this is not enough.

First of all, in the process of eliminating these criminals or criminal groups, problems of jurisdiction may arise. Article 22 of The Convention on Cybercrime, regulates as such: "Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed: a) in its territory; or b) on board a ship flying the flag of that Party; or c) on board an aircraft registered under the laws of that Party; or d) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial

[1] *Idem*, 10.

jurisdiction of any State."[1] Thus, no mention is made regarding the situation when one of the citizens of a state is directly affected, even though not on the territory of his country. Therefore, the state entitled to take action would be either the state on whose territory the servers that host the site are, or the state whose citizen committed the felony. The Convention mentions that "When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution."[2], nonetheless, this consultation may become a lengthy process.

Moreover, even if there were no problems regarding the jurisdiction, most of the times, the real problem consists of identifying and localising the criminals or criminal groups. Given the technological means they can use, they manage to hide both their identities and their locations from the law forces. This explains the fact that under the shelter of The Dark Web the most horrifying crimes are made public, most of the times with the author suffering no consequences.

Another problem that rises when it comes to eradicating the sites that are used for criminal purposes is that The Internet is, after all, a network; a web. Consequently, once something finds its way in this web, it may never get out. Therefore, even if the criminals are identified and the sites closed, frequently, other users of the sites take their place and under a new identity and from a new location and web address, they re-upload the freshly eliminate content, forming a vicious cycle.

Even though this section of The Internet is not, theoretically, open for everyone, the access to it is, in fact, relatively easy, as on the Surface Web there is a high number of materials containing instructions about how to gain this access. For that reason, a large number of people, from people engaged in criminal activities who manage, in this way, to evade

[1] Convention on Cybercrime, art. 22, European Parliament, accessed on 08 May 2017, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf.
[2] *Ibidem*.

being punished, to impressionable youths, succeed in accessing these pages.

3. CYBERCRIMES ON SOCIAL MEDIA

The Dark Web is the place where the majority of cybercrimes take place. However, there are moments when such crimes make their way, hidden in plan site, on social media sites that are frequented daily by millions of users, most of them being excitable, young minds

Even though most often such crimes are limited to cyber bullying (addressing threatening and/or offensive messages to someone), that can be qualified, according to the Romanian Penal Code as harassment, (art. 208, Romanian Penal Code, align. (2) "the making of phone calls or communications through other ways of communication that, through frequency or content, cause distress to someone, is punishable by jail from a month to three months or by fine if the crime is not a major one") other times they are way more serious and can lead to hundreds of deaths.

One of the most recent examples of such crimes is the already infamous "game" known as "The Blue Whale". It first appeared on a Russian social network and it was the reason for over 120 teenagers committing suicide. In time, the "game" spread in several countries in Eastern Europe, eventually reaching Romania as well.

The "game" consists of accomplishing 50 tasks or "challenges" throughout 50 days. The last task is for the player to commit suicide, therefore "winning the game". Some of these tasks are: "Carve with a razor "f57" on your hand, send a photo to the curator."; "Wake up at 4:20 a.m. and go to a roof (the higher the better)", "Cut your lip", "Wake up at 4.20 a.m. and watch psychedelic and scary videos that curator sends you.", "If you are ready to "become a whale", carve "YES" on your leg. If not, cut yourself many times (punish yourself).", "Poke your hand with

a needle many times", "Do something painful to yourself, make yourself sick." and the list goes on with other similar tasks.[1]

The victims of this "game" are most often teenagers. Taking advantage of the vulnerable state of mind that comes with this age, they are drawn into the "game" in spite of the fact that they are warned from the start that at the end of the game they are going to die. According to a 13 years old girl who started the "game", later on trying desperately to get out, the "players" are not allowed to quit. If they try to leave the game, they receive threats, addressed not only to them, but also to their families and friends, the "curator" that coordinates them through the game seeming to have a lot of information about them, including their addresses, and pictures taken with their phones without their knowledge. It was presumed that the information was obtained from the computers and phones that the "players" used to play the game, by their curators. Scared, the teenagers are persuaded to finish the "game".[2]

According to Russian authorities, the man behind this game is Filip Budeikin, who stated that "the victims died happy. I gave them what they never had in real life: warmth, understanding, connection[3]

Budeikin was arrested by the Russian authorities. However, his game continues to take lives, because once it became popular, it is continuously being resurfaced by Budeikin's admirers who try to continue his "work". Because of this, in spite of all the efforts of the authorities, the complete eradication of the game is nearly impossible, given the fact that it has already been spread beyond the limits of the social network where it originated, on websites world-wide, by anonymous users, consequently arising difficulties in identifying and localising them.

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[1] „Cum se joacă „Balena albastră" și ce sarcini primesc tinerii care acceptă provocarea" Antena 1, accessed May 08, 2017, http://a1.ro/news/inedit/cum-se-joaca-balena-albastra-si-ce-sarcini-primesc-tinerii-care-accepta-provocarea-id647915.html.

[2] http://www.digi24.ro/stiri/actualitate/social/exclusiv-marturia-unei-fete-care-a-vrut-sa-intre-in-jocul-balena-albastra-690361,accessed on 8 May, 2017

[3] „Cum se joacă „Balena albastră"".

CONCLUSIONS

Concluding, we may state that The Internet is a global network that presents great and countless advantages, making people's lives significantly easier; however, the same ease is brought in committing crimes. Given the great proportions of this network, a complete control of the information without, at the same time, affecting the privacy and the right to information of its users is almost impossible.

It is our opinion that until the authorities find a viable solution, the best way for their own safety is that each user should use The Internet with the utmost care, and knowing the consequences of their actions. Moreover, we consider that the parents whose children have access to The Internet should act prudently, making use of parental control programs and paying attention to the websites their children access. In addition to these, an open and honest relationship should be maintained with the children, in order to make sure that they trust their parents in order to seek help when needed.

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THE BORDER BETWEEN THE FREEDOM OF EXPRESSION AND DENIGRATION IN THE ONLINE ENVIRONMENT

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Abstract:

The present article is proposing to highlight the distinction between the right to freedom of expression and the right to life and family in the online environment, both in and out of our country, as we will notice, is given by the second paragraph of article 10 of the Convention on Human Rights, namely the limits of the right to expression.

Key words: *disparagement; online; the right to free expression; jurisprudence.*

INTRODUCTION

Over the generations there existed perpetually the enigma transposed into the question: WHAT IS THE HUMAN?; and those who have taken a close look at this existential subject were the philosophers, who have tried to build a moral portrait to the human which he should have in society and in the history, the echoes of the greatest personalities being heard today.

One of these concepts belonged to the French Jean Jacques Rousseau who emphasized an irony of fate, observing that despite the

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nature law through which the human is born free, this becomes trapped by human norms, which in contrast to the universal ones, are ephemeral; getting back the significance montesquien vision, that establishes some limits of freedom, highlighting that this statute is lost by action that is not permitted by law, which is contrary to public order.

1. THE LEGAL REGULATION OF HUMAN RIGHTS

The rights concerning the existence and the physical or moral integrity of human are absolute civil subjective rights, because all subjects of law other than the holder, who constitutes the undetermined passive subject, are held by the negative obligation of non-making. These rights are opposables "erga omnes" and the non-patrimonial persons, cannot be valued in money. They are regulated in the most important of the conventions to which Romania is part of it, namely the European Convention on Human Rights.

The Convention begins with the "obligation to respect human rights" and addresses the contracting parties. Romania is a signatory to this Convention, and according to one of the general principles of the Romanian fundamental law, "The Romanian State is committed to fulfill exactly and in good faith its obligations under the treaties to which it is part ", the report between international law and national law, being one of over-regulation, which means that no law, no normative act or no decision can be contrary to the Convention.

The Romanian Constitution not only guarantees the fulfillment of the correlated obligations to the treaties to which it is party, but also allocates in its content, a chapter dedicated to these inherent rights to the human being, entitled "The Fundamental Rights and Freedoms", chapter placed immediately after ”The Common provisions”, , highlighting their particular importance.

The Civil Code, a common law in the field of private law in Romania, also guarantees by a series of provisions of the abovementioned laws.

The provisions on the rights and freedoms of persons shall be interpreted and applied in accordance with the Constitution, The

Universal Declaration of Human Rights, the covenants and the other treaties to which Romania it is part "(Article 4, paragraph (1) of The New Civil Code), and "If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania it is a part, and the present code, international regulations have priority, unless this Code contains more favorable provisions". (Article 4, paragraph (2) of The New Civil Code).

2. THE RIGHT TO FREE EXPRESSION

One of the freedoms primarily attributed to The European Convention on Human Rights is the freedom of expression available to it in paragraph 1 of Article 10 in order to guarantee freedom and to determine the content that "Everyone has the right to freedom of expression. This right includes the freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and without taking into account the borders"[1].

The second paragraph of Article 10 of The Convention sets out the limits to be taken into account in the exercise of established freedom, but rather: "The exert of these freedoms with obligations and responsibilities may be subjected to formalities, conditions, restrictions or sanctions provided for by law which, in a democratic society, constitutes necessary measures for national security, territorial integrity or public security, defending order and preventing crimes, health, moral, reputation protection, or the rights of others, to prevent disclosure of confidential information or to guarantee the authority and impartiality of the judiciary"[2].

Ever since the first decisions in the field, The European Court has ruled, in a formula that is almost taken up as a style clause in all its subsequent jurisprudence, that "the freedom of expression established in paragraph 1 of Article 10 constitutes one of the essential foundations of a

[1] European Court of Human Rights.
[2] European Court of Human Rights.

democratic society, one of the fundamental conditions of its progress"[1] however, as emphasized in The International Covenant on Civil and Political Rights in Article 19, paragraph 3, the exercise of these rights entails special duties and special responsibilities, which means that he may be subjected to restrictions which must be expressly provided for by law, restrictions which are for purpose respecting the rights and reputation of others, or are necessary to safeguard national security, of public order, of health or public morals.[2]

As I have previously argued, not only at international level are these rights inherent in the person, but also at national level, and one of the norms that support this freedom of expression is implemented in The New Civil Code, specifically in Article 70, which expressly stipulates in its first paragraph, that "every person has the right to free expression"[3]. Its provisions are based on Article 30 of The Constitution which, by paragraph 1, stipulates:"The freedom to express the thoughts, opinions or beliefs and freedom of creation of any kind, by word of mouth, by writing, by images, by sound or other means of communication in public, are inviolable." [4]

Essentially, in a democratic society, the freedom of expression cannot be exercised beyond any limits.

Like any other social freedom, it entails taking into account general interests such as national security, the territorial integrity of the contracting states, public security, its defense and the prevention of crimes, the protection of public health and morals, the guarantee of authority and the impartiality of the judiciary, as well as personal interests, namely the reputation and the rights of others persons, preventing disclosure of confidential information. These limitations are provided in art. 10 parag. 2 of The Convention. [5]

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[1] Corneliu Bîrsan, *European Court of Human Rights. Comment on articles*. Vol. I (Bucharest: C.H.Beck, 2005), 729.
[2] Bîrsan, *European Court of Human Rights.*, 731.
[3] The New Civil Code.
[4] Eugen Chelaru, *The general theory of civil law* (Bucharest: C.H.Beck, 2014), 34.
[5] Bîrsan, *European Court of Human Rights*, 763.

What follows from the reading of the text which is the subject of paragraph 2 of Article 10 of The Convention is structured in three broad conditions, that is:

a) To exercise the right to freedom of expression implies duties and responsibilities;
b) The limitations of this freedom must be done on the basis of interferences stipulated by law, which must be accessible and predictable;
c) Interferences must pursue a legitimate aim, namely those stipulated in paragraph 2 of that article, respectively the protection of social or individual interests.

Such limitations are necessary when freedom of expression may prejudice the rights of other persons. In the absence of such limitations, the freedom of expression may be abusive.

In our country, an important step was done regadin this, at the end of the previous year, respectively in 2016, when the maximum limit for applying the sanctioning fine for the defamation and denigration of human dignity increased.

This aggravation of the sanctioning measures for such acts has been done as a result of the many injustices committed by abusive exercise of freedom of expression, especially in the ONLINE ENVIRONMENT, both in our country and in other states. In the following we will focus on such facts.

3. JURISPRUDENCE IN THE FIELD OF DENIGRATION IN THE ONLINE ENVIRONMENT

3.1. *Facebook is public space*

By the Decision no. 4546/27 from November, 2016 of The Administrative and Tax Litigation Division of The High Court of Cassation and Justice, one of the best-known social networking sites, namely Facebook, was declared for the first time as a public space; this happened after in a cause of trial in administrative litigation The Court of Appeal of Târgu Mureş had already pronounced this in January 2013.

In fact, the lawsuit started at the beginning of 2012, when during the protests against the Government that formed the executive then, the former director of the prefect's office in Târgu Mureș at that time posted on the personal page of the network the message "Arbeit macht frei- that is what the protesters understand" with the translation from German" work makes you free ".

In this situation, The National Council for Combating Discrimination (CNCD) has self-indicted and will sanction the former director in February 2012, arguing that *"the act constitutes a national propaganda that affects human dignity and creates a degrading, humiliating and offensive atmosphere against the group of protesters"*.

The fined appealed the court decision, considering it illegal, citing among the reasons listed in his opinion and the fact that his Facebook page, which he posted the incriminated message, is a private and not a public space.

The Mureș Court rejected its appeal, arguing, among others, that: "Using the affirmation itself "Arbeit macht frei" in a public context or accessible to the public when expressing an opinion on a particular category of persons (the protesters) causes without any doubt the association of this with feelings of contempt, repudiation, intolerance, so that the complainer can not claim to have acted without guilt. On the other hand, they can not be accepted any allegations according to which, by posting the message, he did not seek to hurt human dignity for as long as possible (...) the use of this slogan, associated in popular consciousness with the horrors of Nazism, proves its intolerance to the civil rights of the protesters , the consequence is the injure to their dignity".

Also dissatisfied this time, the complainer appealed to The High Court of Cassation and Justice. The Supreme Court declared: "Concluding, the court of first instance established that the applicant's criticism of the interference with his right to free expression was unfounded, since the need to protect human dignity related to the concrete circumstances of the imputable deed imposed a proportional measure by The National Council for Combating Discrimination and the application of the sanction of contravention did not represent an

interference not allowed by the law in its right to free expression related to the value to be defended, the human dignity, the protection of this from any intimidation, hostility, degradation, humiliation and offenses... it is indubitable that the allegedly discriminatory conduct in dispute...developed on on-line page.

The magnitude of a social networking requires... that users do not own the actual publishing space, being unable to estimate and even less to control the extention of this space. Therefore, it cannot be controlled that the social network would be a private space comparable to an electronic mailbox, as the electronic mailbox is controllable by the owner in terms of the information transmitted or stored ..."

3.2. *Attachments to the image of the Romanian police*

Not only the individuals were injured in their rights through comments on the Internet, but also the representative staff of one of the most important state institutions, namely The Romanian Police.

Thus, a citizen from Oradea city was forced to pay moral damages after denigrating a local policeman on a social network.

In fact, in the summer of 2014, the citizen from Oradea posted a movie on facebook in which he accused a local police officer. In the posted material, it is seen how he is fined by two police officers - one from the Local Police, another from the Municipal Police. The fine was applied to him because he left his dog in a green space without the animal being kept in a leash or wearing a nipple. Also, when the local police officer asks the defendant to sign the offense report, he refuses, requesting a witness stating that there was no dog in the area at the time. In reality, however, the man took his quadruped into the house, taking advantage of the moment when the law man drew up the report of the offense.

Shortly after, he appears - without a dog, and starts filming with his mobile phone. In the recording you can still hear how the police officers inform the accused that he has already been photographed with the dog and that there is no need for witnesses in that situation, and if he is dissatisfied, he can address the court. The movie with the message: "Look at the abuses done by the Local Police, namely Mr. Lasca Cosmin

Petrica. Share as many as possible to see a whole country " has been passed on by many people, together with defamatory comments. The local policeman has won a lawsuit against the native who has injured his dignity and honor through a social networking post, namely Facebook.

3.3. *The right to dignity and to our own image in France*

It is not only internally but also externally that the issue of exceeding the limits of the right to expression persists.

Thus, in July 2013, a French citizen wrote in the Internet, on a Web page for product and service reviews, an acid commentary at a restaurant belonging to a well- known chain in this field. The problem was that the restaurant was not inaugurated at the time of the comment was posted, so the restaurant chain sued the author of "lies". A French court recently ruled that the netizen must pay a fine of 2500 euros and 5000 euros fees, court costs[1].

Also in this case is observed the deviation from the scope of the right of expression, and can establish the desire to harm the dignity and imagination of
claimant.

CONCLUSIONS

The freedom of expression of the person was hardly acquired. But it is extremely important, especially in the current context, and therefore needs to be carefully protected. However, the freedom of expression of a person must not injure another person's rights. That is why the boundary between freedom of expression and the exercise of the rights of others must be set with great care, having regard to the limits imposed by Article 10 (2) of The European Convention on Human Rights, namely

[1] „Francez, condamnat sa plateasca 7500 de euro pentru un comentariu scris pe internet", Ştirile ProTv, accessed May 09, 2017, http://stirileprotv.ro/stiri/international/francez-condamnat-sa-plateasca-7500-de-euro-pentru-un-comentariu-scris-pe-internet.html.

the aim of general and personal social interests is judged on a case-by-case basis.

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