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CONSIDERATIONS REGARDING THE ROLE OF JURISPRUDENCE AS A SOURCE OF LAW IN ROMANIAN LAW AND IN EUROPEAN UNION LAW

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Abstract

All the ways of expressing the content of the law are known in the specialized literature under the name of sources or sources of the law, there being two understandings of the term of source of law, namely: source of law in the material sense known also as material or real source and source of law in the formal sense or formal source. Judicial practice or jurisprudence is one of the formal sources of law. This is defined as representing the whole of the judgments given by the courts of all degrees, including the practical experience of the judicial bodies that apply the law to concrete cases. Being prior to law as a source of law, jurisprudence did not have the same role in the legal systems, its role and purpose being different from one historical era to another, from one system of law to another. Thus, we will briefly discuss some aspects specific to the jurisprudence in contemporary law, in Romano-Germanic law, in Anglo-Saxon law, focusing more on the judicial practice in Romania, on those exceptional situations, provided by the Constitution and other laws, which urge the reconsideration of judicial practice as a source of law. In EU law, case law is accepted as a (complementary) subsidiary source of EU law.

Keywords: *judicial practice, source of law, legislator, EU law, court decision*

1.*"The law passes into the factual existence first through form, by the fact that it is established as a law (...)"*[2]. In other words, in order to be respected, the right must find consecration in a certain form, in a certain way of expression.

The ways of expressing the content of the law – in law theory and in the branch legal sciences – are known under the name of *sources/sources of law*[3].

Two understandings of the notion of source of law are known: *source of law in the material sense (material or real sources) and source of law in the formal sense (formal sources, forms of expressing the norms of law*)[4].

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[2] Hegel, *Principiile filosofiei dreptului,* Academiei RSR Publishing House, Bucharest, 1969, p. 242 (apud N. Popa, *Teoria generală a dreptului*, 5, C.H. Beck Publishing House, Bucharest, 2014, p. 152).

[3] N. Popa, *op. cit.*, p. 152.

[4] For more, see, M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 107-108.

Material sources, also called real sources, designate the social fact, the creative forces or the factors that configure the law, those "givens" of law, external realities that determine the action of the legislator or which give rise to rules arising from practical needs[5].

These are, therefore, the ultimate causes of law, its "creative forces" (Ripert). In this sense, *material sources* are considered to be: *the factors of configuration of the law* (natural environment/framework, the historical, social-economic, ethnic, national framework, the political, cultural-ideological framework, the international factor and the human factor), *natural law, human reason, legal consciousness*[6].

The formal sources of law consider the means by which the material sources are expressed, the external form that the law embodies throughout its norms, the ways in which the perceptive content of the rule of law becomes a rule of conduct and is required as a model to be followed in the relations between people[7].

The classical theory of the sources of law delineates between *written sources and unwritten sources, official sources* and *unofficial sources, direct sources* and *indirect sources.*

The formal sources of law – imposed by the evolution of the law so far – are:legal practice, judicial practice (jurisprudence) and judicial precedent, doctrine, the normative contract and the normative act.

At *EU law level,* there are three sources of law: primary law, secondary law and complementary law. The treaties establishing the U.E. are considered sources of *primary legislation*. (Treaty on European Union and Treaty on the Functioning of the European Union), the *protocols annexed* to the amending treaties, as well as *the treaties regarding the accession of new states.* The *secondary legislation* includes *unilateral acts, conventions* and *agreements. Complementary legislation* is not specifically mentioned in the Treaties, considering that it includes, as a matter of priority, the case law of the EU Court of Justice.[8].

2. *The judicial practice,* also called *jurisprudence,* is defined as the totality of the judicial decisions pronounced by the courts of all degrees.

From the etymological point of view, the "jurisprudence" derives from the latin *"juris"* (law) and *"dictio"* (pronouncement).

As a source of formal law – in the legal systems that enshrine it as such – jurisprudence includes the practical experience of the judicial bodies that apply the right to concrete cases[9].

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[5] N. Popa, *op. cit.*, p. 152.

[6] M. Bădescu, *op. cit.,* p. 107.

[7] *Ibidem.*

[8] For more, see, T.-V. Popescu, *Practica judiciară între izvor de drept şi adevăr juridic particular,* in vol. (CD) "Rolul jurisprudenței în dezvoltarea noului drept român", Universul Juridic Publishing House, 2019, pp. 380-385

[9] See, for more, T.Ionaşcu, *Jurisprudența – izvor de drept,* in Annals of the "Constantin Brâncuşi" University of Târgu-Jiu, Department of Legal Sciences, no. 3/2014, pp. 31-38.

In relation to the law, the jurisprudence knows three forms that distort the law to a lesser or greater extent. These are[10]:

- *compulsory jurisprudence under the law,* of a delegation of the law(*secundum legem*), circumstance in which case law cannot be challenged as a source of law, on the ground that it does not change the law (nor does it complete it), its power deriving from the law in force, contributing or even determining the application of the law;
- *jurisprudence in addition to the law* (*praeter legem*), circumstances in which this type of jurisprudence has the role of supplementing the law or of replacing it, where there are legislative gaps. Legislative loopholes can have several causes. First, we analyze the diversity and mobility of social relations. Then, it should not be overlooked that the legal norm – which has a general nature – cannot, however perfect its expression, encompass all the situations that may appear in the social reality. The legislator cannot and should not foresee everything[11]. It cannot, because it is impossible for it to comprehensively cover the needs of such a large society (Portalis). It should not, because in a legislation it is necessary to have "white areas", "valve conceptions" that "*allow expansion and communication with the outside world[…]"*[12] thus preventing the excessive compression of the legislative system. From this perspective, the *praeter legem interpretation* it can be considered a type of creative interpretation of the law by the judge; although formal, it is kept within the limits of the legal text, although the law is not contradicted, by this type of interpretation, the content of the law can be modified in a subtle way or it can even be deformed;[13]
- *jurisprudence against the law* (*contra legem*) presupposes that the judge gives the law an interpretation in a sense that is contrary to the one envisaged by the legislature, a way of interpreting admissible only insofar as the applicable legal rules constitute numerous anachronisms, being clearly outdated by the development of the society. Even in this hypothesis, we agree with the opinion that the jurisprudence *contra legem* should not find its place in the modern systems of law[14].

3. Historically, some considerations regarding the evolution of jurisprudence as a source of law are, we believe, welcome.

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[10] *Ibidem*, p. 32.

[11] M. Bădescu, *op. cit.*, p. 168.

[12] G. Del Vecchio, *Justitia*, p. 160. In the same sense, *"we must not to blame the lawyers*– writes Levy-Bruhl – *if, by diverting a text from its primary meaning, I do so as is most often the case, to allow a more equitable solution to the given case. By making a slight twist to vulgar morality, they put themselves in the service of a higher morality*" (H.Levy-Bruhl, *Sociologie du Droit,* P.U.F., Paris, 1971, p. 108 (*apud* N. Popa , *op. cit.*, p. 206).

[13] T. Ionaşcu, *op. cit.*, p. 32.

[14] *Ibidem.*

Prior to the law as a source of law, the jurisprudence did not have the same role in the legal systems, its role and purpose being different from one historical era to another, from one system to another. Thus:

- in Antiquity and Feudalism, along with custom – which was considered the main source of law – jurisprudence has played an important role in the hierarchy of sources of law, a role which, as we will see, diminishes over time, especially in continental European countries, as a result of the massive promotion of codifications;
- in Rome, the king was a judge and creator of legal rules at the same time.; after the creation of the royalty, the decisions of the praetors (the edicts) became obligatory for all magistrates, forming the law known as the praetorian law (also called *honorary law*[15]), thus constituting itself as an important source of law; after the formation of the empire, the role of the praetors diminishes, the emperor being the one who makes the laws[16];
- In the thirteenth century, in England, collections of jurisprudence named *reports* appeared;
- the increase of the monarch's power, together with the important codifications of the continental European countries, led to the loss of the role of main source of law by the jurisprudence (with the exception, as we shall see, of the Anglo-Saxon countries); moreover, during the French bourgeois revolution, the role of judicial practice was drastically limited[17].

Over time, some ideological trends and schools of law openly ruled against maintaining the judicial practice between the (formal) sources of law, motivating this attitude by the fact that the jurisprudence opposes the new, not being able to offer legal models suited to social dynamics[18].

4. In contemporary law, the role of law source of jurisprudence differs from a legal system (family) to another, that is, of the most important legal families in the world: the family of Romano-Germanic law and the family of Anglo-Saxon law.

In the law the countries where the applicable legal system is the *Anglo-Saxon* one (England, USA, Canada etc.) *the precedent* is the authority that a judicial decision can have in cases analogous to the one in which it was pronounced[19]. In Anglo-Saxon law, if there is a legal right in a matter, the judge's decision has the

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[15] *Ibidem*, p. 33.

[16] Emperor Justinian codified the whole Roman law, abolishing – consequently – the creative power (until then) of the praetorian law and the jurisconsuls.

[17] For example, when adopting the French Civil Code (1804), Portalis asserted that there must be case law to fill the gaps of the law, while arguing that *"all matters must be regulated by law[…] abandoning the jurisprudence rare and extraordinary cases, as well as those unforeseen by law"* (*apud* T. Ionaşcu , *op. cit.*, p. 34).

[18] *Ibidem.*

[19] See, for more, D.-C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, a 2-a, C. H. Beck Publishing House, Bucharest, 2008, pp. 151-162.

relative value of the work judged (*res iudicata*). In this situation, the precedent has the value of an interpretative source of law[20]. If, however, there is no normative act (law) or it is not sufficient, then the authority of the decision (judgment) is general, similar to the authority of the law, being applicable *erga omnes.* The judge no longer has the task of applying the rule of law, but to release the rule of law[21] which become binding on lower courts in degree or with the same degree of the one that pronounced it. The decision also binds the court that ruled it, although this second rule is not as strict as the first and applies differently in English and American law.[22].

The precedent is not the decision in its entirety, but the *ratio decidendi* of it, that is, the principle by which a case is resolved, the reasons that directly determine the decision, the essence of the judicial reasoning. *Ratio decidendi* must be distinguished from *obiter dicta*, that is, what the judge declares without it being absolutely necessary. Only *ratio decidendi is binding*, *obiter dicta* having a persuasive value[23].

The most important problem – the authors previously cited consider - in Anglo-Saxon law, it is that of distinctions. First, the judge must distinguish between *ratio decidendi* and *obiter dicta,* taking only the principle into consideration and then distinguishing between preceding decisions that are relevant in a matter and decisions made in error or inadequate (*per incuriam*) and which do not constitute a precedent. This activity of distinction is creative, ensuring the development of the jurisprudence and avoiding that the rule of the previous one becomes a simple application of the solutions already given.[24]

5. In Romano-Germanic law (of which the Romanian law is also part) the position of the case-law is different from that of the Anglo-Saxon law.

The jurisprudence is the result of the interpretation and application of the law, carried out by the judicial body according to the *will of the legislator* who adopted the legal norm. In this sense, the courts solve (all) the cases (of public or private law) that are brought before them and give decisions (judgments) based on the law. The judge – notified by action or indictment – *must* judge the case and pronounce the judgment interpreting and applying a legal norm. The activity of the judge is governed by two important principles:

- the judge is always ruling in the case that he is judging and does not have the right to establish general provisions outside the particular case before him;
- the judge is not bound by a judgment in a similar case, pronounced by another judge and, moreover, he is not even bound to his previous judgments.

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[20] H. Brun, G. Tremblay, *Droit constitutionel,* Les Editions Yron Blais inc., Cowanville, Quebec, 1990, p. 24.

[21] R. David, C. Janffret – Spinosi, *Les grands systémes de droit contemporaine,* Dalloz, Paris, 1992, p. 306.

[22] *Ibidem,* p. 351-353 (*apud* D.-C. Dănişor, I. Dogaru, Gh. Dănişor, *op. cit.,* p. 160).

[23] *Ibidem.*

[24] *Ibidem.*

Arguments, such as that the principle of the independence of the judge opposes the idea that the judicial precedent is a source of law, cannot find support in the principles of the rule of law. In a rule of law, the law must have the same meaning for all; the judge is independent of other authorities and of all individuals, but not of the law. On the contrary – as one author writes[25] -, *the judge must be obedient to the law*[26].

So, we admit, along with other authors[27], that the value of the precedent in Romano-Germanic law is shaped according to three fundamental rules:

- the judge's obligation to judge;
- the prohibition to legislate, to make decisions by way of general decisions;
- the relativity of the case judged.

First, the judge must judge even if the legal law is deficient. The legal system does not admit loopholes, because any social situation must be regulated, if not by a legal norm, at least of a fundamental principle.

In the Romano-German system, the creative role of the jurisprudence (from the Anglo-Saxon one) is subordinate to the law.

Theoretically, the judge cannot add to the legal system a new norm, he only discovers an existing norm, implicitly, in the system[28]. He does not proceed as the English judge, formulating a principle, but declares himself bound by a principle that already exists and to which he applies. The difference from Anglo-Saxon law is that the precedent thus created is not obligatory, but only persuasive. The judge is not obliged to apply, in similar cases, the principle that constitutes the *ratio decidendi* of a previous decision. In practice, however, he will rely on this principle, although he cannot rely on previous case law as a legal basis for the new decision. He will invoke the principle as inherent in the system and not as created by judicial practice[29].

Second, according to the principle of separation of powers in the state, only Parliament can legislate. Therefore, to recognize jurisprudence as a source of law means to violate this fundamental principle. In this sense, in order to avoid the interference of the judge in the exercise of the legislative function of the parliament, the civil law in the countries of the Romano-German system prohibits the judge to decide by the way of general or regulatory provisions.

Thirdly, in the Romano-German law systems, the court decision enjoys only the relative authority of the judicial work, which means that the decision is only

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[25] See, M. A. Hotca, *Este jurisprudența izvor de drept în sistemul de drept român?* (http://www. Hotca.ro/index.bhp/blog – pot/ este – jurisprudența – izvor – de – drept – în – sistemul – de – drept – român).

[26] *The Constitution of Romania itself proclaims the principle that the judge obeys only the law.*

[27] See, D.-C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului,* a 2-a, C.H. Beck Publishing House, Bucharest, 2008, pp. 159 – 162.

[28] *Ibidem*, p. 161.

[29] *Ibidem*.

mandatory in the case in which it was pronounced. (*res iudicata inter partes tantum ius facit*). This rule is of fundamental importance, because the judge is not obliged to give the same solution in another case. He is not bound in the future either to his own practice, nor to the practice of the higher courts, which leads to the conclusion that the precedent has no binding legal value, enjoying only *intellectual authority.*[30].

In conclusion, in this light, *jurisprudence cannot play a creative role,* it cannot be a *source of law.*

6. In Romanian law, with all the above, we can accept that there are *situations,* it is true, *exceptional,* provided by the Constitution and other laws, which *urge the reconsideration of judicial practice as a source of law.*

These situations concern[31]:

a) the decisions of the High Court of Cassation and Justice (HCCJ) pronounced in the matter of appeals in the interest of the law (appeal in the interest of the law) and the unraveling of some legal issues;

b) the decisions of the Constitutional Court.

a) According to Article 126 (3) of the Constitution of Romania, *"The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence."*. This constitutional attribution is achieved through the unity of its own practice but, in particular by a decision in appeal in the interest of the law.

- the notification of the Court is made by the Attorney General attached to the High Court of Cassation and Justice, by the governing board of the HCCJ, by the governing bodies of the courts of appeal and the Ombudsman;
- those who have the right to refer must prove that the legal problems that form the object of an appeal in the interest of the law they have found different interpretations and solutions, contained in final judgments, in the practice of the courts of the territory of the country, annexing these decisions to the request for appeal;
- judging the appeal in the interest of the law it is made by a sufficient special body, representative at the Court level (the president or the vice-president of the Court, the presidents of the Chambers, 14 judges from the Chamber in whose jurisdiction the question of law enters the debate, each 2 judges from the other Chamber);
- the decision of the HCCJ has *interpreted work authority,* has no effect on the judgments examined (they will not be reformed by the effect of the considerations of the decision);
- no parties are cited in the debate, no lawyers participate;

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[30] *Ibidem,* p. 162.

[31] N. Popa , *op. cit.,* pp. 163-165.

- the decisions are obligatory for the courts that will solve similar cases in the future;
- the decisions are published in the Official Gazette of Romania, Part I.

Regarding the right of the HCCJ to ensure, through the decisions given in the appeals in the interest of the law, the CCR was notified with an exception of unconstitutionality regarding the essence of this right, on the ground that it violates art. 124 of the Constitution. The reason for this exception of unconstitutionality is that, since only the law is a source of law, the interpretation given by HCCJ in the reunited Chambers, would lead to a subordination of the will of the judge of this court. On the other hand, it is claimed that, in reality, the standardization of the judicial practice is achieved through ordinary appeals.

By Decision no. 528/1997, The Constitutional Court rejected the exception of unconstitutionality that was brought, stating that *"the principle of subordinating the judge only to the law, according to art. 124 paragraph (3) of the Constitution, does not have and cannot have the meaning of the different and even contradictory application of one and the same legal provision, depending exclusively on the subjectivity of the interpretation of different judges."*. The assurance of the unitary character of the judicial practice is also imposed by the constitutional principle of the equality of citizens before the law and of the public authorities, that is to say, including the judicial authorities.

The decisions given in the interest of the law are imposed by the force of the arguments and the quality of the motivation. They are, as has been shown, *obligatory*.

In accordance with the new civil and criminal procedural legislation, a new instrument has been introduced to ensure a unitary practice (together with appeal in the interest of the law analyzed previously): the possibility of notifying the HCCJ with a view to issuing a preliminary ruling *to solve law issues*[32].

The new procedure consists of the possibility of a panel of the HCCJ, of a court of appeal or of the court invested with the settlement of the case in the last instance, which finds, during the trial, that a question of law, the clarity of which depends on the settlement of the case is new, will be able to suspend the judgment and notify the HCCJ.

The special panel organized at the HCCJ will make a decision, and the solution given by the HCCJ is binding.

These interpretative solutions in the two situations are invoked as *judicial precedents* in the judicial activity, resolving the cases with which the courts are invested based on them. It is also the reason why it is considered that the HCCJ solutions can be included among the *secondary sources of law.*

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[32] The foundation of the matter is represented by art. 519-521 of teh Civil procedure Code and art. 475-477[1] din of teh Criminal Procedure Code

Whether or not these decisions contain norms of law has no relevance, as long as they are not considered normative acts, but only "sources of law"[33]. Moreover, those decisions, which therefore contain binding provisions, can easily be included in the category of *interpretative legal rules.*

In the sense of the above, we bring in the analysis Decision no. *2014/2007 of the Constitutional Court of Romania (CCR) which admitted that "the institution of the appeal in the interest of the law confers on the supreme court judges the right to give a certain interpretation, thus unifying the differences of interpretation and application of the same text by the inferior courts. Such interpretative, constant and unitary solutions, which do not concern certain parts and have no effect on the previously pronounced solutions, which have come into the power of the judicial work, are invoked in the doctrine as "judicial precedents", being considered by the legal literature "secondary sources of law" or "interpretive sources " (...).*

b) *The Decisions of the Constitutional Court of Romania (CCR)*

Regarding the CCR, first, there are some clarifications that must be made:

- the position the the CCR is fixed in the ethical system by Title V of the Constitution of Romania (art. 142-147);
- the CCR is the guarantor of the supremacy of the Constitution;
- the CCR is an autonomous authority, it is not part of the legislative, executive or judicial authority;
- the main tasks of the CCR concern the control of the constitutionality of the laws (of the initiatives to revise the Constitution, international treaties and agreements, the Parliament's regulations and decisions and ordinances) before promulgating them or, by the exception of unconstitutionality, the resolution of the conflicts of constitutional nature between the public authorities;
- the decisions of the CCR are generally binding and have power only for the future.

We agree with the authoritative opinion of Prof. Nicolae Popa (and not only), according to which, the CCR decisions in the case of the unconstitutionality exception have characteristics of the judicial precedent[34]. The exception of unconstitutionality of a law or ordinance text is raised before a court, where the parties defend or exploit a legitimate interest. In such cases, the CCR is ruling *in law*, it does not resolve the dispute in the matter, this is what the substantive judge does. The decisions of unconstitutionality have *erga omnes* effects and *not inter partes litigants.*

The source of law is more visible if the constitutional control court returns to its practice, a hypothesis in which it was created at least once, because the legal

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[33] That is, forms *"of expressing the legal norms that are determined by the way of their edict or sanction by the state"* (vezi, I. Muraru, S.-E. Tănăsescu, *Drept constituțional şi instituții politice*, C.H.Beck Publishing House, Bucharest, 2014, vol. I, p.26 (*apud* M.-A. Hotca, *op. cit.*, p.3).

[34] N. Popa, *op. cit.*, p. 166.

norm whose constitutionality has been ascertained cannot have different meanings, even if the interpretation is done at different times[35].

In the same sense, if the rule declared unconstitutional has already been applied in practice (in a sense contrary to the Constitution), the CCR decisions being *erga omnes*, means that the CCR jurisprudence has created law, because the rule declared unconstitutional can no longer be applied for the future. In cases of recourse to the case law of the Court, the solution is equivalent – *mutatis mutandis* – with that in which the legislature, after adopting a law, modifies or repeals it[36].

We therefore observe, instead of concluding, that both in the field of appeals in the interest of the law and that of *"solving law issues"*, as well as regarding the declaration of unconstitutionality of some legal norms, the HCCJ and the CCR have a "*creative role*" as they create binding rules for all judges.

7. In EU law, jurisprudence represents the totality of court rulings of the Courts of Justice of the European Union (CJEU), courts that have a special role in achieving the economic and political integration of the EU, in "*respecting the law in the interpretation and application of treaties*"[37].

The CJEU, being responsible and ensuring the monopoly of the interpretation of Union law, with a view to its uniform application in all EU Member States[38], proves itself to be a *European normative judge*[39], a judge dealing with a system of law still forming[40].

The specialist doctrine[41] acknowledges that, *in EU law, the role of case law* is highlighted *in four main directions:*

a) *regarding the uniform interpretation and application of EU law*, meaning that the solutions given by the judge are obligatory on how to interpret the provisions of EU law, thus, the CJEU jurisprudence contributing to the uniform application of EU rules in the national legal order of the Member States;

b) *regarding the enunciation and substantiation of fundamental human rights in the EU*, meaning in which, the specialized literature holds, among others:

- the general principles of law overlap with the principles of jurisprudential law, as regards the content, although they differ in name;

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[35] See, for example, Decision no. 100/2004 (of the CCR), published in the Official Gazette of Romania No. 261 of March 24, 2004.

[36] M-A. Hotca, *op. cit.,* p. 4.

[37] Conform art. 19 TUE.

[38] M.A. Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia,* Universul Juridic Publishing House, Bucharest, 2012, p. 178.

[39] N. Diaconu, *Rolul jurisprudenței în ordinea juridică a Uniunii Europene, i*n vol. (CD)"The role of jurisprudence in the development of the new Romanian law", Universul Juridic Publishing House, Bucharest, 2019, p. 293.

[40] A. Fuerea, *Drept comunitar european. Partea generală,* All Beck Publishing House, Bucharest, 2003, p. 147.

[41] See, N. Diaconu, *op. cit.,* pp. 293-296.

- the application of general principles is ultimately a matter for the CJEU[42];
- The CJEU ruled that fundamental human rights are an integral part of the general principles whose observation it ensures;
- CJEU replaces – in order to avoid cases of delegation of justice – some gaps in the Community regulations, using the general principles of law for the establishment of solutions[43];

c) *on the basis of the principle of the direct applicability of EU law;* enshrined in the provisions of art. 228 para. (2) TFEU, the principle of direct applicability concerns only the *regulations,* stating that they are of direct applicability in all Member States; for the other EU normative acts and for those adopted under the ECSC, it was the role of the CJEU to establish this principle, when solving certain cases.[44];

d) *regarding the substantiation of the priority principle of the application of EU law.* The primordiality of the Union law over the national law of the Member States has not been regulated in the Treaties establishing the Communities; in this situation, the EU Member States – according to the accession agreement – they are obliged to recognize the primordiality of Union law over national law.

However, the practice raised a number of issues to which the CJEU had to resolve, in many situations following the request of the national courts, so that it can be seen that the grounding of this principle was solved by the CJEU by interpreting the European legal norms globally.[45]

The CJEU is a union institution, joint of the EU and EURATOM, whose main task is to ensure the observance of the Union law in application and the interpretation of the Union normative acts.[46].

The CJEU:

- controls both the legality of the Union normative acts and the administrative affairs of the Union institutions, thus overseeing both the legislative and the Union executive;
- it can solve both the disputes between the Union bodies, between the bodies and the Member States, as well as the disputes between them and natural or legal persons, respectively between natural persons or between legal persons;
- the competence of the CJEU is a compulsory one, the parties to the dispute do not have the possibility to refuse the Court's jurisdiction, except for a few limited cases;

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[42] P. Manin, *Les communautés européennes. L'Union européenne. Droit institutionnel*, A. Pedone, Paris, 1993, p. 223.

[43] CJEU, Decision. "Haetcht" – C48/72 – SA Brasserie de Haecht v. Wilkin-Jansen (regarding the principle of legal certainty); C.11/70 (on the basic principles of Community law).

[44] See, în this sense, The Decision of Van Gend end Loos (CJEU, Decision of 05.02.1963, 26/62.1.) şi Decision COSTA/E.N.E.L. (CJEU, Decision of 15.07.1964, 6/64).

[45] N. Diaconu, *op. cit.,* p. 296.

[46] For more, see, F. Gyula, *Drept instituțional al Uniunii Europene,* Hamangiu Publishing House, Bucharest, 2012, pp. 241-242.

- the decisions of the Court are final and have binding force within the territorial boundaries of the Union, being dispensed even by the procedure of "exequatur" or by any other approval from the State in whose territory it is to be enforced.;
- the supreme courts of the EU Member States, or rather the national courts of last jurisdiction, are obliged, in the matter of interpreting or establishing the validity of the rules of Union law, to request the opinion of the CJEU whenever they appear unclear in this regard, and the Court , without judging the fund, through a preliminary ruling, it will solve the purely theoretical problem, of law, raised by the national court;
- In some cases, the CJEU intervenes in the procedure of ratification of public international treaties concluded by the EU, the Union bodies being obliged to consult with it before signing such treaties;
- *the jurisprudence of the court* – in the light of its own appreciation - although it is not considered unanimously and expressly a source of law, it is accepted as a subsidiary source of the Union law, contributing to filling its gaps, as well as clarifying the less clear formulations of the Union normative acts; moreover, in the matter of actions for annulment, the judgment of the CJEU has absolute working authority, not only *inter partes* (as in the case of the illegality exception).

Equally, we need to bring to discussion – in short – the jurisprudence of the European Court of Human Rights (ECHR).

The ECHR is a supranational court that guarantees respect for human rights by the courts belonging to the States Parties to the European Convention on the subject. This court makes *binding judgments for national courts and authorities.*

Together with other authors[47] believe *that the ECHR judgments also have the right source of law*, because, according to art. 20 paragraph (1) of the Constitution, the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party. According to art. 20 paragraph (2) of the same article, if there are inconsistencies between the pacts and the treaties regarding the fundamental human rights to which Romania is a party and the internal laws, the international regulations take precedence, unless the rules of national law are more favorable. Also, in accordance with the provisions of art. 11 of the Constitution, the international treaties to which Romania is a party, constitute internal law.

8. From the presented ones, some *conclusions* are drawn:

a) in contemporary law, the role of source of law of the jurisprudence differs from one legal system to another, being more precisely about the most important systems (families) of law: Romano-Germanic law and Anglo-Saxon law;

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[47] M.-A. Hotca, *op. cit.,* p. 4

b) in Anglo-Saxon law, judicial precedent (jurisprudence) is the authority that a judicial decision can have in cases analogous to the one in which it was pronounced;

c) in *Romano-Germanic law*, the jurisprudence is the result of the interpretation and application of the law, carried out by the judicial body, according to the will of the legislator who adopted the legal norm; the court decision enjoys only the relative authority of the judicial work, which means that the decision is not compulsory except in the case in which it was delivered; therefore, jurisprudence cannot have a creative role, it *cannot be a source of law;*

d) in Romanian law (integrated with the family of Romano-German law), with all of the above, we can accept that there are situations, it is true, exceptional, (provided by the Constitution and laws) that urges the reconsideration of judicial practice as a source of law. These situations concern: the HCCJ decisions rendered in the matter of appeals in the interest of the law and of the solving of some issues of law; the decisions of the Constitutional Court; ECHR and CJEU judgments;

e) *"The reserve attitude towards the recognition of the source of the law of jurisprudence* – writes Prof. N. Popa – *it is based on the principle of separation of powers in the state"*[48]. It is true, in a rule of law, the legislative authority has the task of legislating, and the judicial one, the task of applying the laws to concrete cases. *"To recognize the right of the courts to direct normative elaboration would mean to force the door of legislative creation, disturbing the balance of powers"*[49].

However, even if the *jurisprudence has a relative value* in the Romano-Germanic systems, it remains undisputed that there *are* still *jurisprudential rules that the judge considers obligatory;*

f) In EU law, the CJEU's case law is not a source of EU law, as court decisions do not have an *erga omnes* effect, but in terms of interpreting the provisions of EU law, the CJEU's solutions are mandatory[50]; it is accepted as a (complementary) subsidiary source of EU law, contributing to filling its gaps, as well as clarifying less clear formulations of EU normative acts[51];

g) whether or not it is considered a source of law, the jurisprudence has shown that it can contribute to the improvement of the law, to the removal of unconstitutional legislative solutions or to the creation of unitary normative solutions for the courts, regarding the application of legal provisions[52].

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[48] N.Popa , *op. cit.,* p. 166.
[49] *Ibidem.*
[50] N. Diaconu, *op. cit.,* p. 296.
[51] *Ibidem.*
[52] T.-V. Popescu, *op. cit.,* p. 385.

Bibliography:

1. M. Bădescu, *Teoria generală a dreptului (General theory of law)*, Sitech Publishing House, Craiova, 2018.

2. H. Brun, G. Tremblay, *Droit constitutionnel,* Les Editions Yron Blais inc., Cowanville, Quebec, 1990.

3. H. Levy-Bruhl, *Sociologie du Droit,* P.U.F., Paris, 1971.

4. M. Cappelletti, *Le pouvoir des juges,* Economica, Presses Universitaires d'Aix-Marseille, 1990.

5. R. David, C. Janffret – Spinosi, *Les grands systémes de droit contemporaine,* Dalloz, Paris, 1992

6. D.–C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului (General Theory of Law), Ed.* 2, C.H. Beck Publishing House, Bucharest, 2008.

7. N. Diaconu, *Rolul jurisprudenței în ordinea juridică a Uniunii Europene (The role of jurisprudence in the legal order of the European Union), in* (CD)"The role of jurisprudence in the development of the new Romanian law", Universul Juridic Publishing House, Bucharest, 2019.

8. M.A. Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia (European Union law and its specificity),* Universul Juridic Publishing House, Bucharest, 2012.

9. A. Fuerea, *Drept comunitar european. Partea generală (European Community law. The general part),* All Beck Publishing House, Bucharest, 2003.

10. F. Gyula., *Drept instituțional al Uniunii Europene (Institutional law of the European Union),* Hamangiu Publishing House, Bucharest, 2012.

11. Hegel, *Principiile filosofiei dreptului (The principles of the philosophy of law),* Academiei RSR Publishing House, Bucharest, 1969.

12. M.-A. Hotca, *Este jurisprudența izvor de drept în sistemul de drept român? (Is the jurisprudence a source of law in the Romanian law system?)* (http://www. Hotca.ro/index.bhp/blog – pot/ este – jurisprudența – izvor – de – drept – în – sistemul – de – drept – român)

13. T. Ionaşcu, *Jurisprudența – izvor de drept (Jurisprudence - a Source of Law),* in the Annals of the "Constantin Brâncuşi" University of Târgu-Jiu, Legal Sciences Section, no. 3/2014.

14. P. Manin, *Les communautés européennes. L'Union européenne. Droit institutionnel*, A. Pedone, Paris, 1993,

15. J. Mayda, *François Gèny and Modern Jurisprudence,* Baton Rouge, L.A. Stat University Press, 1978.

16. P. Pescatore, *Introduction á la science du droit,* Centre Universitaire de l'Etat, Louxembourg, 1978.

17. N. Popa, *Teoria generală a dreptului (General theory of law)*, Ed. 5, C.H. Beck Publishing House, Bucharest, 2014.

18. T-V. Popescu, *Practica judiciară între izvor de drept şi adevăr juridic particular (The judicial practice between the source of law and the particular legal truth), in* vol. (CD) "The role of jurisprudence in the development of the new Romanian law", Universul Juridic Publishing House, 2019.

19. M. Troper, *Fonction jurisdictionnelle ou pouvoire judiciare?,* în "Pouvoirs", no. 16/1981, P.U.F.,Paris.