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TABLE OF CONTENTS

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LAND AND PROPERTY RIGHTS WITHIN THE URBANISM LAW

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ABSTRACT

The study intends to highlight the functions of property rights in relation to the characteristics of urbanism law. The analyse aims to identify the role of public authorities in the production process of planning public policies, under current regulations in force in Romania. Moreover, while the legislasion led to confer a social function of property rights, this conception of property rights comes up against the revival of private property, which is likely to complicate the implementation of public planning policies. The social function of the property law, however, could reach its limits in the coming years. Indeed, the jurisprudence appears to give a boost to the individualistic dimension of ownership complicating the achievement of public planning policies.

KEY WORDS: PROPERTY LAW, PUBLIC AUTHORITIES, LAND USE PLANNING

INTRODUCTION

Ever since the dawn of it's becoming, the society has used its own means to reshape the natural environment and create within it a self-made environment which the authors call "artificial", with volumes, spaces and structures that significantly differ from the natural environment in terms of quality.

In order to overcome the challenge of ruthless exploitation of natural resources and intrusion of *the artificial environment*[2] into the natural one (which further leads to chaotic development of urban agglomerations and destruction of large areas) a new approach on the urbanism practices was necessary. This revival has – progressively – reached each and every aspect of urbanism: the purpose, the methods and the scope of application. Although the word "urbanism" is relatively recent, the discipline it designates is very old, and it roots back in the antiquity when it referred to cities with orthogonal, regular shape[3].

As regards typology of contemporary sources, one may notice that international law is completely silent in this matter and EU law addresses the matters of urbanism and land development only to the extent that consequences exist or influence the environmental law. The Constitution of Romania is quasi used in this matter but it only contains provisions that govern the property right. The regulations that govern the urbanism are of legislative nature

[1] Beneficiary of the Project financed from Lucian Blaga University of Sibiu research grants LBUS-IRG-2016-02
[2] Elena Maria Minea, *Urbanism și amenajarea teritoriului* (in English, Urbanism and land development), Training support for remote education, Cluj-Napoca, 2011, p. 24.
[3] The word "urbanism" was first used by Ildefonso Cerda, a Catalan engineer, in his work titled *Teoría general de la urbanización y aplicación de sus principios y doctrinas a la reforma y ensanche de Barcelona*, published in 1867 (briefly, in English, General Theory on Urban Planning). He used the Latin word "urbis" to designate the science of city development.

but there is no code in this respect, whereas the rules are disparate, incomplete and, in our opinion, anachronistic in some respects.

According to Professor Mircea Duțu "in this stage of its assertion as an autonomous law branch and new science, the Romanian law on urbanism basically represents an right of administrative police meant to prevent the violation of a defined order and concerned with causing the protection rules to be strictly observed".

The urbanism law is to be viewed in the same context as an element of the economic law whenever it offers priority to a plot of land on the ground that it is an economic asset, element or resource. However, it remains quasi silent when it comes to operational urbanism, dynamic aspects of urban morphology and the transformation processes that impact the use of lands, urban extension and regeneration, rehabilitation of historical centers and old neighborhoods etc.[4]

The recent developments go even further and reflect the intention to move on from a real estate-based urbanism to a real life policy in increasingly crowded urban communities. Although urbanism was initially intended to merely respond to some aesthetic considerations and was mainly reserved to architects, it is currently a multi-disciplinary field meant to serve the social, land development and environmental policies. Initially imagined to address the urban soil as part of the real estate law, the urbanism law tends to become a law concerned with the activities developed in connection with it.

The way in which the legal regime of urbanism has evolved and developed reflects a limitation of the ownership title in an increasingly restrictive manner, so that the owner had to give in to the public good (just like it happened for the right to build – as a sub-division of the ownership title) and to offer guarantees to the administered communities[5].

The problem with regulations governing the urbanism is very sensitive and complex because it is "organically" linked to property related matters. One of the major issues that urbanism has to cope with is the manner in which the principles governing the two types of property – the public and private property[6] – may be made compatible, because whenever implementation of local communities projects is sought, the rights of landlords may very easily be prejudiced.

In Romania, the property right is defined in article 555 of the Civil Code, according to which "(1) Private property means the right of the holder to possess, use and dispose of an asset in an exclusive, absolute and permanent way, within the limits set by the law. (2) Under the law, the private property right can be subject to terms and conditions and subdivisions, where appropriate".

A New Civil Code[7] has been recently adopted in Romania which dedicates a whole chapter to the issue of legal and conventional limitations of the property right. In our opinion, the limitations set by the law become compatible with the land development objectives sought by the local communities, but the adjustment to the practical situations of space organization

[4] Interview with Professor Mircea Duțu, PhD, published on www.juridice.ro.
[5] Elena Maria Minea, *Urbanism și amenajarea teritoriului* (in English, Urbanism and land development), Training support for remote education, Cluj-Napoca, 2011, p. 44.
[6] As regards assets which, by law or by their nature, are of public use or interest (according to article 1 of Law 213/1998 on public property and legal framework thereof), the public property right belongs to the state or to the administrative and territorial units.
[7] The Civil Code of July 17th, 2009, adopted by Law 287/2009, published in the Official Journal, Part I, no. 505 of July 15th, 2011.

is often difficult because the specific regulations do not offer instruments to support the administrative practice in this respect.

The Romanian regulations in the matter do not provide for a definition of either the urbanism or the land development and they merely indicate the content, specific features, objectives thereof and means to achieve them. For instance, according to article 2(3) of Law 350/2001 on land development and urbanism[8] "The space management of the territory is achieved through land development and urbanism which are sets of complex activities of general interest that facilitate the balanced space development, the protection of natural and built-in patrimony and the improvement of living conditions in urban and rural localities".

It may be inferred from the above quoted text that the urbanism[9] is one of the two instruments (the other one being land development) that help achieving the space management of the territory, with the complex role stated in the above mentioned acts.

A review of the specific activities of urbanism and land development allows us to identify the formal features of the urbanism law. According to most authors, *the urbanism law shall remain a law for the constantly expanding city*[10], a specialized, technical and permanently changing sub-division of the administrative law, which confines the property right.

DEMOCRATIC AND PROSPECTIVE CHARACTER

The specific published literature[11] defines openness as a phenomenon which allows outside opinions and ideas to be absorbed and transparency as a means to reflect the public character of public administration's actions and efforts to meet half way the community's needs by direct and immediate access and *the participation of diligent persons in the decision making process*[12].

The constantly growing role of local communities in the public life doubled by the transfer to them of some urbanism related competencies is also manifest in the recent developments of the legislation which proposed mechanisms intended to strengthen *the democratic functioning of local institutions*[13], substantiated by and implemented through some international[14] and domestic[15] legal instruments.

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[8] Updated Law 350/2001 on land development and urbanism, published in the Official Journal no. 373 of June 10th, 2001, as supplemented and amended from time to time.

[9] According to article 4 of Law 350/2001 urbanism must be (a) an operational activity intended to assure on site detailing and delimitation of the provisions of the land development plans; (b) an integrated activity which summarizes the sectoral policies on management of localities' lands; (c) a standard-setting activity which states the methods for the use of lands, the definitions of destinations and overall dimensions of buildings, inclusively the infrastructure, the layout and plantations.

[10] Norbert Foulquier, *Comment caractériser le droit de l'urbanisme français après la loi SRU. Une analyse historique du droit contemporain de l'urbanisme* (in English, How to Characterize the French Urbanism Law in Light of SRU Law. A Historical Approach to Contemporary Law on Urbanism), http://www.univ-paris1.fr/fileadmin/cerdeau/son/Les_caract%C3%A9ristiques_du.

[11] Dana Alexandru, *Comunitățile locale și rolul lor în spațiul administrativ european în contextul descentralizării administrative* (in English, Local Communities and their Role in the European Administrative Space in the Context of Administrative Decentralization), Pro Universitatia publishing house, Bucharest, 2013, p. 72.

[12] Emil Bălan, *Drept administrativ și procedură administrativă* (in English, Administrative Law and Administrative Proceedings), Ed. Universitară publishing house, Bucharest, 2002, p. 148.

[13] A recent act in this respect is Order 2701/2010 published in the Official Journal of Romania, Part I, no. 47/2011 approving the Methodology for dissemination and public consultation regarding the elaboration or revision of land development plans and urbanism plans.

[14] The European Charter of Local Self-Government adopted in Strasbourg on October 15th, 1985, became effective on September 1st, 1988. Romania signed the Charter on October 4th, 1994 and ratified it by Law 199 of November 17th, 1997, published in the Official Journal or Romania, Part I, no. 331 of November 26th, 1977, except for article 7(2) of this European act.

[15] Article 120 of the Constitution of Romania, revised.

The decentralization of urbanism reflects a closer relation between the administered communities and the local authorities entrusted with the issuance of urbanism documentations, which further leads to the need to create leverages for the public to be able to participate in the elaboration of such norms. These efforts materialized[16] into some specific rules implemented in terms of the right to be informed, the right to file petitions and the right of citizens to be consulted.

This reform is intended to improve the decision-making process in a field that impacts the sustainable development of the territory, to improve the view on the realities of the administrative system and to enhance the ability to analyze and summarize the information provided by citizens.

Order 2701/2010[17] sets forth the methodology regarding the mandatory elements of public dissemination and consultation to be applied in terms of elaboration or revision of urbanism and land development plans, in accordance with article 61 of Law 350/2001[18] on land development and urbanism, as further amended and supplemented.

The scope of application of this order is set out in article 2 and refers to the people initiating, elaborating and approving the urbanism and land development plans, as well as to the decision-makers, and applies to all categories of urbanism and land development plans laid down by the law.

The topic of interest for this opinion is set out in article 3, according to which *the public must be kept informed and consulted all throughout the elaboration or updating of the urbanism and land development plans, as an inseparable and binding part of the process of initiation, elaboration, permitting and approval of the urbanism and land development documentations*.

Lawmakers set out a detailed administrative proceeding which is mandatory for the public authorities and they also laid down severe penalties in case of failure to observe the obligation to inform and consult the public all throughout[19] the elaboration or revision of urbanism and land development plans.

The mechanisms of participatory democracy are doubled by legal instruments which allow the verification of validity of the administrative acts. Thus, a citizen who considers that either one of his/her rights was prejudiced, is allowed to seek justice before the court vested to rule on contentious and administrative matters which must look into the validity of that administrative decision. Contentious rules in urbanism matters must be improved because, in the absence of a code of laws and of some rules governing the administrative proceedings, the ruling on administrative decisions is very difficult. A practice does exist, but it focuses on the validity of the building permits and not on the regulations applicable to urbanism matters. Applying a censorship to this field is quite difficult because there is political interference in the elaboration of public urbanism policies which makes it rather impossible to examine it in

[16] Dana Alexandru, Mihaela Olteanu, *Democrația locală instituțională. Între consacrare normativă și practică administrativă. Caietul științific nr. 13 al I.S.A Paul Negulescu* (in English, Local Institutional Democracy between Standard Setting and Administrative Practice. Scientific Book no. 13 of the Institute for Administrative Sciences Paul Negulescu), Universul Juridic publishing house, Bucharest, 2011, p. 471-480.

[17] Published in the Official Journal of Romania, Part I, no. 47/2011.

[18] Published in the Official Journal of Romania, Part I, no. 373/2011.

[19] According to article 4 of Order 2701/2010 the process has several stages, as follows: a) the preliminary stage – notify the intention to elaborate; b) first stage – document and elaborate the substantiation report; c) second stage – elaborate proposals to be lodged for approval; d) final stage – elaborate the final proposal which takes into account all comments from permit issuers and is subject to the process of decisional transparency.

terms of opportunity, as long as the courts of law are only entitled to determine the validity of the administrative decisions.

In conclusion, the right of citizens to participate in the solving of public issues is well defined in the Romanian law but the Romanian law does not offer the tools necessary to achieve efficiency and effectiveness in terms of urbanism.

The urbanism law is undoubtedly a prospective right by its very nature. Land development – as a general, encompassing activity (which circumscribes the urbanism) must be (in accordance with article 3):

1. A global activity intended to group the various sectoral policies into an integrated set of rules;
2. A functional activity which must take into account the natural and built-in environment based on the culture and mutual interest values;
3. **A prospective activity**, meant to examine the long-term development trends of economic, environmental, social and cultural phenomena and interventions and take them into consideration during implementation;
4. **A democratic activity** intended to assure the participation of population and of its political representatives in the decision-making process.

Land development – the purpose of which is to reconcile economic, social, environmental and cultural policies throughout the Romanian territory – is an activity conducted all along Romania, based on the principles of prioritization, cohesion and space integration at national, regional and county level.

Urbanism is intended to stimulate the complex evolution of localities by means of the short, medium and long-term development strategies. Activities are being conducted in all urban and rural localities in accordance with their potential and the expectations of their inhabitants.

The activities conducted are intended to achieve objectives such as: ■ improving the living conditions by eliminating all malfunctions, ensuring the access to infrastructure, public services and convenient housing for all inhabitants; ■ creating conditions for the special needs of children, elderly and disabled persons; ■ efficiently using the lands in accordance with the adequate urbanism functions; controlled expansion of built-in areas; ■ protecting and leveraging the cultural, built-in and natural patrimony; ■ ensuring the quality of built-in, developed and planted environment in all urban and rural localities; ■ protecting the localities against the acts of God.

Whereas the specific urbanism activities are very complex in reality, they need to be properly "articulated" so that the "whole" system relies on an adequate work and life environment for the members of the community. A very strenuous effort lies ahead the relevant public authorities that must undertake responsibilities for several generations to come[20].

STAKEHOLDERS IN URBANISM LAW AND DECENTRALIZATION

The public administration is intended to serve the public interests and by its very nature it must cause the implementation of the political values that express the general

[20] Elena Maria Minea, *Urbanism și amenajarea teritoriului* (in English, Urbanism and land development), Training support for remote education, Cluj-Napoca, 2011, p. 48.

interests of the society organized by the state. Law implementation is a prerogative in the hands of the executive power but it needs help from the public administration.

The Romanian local administration has been constantly concerned with the urbanism matters ever since the publication of the Organic Regulations (1831) based on which there have been created the „city councils" (in Romanian, „*sfaturile orășenești*") the main powers and duties of which were the administration and management of cities in all their areas (street paving, public lighting, urban embellishing actions etc.).

Local public issues have always been entrusted to the public authorities which were given specific powers in this respect.

Hence, the applicable law in the matter of local authorities' competence is Law 215/2001 on local public administration. According to article 3 of this law, the decision-making bodies are vested with *the settlement and management of the local public affairs for and on behalf and to the best interest of local communities they represent*[21].

According to the doctrine, *the principle of decentralization and subsidiarity* governs the allocation of local powers and duties, depending on the right of local communities to make decisions intended to solve problems that fall under their scope of competence. *This principle relies on the fundamental rationale that a decision concerning a person's or a community's own interests must be made by that person or community which is the next competent decision implementing factor*[22].

Liability for land development and urbanism falls on the authorities of the central and local public administration. The land development and urbanism activities are entrusted to the public administration because it is the institution called to answer to all kinds of requests and is held liable for the proper management thereof.

It is the local council that examines and approves the land development and urbanism documentations according to the law and determines the material and financial resources necessary to implement them, approves the allocation of funds from the local budget for defense against flood, fire, natural disasters and bad weather consequences.

Furthermore, the local council determines the actions necessary to build, maintain and revamp the roads, bridges and the entire infrastructure of the local interest transportation routes (article 38).

According to article 104(1)(j), the county council shall, after consultation with the authorities of local, communal and city public administration, determine the projects for land organization and development for the entire county as well as the projects for general urbanism development of the county and of the administrative and territorial units thereof, and monitors the way in which they are implemented in cooperation with the concerned authorities of local, communal and city public administration.

The Ministry of Regional Development and Public Administration is the authority of the specialized central public administration called to implement the government's development strategy and policy in terms of land development, urbanism, public works and constructions, subject to local autonomy.

Its powers include, among others, the obligation to elaborate the Plan for national territory development as a tool summarizing the sectoral and local policies and plans for land

[21] According to article 3 of Law 215/2001.

[22] Emil Bălan, *Instituții administrative* (in English, Administrative Institutions), C.H. Beck publishing house, Bucharest, 2008, p. 30.

development, the obligation to determine along with the authorities of the central and local public administration their duties and powers and the actions to be taken in order to protect areas of historical, architectural or landscape value.

This authority coordinates the public interest scientific researches in respect of land development, urbanism, enhanced stability and safety of constructions, protection against earthquakes, and coordinates the elaboration, permitting and approval of norms, specifications and technical regulations for the activities that fall under its scope of competence and it also coordinates the verification of the implementation thereof.

Furthermore, this ministry exerts the state control on constructions, public works, urbanism and land development in respect of compliance with the rules governing the authorization of buildings and implementation of the quality system in design, execution, operation and use of constructions.

There are other governmental or non-governmental bodies that join these administrative structures in their efforts to promote and implement the urbanism policies and regulations (inter-ministerial councils, technical councils, the Romanian Union of Architects, the Romanian Professional Association or Urbanists, the Romanian Union of Plastic Artists, other scientific, professional, creation organizations).

EXERCISE OF THE PROPERTY RIGHT WITHIN THE URBANISM LAW

Human evolution has been and is relying on the property. It is common knowledge that the property right is a complex, constantly evolving notion with various historical, sociological and legal implications.

The literature defines the property right as a right *in rem* which offers the holder the powers to possess, use and dispose of an asset; the holder is solely entitled to exercise all these powers as he/she may deem fit in his/her own discretion for his/her own benefit subject to the regulations in force[23].

It is a fact of the modern society that urbanism and property right are interlinked and overlapping – which calls for a thorough analysis of this notion. The legal traits, attributes and sub-divisions of the property right are the basic elements addressed by the regulations governing the land development and planning.

The property right is an *absolute* right. This *absoluteness* of the property right results first from its definition in the Civil Code and then from logic. However, as regards its legal content, the property right is not absolute because it is limited by the law, as stated in article 555 par. 1 of the Civil Code, according to which the property right may only be exercised "within the limits set by the law".

Therefore, the expression "absolute" should be read as follows: the property right is opposable to all[24], that is, *erga omnes*, but its content is limited[25].

A French[26] conclusion of the relevant literature is that the legal force of this right no longer offers guarantees and that social pressure "mutilates the force given by its content".

[23] L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale* (in English, Civi Law. Main Real Rights), Universul Juridic publishing house, Bucharest, 2006, p. 72.

[24] As regards the larger discussion on opposability of private rights, see I. Deleanu, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice* (in English, Parties and Third Parties. Relativity and Opposability of Legal Effects), Rosetti publishing house, Bucharest, 2003.

[25] Marius Văcărelu, *Administrația publică și dreptul de proprietate* (in English, Public Administration and Property Right), doctoral thesis, p. 44, not published.

"The absoluteness of the property right is compromised two times, first by the existing laws and regulations, as stated in article 544 of the Civil Code according to which «*property means the right to benefit and dispose of one's own assets in the most absolute manner, unless they are used in a manner prohibited by the law and regulations*» and second by the social context according to which «*neither the owner nor his/her asset are ever isolated; any property borderlines other properties, other freedoms which inevitably limit it*»" (C. Atias) (*translation from French*).

The property right is a permanent and exclusive right. Exclusiveness, just like absoluteness, is expressly stated in article 555(1) of the Civil Code. Doctrine[27] also reverts to article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms[28] which sets out three norms for the protection of the property right:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
2. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
3. States are entitled to enforce such laws as they deem necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The norms that guarantee and protect the property are in addition to regulations governing the limitations of the property right: the international law provides for exceptional restrictions that may result in the loss of the property right for public utility.

The content and limitations of the property right in Romanian law are first laid down in article 44 of the Constitution, according to which "Everyone's property right and the claims against the state are protected by law. The content and limitations of these rights are laid down by the law."

The provisions of article 556 of the Civil Code titled "Restricted exercise of the private property right" set out some material and legal limitations. The topic of interest for this opinion is the legal limitation which may represent a normal limitation, generated by the need to protect the general interests of the society or the property rights of the other holders. Under the circumstances, the regulations on urbanism acquire a major role. When examining this issue, the French Court of Cassation concluded that: "*The use of the asset by its owner is limited by a public order which sometimes refers to organization and planning and sometimes refers to management. This public order limits both the holder's right to use and his/her right not to use that asset. Any owner of immovable property is subject to the same urbanism restrictions that his/her immovable property is subject to. He/she can only use it in accordance with its destination. The compliance of projects and their execution with the general rules relying on security, hygiene, construction and aesthetic reasons and with the urbanism specifications is controlled a priori by the building permit and a posteriori by the certificates of compliance*"[29] (*translation from French*).

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[26] https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2008_2903/etude_discriminations_2910/distinctions_justifiees_2918/distinctions_entre_proprietaires_2920/limitations_exercice_droit_propriete_12143.html

[27] M. Rudăreanu, *Dreptul bunurilor (Drepturile reale)*, FRM publishing house, Bucharest, 2006, p. 57.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 and ratified by Romania by Law 30/1994, published in the Official Journal of Romania, Part I, no. 135/1994.

[29] https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2008_2903/etude_discriminations_2910/distinctions_justifiees_2918/distinctions_entre_proprietaires_2920/limitations_exercice_droit_propriete_12143.html.

A sensitive issue that land development and urbanism have been and are systematically required to cope with is the incompatibility of the principles that govern the two types of property – public and private: public interest and private interest are often on opposite or even antagonist positions and a simple "call" for a legally diligent person to give in to the general interest can prove to be but an utopic effort.

It was therefore necessary to sort out this "conflict" between the holders of the private property right – who are expected to give in – and the beneficiaries of such "courtesy".

This issue seems to have been solved by the French case law but the discussion on the social function of the property right continues in literature[30]: "*However, the social dimension of the property right within the urbanism law might be exhausted in the near future. In fact, the case law seems to re-boost the individualistic dimension of the property right, which will make it more complicated to implement the public urbanism policies, with the Constitutional Council passing several decisions in this respect. For instance, it has determined that article L.332-6-1 of the Constitution, which allowed the public administration to issue a building permit in exchange for the concession of a plot of land by the claimant, was unconstitutional*[31]*. Even though this censorship relies on the fact that the lawmaker and not the regulatory authority was called to clarify the regime of this «exchange», this case law testifies of the judge's concern to protect the property right*" (*translation from French*).

This is not the case in Romanian administrative practice. Once they issue the urbanism documentations, the local authorities impose on the landowners who initiated the PUZ the obligation to clarify – until the building permit is released – the legal standing of the land plot to be assigned for the purposes of road bed widening.

The landowners who initiated the urbanism documentation shall execute the "works for planning and revamping of the proposed roads (accesses) at their own expenses. The connections to public urban networks shall be executed by the investor at its own expenses. The building networks referred to above shall, irrespective of the manner in which they are financed, join the public property according to article 29 of Government Decision 525/1996 approving the General Urbanism Regulation"[32].

Landowners do not revert to the courts of law seeking invalidation of these obligations set by the local authorities but, on the contrary, in executing their investments they implement the provisions of the decisions issued by the local councils. This phenomenon is increasingly evolving in Romania. The absence of some specific, urbanism-related, regulations which would provide the players with accurate leverage capable of reconciling the interests of private entities with those of the public administration facilitate the abuse of power by the public authorities.

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[30] Norbert Foulquier, *Comment caractériser le droit de l'urbanisme français après la loi SRU. Une analyse historique du droit contemporain de l'urbanisme* (in English, How to Characterize the French Urbanism Law in Light of SRU Law. A Historical Approach to Contemporary Law on Urbanism), http://www.univ-paris1.fr/fileadmin/cerdeau/son/Les_caract%C3%A9ristiques_du.

[31] Constitutional Council, November 22nd, 2010, Decision no. 201033-QPC, Esso SAF: AJDA 2010, p. 2384, comment by F. Rolin, Collection Dalloz, 2011, p. 136, comment by E. Carpentier.

[32] Decision no. 85 of March 26th, 2016, passed by the Local Council of the Municipality of Sibiu, approving the Zonal Urbanism Plan and the Local Regulation; green area intended to protect the major infrastructure – fuel distribution station "Mol", shopping building (…) without number; initiator: City Hall of Sibiu; investor: MOL Romania Petroleum Product S.R.L.; https://extranet.sibiu.ro/Registratura/Hotarari/Detaliu.aspx?registru=HOT-HCL-SIBIU&nr=85&an=2015.

For the purposes of a profound metamorphosis of the Romanian regulations on the matter it may be very useful to revert to the French regulations and case law[33]:

"*The public utility easements are an important source of differentiation between owners. By definition, an easement is a limitation of the individual property right, because it consists, according to article 637 of the Civil Code, in «a fee levied on an estate for the use and benefit of another owner' estate».*

It can be natural, conventional or judicial, while remaining legal. The easements established by the law refer either to the public or communal benefit or to the benefit of individuals (article 649 of the Civil Code). The easements created for public utility (article 650 of the Civil Code) are of various types and refer to the transport infrastructures, the electricity distribution, the maritime public domain (...), the urbanism, the environment, the execution of public works etc.

The regime of easements created for public utility is autonomous and laid down in particular laws and regulations whereas the rules governing the easements created for individuals would not be applicable. Hence, a public company in charge with the public service of electricity distribution who unlawfully occupies a land may not argue the acquisition of the easement by prescription (3rd civil division, March 7th, 2007, Bull. 2007, III, no. 35, appeal no. 05-18.057). On the other hand, the public utility easement does not expire upon the elapse of a 30-year term of non-use of the land".

Although the rationale behind the limitations of the property right remains, it must be outlined that there is also a less aggressive way for the state to acquire the ownership title: the preemption right.

There is limited reference in the Romanian regulations to the preemption right and no such prerogative is offered to the state in terms of urbanism. Such a legislative gap is adversely impacting the intensification and the quality of actions in respect of land management and urban development.

For all these reasons, it is imperative to create the necessary framework which allows the rules and actions intended to assure the urban development in Romania to be reconsidered and implemented on a wider and wider scale in order to keep up with the rapid growth of Europe.

CONCLUSIONS

In light of these considerations, it is critical for the development of the urbanism law to benefit of legislative changes which would focus on providing legal methods and instruments for urban planning actions and interventions intended to create a "legal system in urbanism" offering adequate principles, regulations, notions and concepts.

Let alone the quasi "procedural" issues, it is appropriate to notice that such an endeavor requires a significant amount of synthesizing and creative efforts. Where the regulations in the matter are relatively poor, incomplete or even inadequate to a certain extent, a highly creative encoding is required, which means a significant amount of new laws.

While struggling to provide a basis for the urbanism law, Romania is simultaneously forced into rapidly adjusting to the new, post-modern, challenges. The assimilation of values and requirements of a "sustainable urbanism development" which means reconciling

[33] https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2008_2903/etude_discriminations_2910/distinctions_justifiees_2918/distinctions_entre_proprietaires_2920/limitations_exercice_droit_propriete_12143.html.

economic efficiency, environmental protection and social equity, is now doubled by the environmental-climate related requirements[34].

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[34] Mircea Duțu, www.juridice.ro.

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CONSIDERATIONS RELATING TO CERTAIN ASPECTS OF THE APPEAL IN THE CRIMINAL PROCEDURE

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ABSTRACT

The appeal constitutes a judicial mechanism made available to consumers and to the Prosecutor that aims straight for errors committed by a Court of law in its approach of jurisdiction. The term judicial error must be understood in this context as defined in its broad, drawing together both errors of fact and errors of law. Therefore, the appeal is made for the one dissatisfied with the Court decision as a veritable juridical panacea.

The role of the right of appeal is not limited to conferring the possibility of requesting a new retrial of the case. They serve the interests of private individuals higher interests, being accused of public order needs. Thus, the existence of remedies is required by principles such as finding out the truth, the right to a fair trial and the reasons for the population's confidence in the judiciary or the respect due to justice.

The new code of criminal procedure[1] has reformed the system of appeal may be exercised in criminal matters, giving them a generous space between regulators, art. 408 and 470. We meet thus, in penal matters, the following remedies: appeal, opposition, and cancellation, opposition in cassation, review and reopening of criminal trial resulting from the absence of the person convicted. Distinct from these, we encounter the complaint which may be made against preventive measures (judicial review and judicial control on security) prepared by the Prosecutor during criminal proceedings and which is addressed to judge rights and freedoms. Still exemplifying, we may meet and demand the cancellation or reduction of the fine, governed by art. 284 of NCPP, and the examples do not stop there. We must note that, in our opinion these latter examples may be considered legal remedies only in the usage of the term largo sensu „remedy". From the etymological point of view, the appeal originates in French, designating a claim appel, a calling application, a request etc. addressed to persons or institutions in order that the latter to settle claims by the appellant.

KEY WORDS: *remedies, appeal, procedure remedy, judgment*

1. BRIEF DETAILS OF EXISTING REMEDIES IN CRIMINAL MATTERS

Existential reasons and the functions of appeal differ in the ratio of specifics in each of them, but they may be regarded as having a common denominator, that of ensuring the right to a double degree of jurisdiction. The right to a double degree of jurisdiction in criminal matters is provided for in art. 2 paragraph 1 of Protocol No. 7 additional to the European

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[1] The law no. 135/2010, published in O.M. Part I, no. 486 of 15 July 2010, with amendments and completions, NCPP.

Convention on Human Rights[2] stating the following: "*any person declared guilty of a criminal offence by a tribunal shall have the right to require an examination of the Declaration of guilt or condemnation by a superior jurisdiction. The exercise of this right, including the reasons for which it may be exercised, shall be regulated by law*".

In the light of the aforementioned, the remedies constitute a repair mean, a procedural remedy, capable of optional using, to carry out a thorough legal and settlement of the criminal cases[3].

Appeals have more classifications, depending on various criteria. Given that the right of appeal in exegesis generally exceeds the present study objectives, we will focus on the most important classification of remedies.

A criterion for the differentiation of the appeal is that of the conditions required to be met for exercising an appeal. In relation to this criterion, the remedies involve a dichotomous separation: paths of ordinary and extraordinary remedies. Ordinary remedies are appeal and opposition and are characterized by the fact that the legislature does not advertise the fulfilment of conditions for the exercise thereof. Another feature of the ordinary appeal lay in the fact that they are targeting the non-definitive judgments of courts. Extraordinary remedies are cancellation in opposition, appeal in cassation, review and reopening criminal trial resulting from the absence of the person convicted. They claim compliance with certain requirements for their exercise, namely: first, targeting only definitive judgments that bear the imprint of the final place; secondly, the reasons for which the extraordinary remedies may be exercised are expressly and specifically provided by law.

Regulation of rights of appeal is of fundamental importance in a procedural system, particularly in criminal matters, given that criminal repression is most intrusive in rights and freedoms of the person. Moreover, the remedies contributes to ensuring greater effectivity of the right to defense, the opportunity given to the appellant, to the recurrent or the contester, as appropriate, to subject its cause to be heard and through the filter of reason and by another court. The judge's fallibility is much better known and accepted as a truism, and precisely this characteristic inextricably linked to human nature, it is desirable to be reformed by means of redress.

2. THE APPEAL HISTORY AND IMPORTANCE

From the etymological point of view, the appeal originates in French, designating a claim appel, a calling application, a request etc. addressed to persons or institutions in order that the latter to settle claims by the appellant.

In legal domain, the remedy of the appeal has been noted since before Christ, in procedural law. The one who first introduced the remedy of appeal was Publius Valerius Publicola, roman consul who was instrumental in the establishment of the republican regime in VI century B.C. Rome. Through a law it has conferred the right to the men convicted to appeal to people using an action that enjoys a suggestive nomenclature: *provocatio ad populum.* This action was a matter for the people's assembly, which could be admitting and totally abolishing the judgment of the Court, or to reject it and maintain integrity in the first judgment, middle, intermediate solutions were not supported[4].

The settlement continuity was provided by Canon law, with some nuances specific to the ecclesiastical rules[5].

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[2] Both ratified by Romania through Law No. 30/1994 concerning ratification of the Convention for the Protection of the Human Rights and Fundamental Freedoms and the Additional Protocols to this Convention, as published in O.M., no. 135 of 31 May 1994.

[3] See in this respect, I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea specială*, Universul Juridic, București 2015, p. 273.

[4] For developments, see I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea specială*, Universul Juridic, București 2015, p. 277.

[5] ibid., p. 277, quoted T. Pop, *Drept procesual penal, Tipografia națională*, Cluj, 1948, vol. IV, pp. 390-397.

Pavel Kiseleff was the one under the leadership of whom was included in the Romanian legal domain the appeal possibility to be exercised via the adoption of a regulation. The organic regulation was a quasi-constitutional organic law promulgated in 1831-1832 by the Imperial Russian authorities in Moldavia and Wallachia[6]. He consecrated it under art. 263 the right of the Attorney at law.

Further, the appeal has received relevant regulatory a good period of time. Thus, under the leadership of Prince Al. I. Cuza was adopted The Criminal Procedural Codices which have foreseen under art. 169: "*Sentences given in police matter that can be attacked on the way of appeal when they will decide imprisonment, or fines, or repairs and restitutions and civilians will pass by their will, regarding money".* And the Code of Criminal Procedure of Charles II foresaw the institution of appeal, granting it more articles (articles 15, 17, etc.). With the change of regime in 1947 was suppressed and the appeal of the appeal, this change would have the being proclaimed to ensure speed in the process. The appeal institution was absent from the legal horizon throughout the period of the Romanian Communist regime, totalitarian, being necessary a new change of regime in order to make possible the consecration of the appeal again. This was done in 1992-1993, when through the Law on judicial organization no. 92/1992 and the Law No. 45/1993 modifying and supplementing the Code of Criminal Procedure it was rendered the appeal in the palette of the remedy paths.

In the NCPP, the appeal enjoys generous rules in the context of Chapter III of Title III, was devoted to articles 408-425. The appeal is a way for ordinary remedies for reform.

The importance of the appeal in the current criminal procedure system economy is undeniable, and it was the appeal that allows the Prosecutor or the legislator to reclaim a new judgment in the substance of the case to another court or higher grade. The legal regulation of the appeal granted to the one dissatisfied with the judgment of the Court a second chance to be tried by an independent and impartial court. The importance of support and appeal is sustained by the constitutional provision of art. 129 stating about the possibility of the Public Ministry and the parties warranting an interest to pursue legal remedies.

Furthermore, art. 14. (5) of the International Covenant on Civil and Political Rights, as in force in Romania dated 20 November 1974, stipulates the following: "*Any person declared guilty of a criminal offence has the right to obtain the superior jurisdiction, in accordance with the law, the Declaration of guilt and of his conviction*".

In the Romanian procedural system, the appeal is the main tool that ensures the effectiveness of the right to a double degree of jurisdiction being a genuine appeal for reform which aims at shifting the mistakes where they exist.

The institution of appeal comes in support of recognizing the principle of truth, a platform principle of criminal law, in that the appeal is allowed a reassessment of the evidence and support participants in a process of argumentative, as well as the new administration and the formulation of conclusions written and oral.

Last but not least, the remedy of the appeal appears to the defendant sentenced in first instance as a genuine guarantee of the rights of the defense.

3. THE PURPOSE OF THE APPEAL

By understanding those judgments under appeal likely to be attacked on the way. Decisions are open to appeal provided for expressly by law under art. 408 para. (1): "Sentences can be appealed, if the law does not provide otherwise". To be able to delimit the scope of decisions open to challenge with is it is necessary the definition of *sentence.* This term has a different meaning from that accepted in current speaking, legal rigor impose a clear delimitation between the names of the various decisions of the courts. Art. 370 para. (1) of the NCPP gives us a definition of the term sentence, stipulating the following: "*the judgment by*

[6] For details, see https://ro.wikipedia.org/wiki/Regulamentul_organic.

which the cause is resolved by the Court of first instance or by which it is not endowing without resolving the cause is called a sentence. The Court shall pronounce by sentence and in other cases provided by law."

At first corroborated reading of the law texts, it would seem that any judgment of first instance whereby the Court be dealt with either cause it not endowing, it would be attacked with the appeal. The assertion is only partly valid. It is true that, with his rule, the decisions to which we have referred above are appealed, but a series of exceptions come to confirm the rule. The exceptions to the rule consists in situations where, although the court decide a sentence, the legislature repealed the remedy of the appeal. In order to be in a situation where an exception is necessary a provision of the law removing the applicability of the appeal.

The second sentence of art. 370 para. (1) regulates another hypothesis in which the court shall decide by means of a custodial sentence, taking the opportunity of the existence of other cases strictly prescribed by law, distinct from the two mentioned above. In this sense, we witness the article 74 para. (1) para. 1, 459 para. (5), 469, para. (4) etc. However, in these cases the sentence is callable only in so far as the legislature has not acted otherwise. An example where the legislature provides otherwise is even in matters at the cause of dislocation incident when, although the court decides a sentence, in art. 74 para. (6) the final character proclaims these verdicts, not permitting the appeal against it.

Also, there are circumstances in which the sentences handed down by non-investing of courts are non-attackable on the path of the appeal. Such an example we find in the competence matter in art. 50 para. (4) of the NCPP providing that *"the disclaimer of judgment is not subject to appeal*."

Given that in criminal matters the power to judge at first instance belongs to all courts in the judicial system, means that the appeal may be directed against the death sentences handed down by a court, tribunal, Court of Appeal, the Court of Military Appeals, the Military Court, even against a sentence handed down by the High Court of Cassation and Justice in cases provided for by art. 40 para. (1) of NCPP.

Further, art. 408 para. (2) and (3) regulates the legal regime applicable to discharges which Court acted, stipulating that "*decisions may be appealed only together with the sentence, except where, by law, may be subject to separate appeal*" and that "the *appeal against the sentence is made and counts the discharges*". It follows from the preceding rule whereby decisions are subject to appeal by the run-up to only once with the case. We note that this rule behaves, with exception cases where the NCPP lay attacking with a separate appeal about a conclusion[7]. Another exception is the hypothesis opposition on the discharges with the separate track[8]. In the NCPP, as a rule, the decisions leading up to that are open on a separate path and are subject to contestation, and no appeal. Also, in the absence of any express indication in the statement of appeal, appeals sentence leads attack on *ope legis* and attack the discharges prior to the appeal.

Exemplifying, the legislature does not allow for the exercise of the appeal in the following situations: where the Court shall decline jurisdiction or acted a regulator of competence, with regard to resettlement, rehabilitation, in terms of enforcement of sentences, as well as in the event of invalidity by a Court of a final decision, or a decision open to appeal[9].

[7] Art. 410 paragraph (2) stipulates the following: „in the case referred to in article 409 para. (1) let. e), the appeal may be exercised immediately after the conclusion of the willing on the trial expenses, allowances and judicial fines and not later than within 10 days of the pronouncement of the sentence which has settled the case".

[8] See, in this respect, the decisions handed down by the first instance during the closing measures judgment, with the preventinve open opposition within 48 hours of ordering or communication, as appropriate - art. 206/NCPP.

[9] For examples of such a judgments not attackable with appeal, see *M. Udroiu*, *Procedură penală. Partea specială. Sinteze și grile*, C.H. Beck, București, 2014, p. 248.

Summing up the above, in general rule, the sentences of the Court are appealed, and with the latter the decisions leading up to that were not the subject of this request or appeal on other way.

With regard to the jurisdiction to hear the remedy of the appeal, the NCPP innovates, assigning the jurisdiction to hear the appeal against death sentences handed down by judges and courts, and the Court of appeal against decisions of first instance courts of appellate jurisdiction to resolve the call returns the High Court of Cassation and justice. Also, against the judgments of the first instance of the I.C.C.J., the jurisdiction to hear the appeal is attributed to the bench 5. With the apart title, in the matter of the offences committed by the military power to resolve the appeal, it returns either to the Court of Military Appeals, or to I.C.C.J. as the cause was adjudicated at first instance by the Military Tribunal, the Military Court of Appeal, respectively. Competent panel to judge the appeal shall consist of 2, 3 or 5 judges, in the light of the court competent to judge the appeal[10].

4. PERSONS TO EXERCISE THE APPEAL

The matter is given by art. 409 from NCPP[11] which assigns the right to appeal a judgment of the first instance of a wide range of people, confirming once again the ordinary character of this appeal.

Previously, it should be noted that *the interest*, although the condition of the exercise of civil action, finds a fertile area and in exercise of his right of appeal. Therefore, in an effort to attack a decision represents a condition *sine qua non* for admissibility of appeal[12]. Where the legislator does not justify the interest of an appealed judgment, we appreciate that the sanction is inadmissibility incident.

From the text of article 409 of the NCPP it can be seen that the right to appeal a sentence is conferred by the legislator: to the parties at the criminal trial (the public prosecutor, the accused, the civil party responsible, the civil aggrieved person, the witness, the expert, the interpreter, the advocate) to third persons outside the criminal process (any natural or legal person whose rights or legitimate interests have been damaged by a measure or by an act of the Court) as well as the legal representatives and the trial substitutes (lawyer, legal representative, spouse of the defendant). The right to appeal the judgment is confined to certain people only to particular solutions of the proceedings, as we shall see below.

The Prosecutor, as the basis of the indictment, and in his capacity as representative of the interests of the State, is obliged to exercise the appeal under the criminal side of the case and the civil side of the case. If the criminal side of the Prosecutor's interest to pursue the appeal is undoubtedly, under the civil aspect there were controversies over the years. Thus, there were authors who argued that the civil side of the case sits under the sign of the availability of the parties, thus not indicating the right of the Prosecutor to intervene in the private affairs of the parties through an appeal to the civilian side of the criminal case. On the

[10] The Court of Appeal and the Court of Military Appeals judges in panels of 2, and the I.C.C.J. judges in panels of 3 or 5 as appropriate. For additional details, see the Law. 304/2004 on judicial organization and published in the O. M. No. 827 of 13 September 2005.

[11] Art. 409 from NCPP provides as follows: „(1) May appeal: a) the Prosecutor, referring to the criminal side and the civil side; b) the defendant, in terms of criminal and civil side; c) civil side as regards the criminal side and the civil side, and the party civil responsible, regarding the civil side, and concerning the criminal side, to the extent that the solution of this side of the solution in the civil side; d) the injured party, in relation to the criminal side; (e), the expert witness, interpreter and lawyer, in terms of judicial expenses, allowances and proper judicial fines applied; f) any legal or natural person, whose rights have been directly injured by a measure or by an act of the Court in respect of provisions that have caused such damage. (2) to persons covered by paragraph (1) let. b)-f), the appeal may be declared by the legal representative or by a lawyer, and for the accused by his/her spouse."

[12] In the same regard, see, I. Neagu, M. Damaschin, op. cit. p. 281, N. Volonciu (coordonator), *Noul Cod de procedură penală comentat*, Hamangiu, București, 2014, p. 1005.

contrary, it has voted a Constitutional Court in its decision no. 190 from 26.02.2008[13] through which it held down by law as follows: *"The prosecutor is not party to any opponent, but he is involved in the process in order to guarantee the observance of the law. (.....). Although it is about the civil side in a criminal trial, it is undeniable that in this area there are general interests which must be defended, and in the judicial activity of the Constitution it established the role of the defender for the District Attorney*."

Therefore, the interests of the Prosecutor to appeal the civil side of the case is so required by law, and supported the decision of the Constitutional Court as argumentative.

Regarding the defendant, in his capacity as the passive subject of the criminal action and the civil action, he is the main interested in calling the sentence. The defendant can appeal the sentence of the court irrespective of the solution which it comprises. For example, the defendant can appeal to a non-criminal process based on the existence of causes of non-punishment, while ensuring that the appeal should obtain the path of his acquittal on the grounds that the act did not exist, his interest manifesting itself in this case in relation to the civil consequences of the solutions. The defendant exhibits full freedom in the choice of the solution which it decides to appeal. In spite of this freedom of choice, the defendant's right to appeal the sentence of a court is not absolute. Thus, the personal character and independent of the appeal shows that the defendant can appeal this judgment of the Court only in relation to his personal situation, the reasons thereof and may not refer to other people, or not participate in the criminal process, whose procedural position could not change its own procedural situations[14]. Exceptionally, we appreciate that there might imagine circumstances in which the defendant to justify procedural interest in exercise of the appeal on other people than his own person. For the latter case, we consider the hypothesis of the instigator that critical judgment of the Court in its determination, requesting the lifting of her on the grounds that there is evidence that the act has been committed by the author. The instigator's interest in appealing the judgment on other people is fundamental in this one case, because to the extent that it would obtain the author's acquittal on the grounds of art. 16 para. (1) let. c) of NCPP, would disappear the foundation of the instigator's conviction, on the understanding that the Commission of an act by the author is the prerequisite of the commitment of criminal liability of the instigator.

With respect to the ability of the injured person to appeal, this one is limited by the procedural position of the participant, only in the context of the the criminal side of the case. Consequently, the person aggrieved may appeal against court only under the solution of its appearance, the quality of the criminal proceedings in declaring an appeal on the civil side of the case. Of course, in so far as the injured party was legally constituted as a civil party in criminal proceedings, it will be able to appeal the sentence and the civil proceedings, but not as an aggrieved person, but as a civil party in the criminal proceedings.

The civil side enjoying a plenitude of powers in connection with the exercise of the call, which may appeal the sentence of the Court under both its sides. Things have not always been so state, under the old criminal procedure code existing on the country's civilian side could critique this solution of the Court only under its appearance. By *lege lata*, the solution is the rational one, given that most of the times the solution with regard to the criminal side of the case is decisive in enabling the Court to settle the civil side of the criminal process.

The party civil responsible for accessing the opportunities is to pursue its appeal. Thus, art. 409 para. (1) (a). c) of NCPP provides that the party responsible will be able to declare the civil appeal "*regarding the civil side, and concerning the criminal side, to the extent that the solution of this side of the solution in the civil side*." We should note that the

[13] Published in O. M. No. 213 of 20 March 2008.
[14] *N. Volonciu* (Coordinator), *op. cit.*, p. 1006.

right person to civil side of the appeal of a court sentence is conditional upon a certain influence on the settlement of the criminal side of the case has exerted on the civilian side.

Further, the NCPP grants active quality in declaring the appeal and some other subjects, namely: the trial witness, the expert, the interpreter and the advocate. They justify the interest of appealing this judgment only in part, with regard to the solutions concerning and directly affects them. The text of the regulations restricts the possibility of appealing the sentence "*appropriate judicial expenses, allowances and judicial fines applied*". The logical solution is one, being related to the specificity of the role played by each of them in the criminal trial. Thus, the witness, the interpreter, the expert are legitimated in to recover the costs of transport, accommodation and subsistence expenses which has resulted on the process in their task, and to the extent that it would be unhappy with the Court solution to these issues, they can appeal in this context.

Regarding lawyers, the text from article 409 para. (1) let. f) is considering the situation of lawyer engaged in appeal on its own behalf and not on behalf of his client. Thus, counsel ex officio dissatisfied with court fees established for logs on who submitted it can appeal its solution in the Court of Appeal.

For the witness, interpreter, expert and attorney, the law enshrining their right to appeal and the Court decision by which they were fined.

With the exception of the Prosecutor, the appeal may be exercised for the benefit of the above mentioned persons and their legal representative or lawyer. Furthermore, the law recognizes the possibility that for the defendant the appeal should be declared also by the spouse. Considering that the law on criminal procedure law is corrupt, we appreciate that a family member may not declare a valid appeal to the defendant, being not acceptable for the extensive interpretation of the norm.

Art. 409 para. (1) let. f) forms the basis of the statement of the external appeal for the criminal trial. The legislature does not distinguish, so any natural or legal person injured through acts or measures taken by the Criminal Court will be able to turn its harmful solutions. As distinct from the General conditions governing the performance of the call, we appreciate that in this case it is necessary to respect the following conditions:

- acts or measures taken by the Criminal Court to aim at and people other than the trial participants;
- criminal acts or measures of the Court to produce direct injury to external criminal trial persons.

These third party apart from the criminal procedure, there are not subjects of conflict, neither to criminal nor civil law nor does come under the category of subjects to the trial, as they are individualized under the art. 33 and 34 from NCPP[15]. The injured persons are thus practically "collateral victims" of the criminal process. An example of this is the disposition of the Court of the measure of extended confiscation of property which is the property of persons other than those who participated in the judgment at first instance.

Last but not least, for those people who are external to the process, the appeal can be exercised by their legal representative or lawyer.

[15] In this regard, see M. Udroiu (coordinator), *Codul de procedură penală. Comerntariu pe articole*, C.H. Beck, București, 2015, p. 409.

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GENERAL CONSIDERATIONS REGARDING THE INTEGRATED INFORMATIONAL SYSTEM OF TRACKING TIMBER– SUMAL IN THE ACTUAL CONTEXT

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ABSTRACT

In order to fight the illegal deforestation, as well as to reduce the criminal facts in the forestry field and the inappropriate forestry, it was constituted and implemented the integrated informational system of tracking timber in real time, called SUMAL. This system can provide information regarding the complete tracking of timber, from the moment of harvesting it to the final processing or export.

KEY WORDS*: ILLEGAL DEFORESTATIONS, TRANSPORTING TIMBER, SUMAL, THE FORESTRY CODE.*

As an essential component of the environment, the forest has an important role in maintaining the ecological balance, not only across Europe, but also in the whole world. Thus, an inappropriate forestry can have a series of negative consequences, both immediate and on a long term. Here we take into account the fact that deforestations constitute the main cause of the desert extension, while reducing the forest vegetation favors the greenhouse effect, the global warming[1] and so on.

In the context of illegal land clearings, of illegal tree cutting and the attempts to limit the negative consequences of these deeds, the European Union undertook a series of actions in the forestry field. The most important are: *"The European Union Forestry Strategy"*[2] from 1998, that establishes the general action context for the sustainable development of forests, *"The EU Forestry Action Plan for 2007-2011"*[3] from 2006 for applying the Strategy, and in 2013 was adopted *"A New EU Strategy for Forests and the Forestry Field"* proposing a European frame of reference for the elaboration of regional politics impacting the forests[4], promoting the sustainable management of the forests as a means to protect the biodiversity, to fight the desertification and react to the climate changes[5]. Thus the REDD+[6], FLEGT[7] and the

[1]Mircea Duţu – *"Dreptul internaţional al mediului"* (International Environmental Legilation), Editura Economică, Bucureşti, 2004, p.419.
[2] The Ministerial conference regarding the protection of the forests in Europe, Helsinki, 1993.
[3]The Communication of the Committee from June 15th 2006 regarding an EU action plan for forests /COM(2006) 302 final
[4] Communication of the Committee from September 20, 2013 called "A New EU Strategy for forests and forestry filed"/COM(2013)659 final
[5]COM(2013)659 final.
[6] Reducing emissions from deforestation and forest degradation (REDD; REDD + (or REDD-plus) refers to the" *emissions reduction caused by the deforestation and degradation of forests in the developing countries, as well as the role of preservation, long term management of forests, conservation of forest carbon stock and increasing the forest carbon stock being "+", in REDD +",* according to the European Parliament Resolution from April 23rd2009 regarding the approach of the problems related to deforestations and degradation of forests in order to tackle climate changes and reduction of biodiversity (2010/C 184 E/08).
[7]The Regulation (CE) no.2173/2005 regarding the institution of a licenses regime FLEGT for importing timber in the European Community.

EU Regulations regarding the wood exploitation[8] have as purpose the implementation of these goals.

The *EU Timber Regulation (EUTR),* adopted on October 20th2010 and implemented starting March 3rd 2013 by all the state members of the European Union forbids the placing of illegally cut timber and derived products on the European Union market.

The purpose of this Regulation is reducing to a minimum the risk of placing on the internal market of timber and of products derived from timber obtained through illegal exploitation[9], stipulating the following obligations[10] of the agents:

a) banning the placing on the EU market of illegally cut timber and of any products derived from it;

b) the obligation of EU traders who introduce for the first time timber or derived products on the EU market to exercise the *„due diligence"*;

c)in order to allow the traceability of timber products, the agents or traders must keep track of providers and clients all along the supply chain.

In the Romanian context of illegal deforestation and increase of criminal activity in the forestry field and in order to implement article 73[11]of Law 46/2008 in the Forestry Code, *Government Decision no.470/2014*[12]was adopted in order to control the illegal land clearing and improper exploitation of forests.

This normative act intends to complete the obligations mentioned by The EU Timber Regulation (EUTR) for the agents introducing on the market timber and timber derivates and also to introduce stricter rules regarding the documents accompanying the timber transportation.

According to the provisions of the aforementioned decision, in order to facilitate the timber traceability and purveyance of statistical information, an *Integrated Informational System of Tracking Timber* in real time, called SUMAL, was instituted.

The necessity of instituting this system appeared after analyzing data showing both the inefficiency of the measures undertaken in order to reduce and limit the illegal timber harvest and the lack of basic information regarding the timber available or entered in the economical circuit.

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[8]Regulation (UE) no. 995/2010 establishing the obligations of operators who introduce timber and timber products on the market.

[9]Without an internationally accepted definition, the legislation of the timber origin country should constitute the basis for establishing the definition of *illegal forest exploitation,* as shown in paragraph 14 of EU Regulation (UE) no.995/2010 establishing the obligations incumbent on the agents who introduce timber and timber products on the market. This Regulation defines in article 2 letter g) only what "illegally cut" timber means, namely *"cut by breaking the applicable law in the country of origin".* The letter h) defines what the "applicable law" means, namely *"the effective legislation in the country of origin that regulates the following aspects: — the rights to cut timber within the legal limits made public; — fees for the timber and harvest rights, including the timber cutting fees; — harvesting the timber, including the environment and forestry legislation, including the forests' management and the preservation of biodiversity when they are directly related to harvesting the timber; — the legal rights of third parties regarding the use and property impacted by timber harvesting; as well as — trading and customs, to the extent that it covers the forestry field."*Also, see The EU Regulation (UE) no.363/2012 on procedural rules for the recognition and withdrawal of recognition of monitoring organizations, mentioned by the EU Regulation (UE) no.995/2010 of the European Parliament and the Counsel of establishing the obligations incumbent on the agents who introduce timber and timber products on the market.

[10]According to art.4 and art. 5 from EU Regulation (UE) no.995/2010.

[11] Art.73 has are the following content: *"The rules concerning the origin, movement and marketing of timber, the regime of timber storage facilities and installations of processed round wood are established by Government Decision at the proposal of the central public authority responsible for forestry."*

[12]*... for approving the Norms on the origin, movement and marketing of timber, the regime of timber storage facilities and installations to process round wood as well as measures for implementing the Regulation (EU) no. 995/2010 of the European Parliament and of the Council of October20th 2010 establishing the obligations of agents who place timber and timber products on the market wood,* published in the Official Gazetteno.426 of June 10th2014.

The central authority insuring the implementation and proper functioning of the SUMAL system is the Ministry of Environment, Waters and Forests. The system is mandatory for the forest districts and for all the agents and traders who cut, process, store, sell or import-export timber materials.

The main objectives[13] of SUMAL are:

a) The increase in the efficiency of controls as part of the public politics to reduce the crime level in the forestry field in order to prevent and fight the illegal activity through the control of the timber provenience and traceability; b) Obtaining of statistic information at a national level regarding the volume of timber processed and the resulting wood products;

c) A unified action in the timber bookkeeping by making available to the professionals of a free IT application.

The categories of SUMAL users are[14]:

- the staff with control attributions from the central public authority responsible for forestry (APCRS) and from the regional special structures of the central public authority responsible for forestry, hereinafter referred to as ITRSV;
- the officers and petty officers from the Romanian Local Police, the Romanian Military Police and the Customs Police;
- forestry staff within forestry districts, higher structures, National Forest Management – Romsilva and the units subordinated to it, as from the Institute of Research and Forestry Arrangements in Bucharest and the subunits subordinated to it;
- employees of the economic agents possessing the distribution agreement of waybills for the transportation of timber, issued according to the legal provisions, hereinafter called agreement;
- employees of the economic agents specialized in transportation with whom the economic agents possessing the agreement signed contracts for the transportation of timber;
- employees of customs authorities where the customs clearance is done, specially enabled by the General Direction of Customs.

The Monitoring System of the timber tracking from the forest till the final beneficiary is put into operation starting from the moment of marking the trees in the forest in view of exploitation and the act of valorization is issued. (AVP).

The timber destined to be cut is registered in the SUMAL and receives a *unique code.* This code will be written in the waybills and the timber missing this unique code will be confiscated as it has no legal provenience.

The advantage of the SUMAL system consists in the fact that the timber to be cut is identified and prepared in order to be tracked in real time, even before the trees are cut[15].

For this to be achieved, all professionals must be equipped with smart phones or tablets capable of a permanent connection with SUMAL or any electronic terminal using the SUMAL application. This application is available for free for the users mentioned in art.2 paragraph (4) from the aforementioned decision, that is: forest districts and all agents and traders, called *professionals,* who cut, process, store, trade or import-export timber. These do not include the agents and traders that cut, store, process, trade or import-export with ornamental trees, shrubs, osier and saplings.

According to the provisions of art. 2 paragraph (7) from the Government Decision no.470/2014, the acts of valorization, the authorizations to exploit the lots, the documents to

[13]According to Art. 2 of the Methodology Regarding the organization and functioning of SUMAL, the obligations of SUMAL users, as well as the structure and mode of transmission of standard information, approved by the Order No. 837/2014 published in the Official Gazette no.761 of October 21st2014.

[14] According to Art. 3 from the *Methodology* approved by Order No.837/2014.

[15] According to the provisions in art. 3 and art. 6 from the Government Decision no. 470/2014, and art.72 from the Forestry Code.

recover the lot sand the confiscation minutes are mandatorily registered by the forest districts in the SUMAL and a *unique number* will be generated for each document.

From the beginning of the timber transportation *"from the cut/storage/acquisition/custody/loading place, after the release of the customs free in case of import, the notice issuer has the obligation of loading in the application online or, accordingly, offline (...) of all the standard information so it could be communicated".*

One of the remedies that this Government Decision is bringing consists in the regulation of accessibility to GSM. Thus, in case the aforementioned place is located in an area covered by GSM, the notice issuer has the obligation of communicating online in SUMAL the standard information and the registration in the waybill of the unique code as well as the precise date, hour, minute and second generated by SUMAL. In case the timber loading place is in a GSM free area, the issuer of the waybill should upload the standard information in the application installed on the device that mandatory accompanies the transportation truck. The application generates an offline code that will be written on the waybill. In this latter case, when the transportation truck enters a GSM area, SUMAL generates the unique code, date, hour, minute and second that will be introduced in the waybill in maximum 12 hours from the generation of the offline code.[16]

Another positive aspect is the fact that the receiver of the timber has the obligation, before the reception of the timber, to enter the SUMAL system and check the authenticity of the unique code and date, hour, minute and second of the unique code generation.

The SUMAL system includes 3 elements[17]:

a) client applications used by the professionals for:

1)registering or issuing the acts of valorization, the lots' exploitation authorizations, the minutes of force majeure, reports at the expiry of exploitation deadlines, documents of re-engaging the lots and minutes of confiscations, all these being applications grouped in the *SUMAL Forestry* software[18].

2)operating the timber waybills, the final deposit receptions and the mandatory management situations, all these being applications grouped in the *SUMAL Agent* software;

b) applications to track and control in real time the provenience and the way to ensure the traceability of timber;

c) the central unit - hardware and software –to centralize, process and analyze the information and control. The central unit is in the custody of the Special Telecommunication Service, called SUMAL Central.

The methodology concerning the organization and the functionality of SUMAL, the obligations of the SUMAL users as the structure and the means of transmitting the standard information were approved through the *Order no.837/2014*[19].

Besides the prohibition to introduce on the market illegally cut timber and products derived from it, another essential obligation mentioned just for the agents introducing timber and timber derived products on the market consists in the implementation and the application

[16] According to art. 3 from the Government Decision no.470/2014.

[17] According to art. 4 from the *Methodology* approved by Order No. 837/2014.

[18] The SUMAL Forestry application is distributed to the forest districts and the software of tracking and real-time control of origin and means to ensure traceability of timber via the applications –Wood tracking Agent movable type (WT) –destined to state and private forest districts, and economic agents exploiting, transporting and marketing timber, and Inspector type mobile / desktop I wood tracking (IWT) –destined to inspection authorities or those who have legal powers to control the movement of the wood. In this respect see the provisions of Order No. 837/2014 approving the Methodology regarding the organization and operation of SUMAL, the obligations of SUMAL users, as well as the structure and the way to provide standardized information and the Order no. 596/2014regarding the approval of the Methodology for Testing the implementation of the Integrated information system for tracking timber.

[19] *...for the approval of the Methodology regarding the organization and functioning of SUMAL, the obligations of SUMAL users, as well as the structure and the means to provide standardized information,* as amended and supplemented.

of a "*due diligence"* system[20]. The essential elements[21] that the "due diligence" system presumes in order to reduce to a minimum the risk of introducing on the EU market of timber or products derived from it, issued from illegally cut timber are:

a) The access of the agent to information describing the timber and the products derived from it, country of origin, quantity, furnisher data as well as other information regarding the observance of national legislation;
b) The evaluation of the risk of introducing on the market of illegally cut timber or products derived from it;
c) Reducing of the risks according to their amplitude when the evaluation indicates the existence of such a risk in the supply chain.

As an exception, the agents that do not operate the first introduction on the market but only forest exploitation through forest benefits, are not obliged to use a "due diligence" system [art. 4 paragraph (3)]. Also, the "due diligence" system does not apply to ornamental trees and shrubs, Christmas trees, osier and seedlings [art.5 paragraph (1)].

Regarding the *legality of timber origin*, the dispositions ofart.6 paragraph (1) from the Government Decision no. 470/2014 establish the *conditions* that should be met in order for the timber to be considered legal. These conditions are:

a) the existence of the valorization document approved according to the competences, of the exploitation authorization registered in SUMAL, and of the lot rendition notice;

b) the dispatch, possession, shipping, reception, storage, processing or trading of timber should be done with waybills having correctly marked the unique code generated by SUMAL and the date, hour, minute and second when it was generated.

Regarding these conditions, we notify that the legal dispositions require a cumulative completion of the conditions, meaning that in the situation when one of these conditions is not met, the timber does not have a legal provenance. In this latter case the premises for liability of the guilty parts are created.

Furthermore, we bring into notice another inconvenience, namely: according to art.2 paragraph (8) from the Government Decision no.470/2014 the forest districts and all the agents and traders that harvest, store, trade or perform timber import-export are bound to send monthly reports with the SUMAL data of the past month until the 15thof the current month the latest. According to art. 6 paragraph (6) the timber for which the monthly report was not sent in SUMAL by the aforementioned professionals until the deadline mentioned in art.2 paragraph (8) is considered as not having a legal provenience. Thus, in the situation in which an agent providing the timber does not respect the reporting obligation, the provenience of the received timber becomes illegal. Consequently, a clarification is needed regarding the term *"legal provenience"*, since the provisions from art. 7 paragraph (7) show that, in case of the presence of timber without documents clearly proving its legal provenience, the sanction of a fine and the confiscation of the timber is applied, according to art. 72 from the Forestry Code.

For the imported timber with import customs declaration or, if the case requires it, the FLEGT license[22] as provenience documents, the legality of provenience is established if, from the moment of the customs release it is accompanied by waybills in which, besides the ordinary data, are correctly written the *unique code* generated by SUMAL, the date, hour, minute and second of its generation [art. 6 paragraph (1^1)].

[20]As provided in Art. 6 of Regulation no. 995 /2010 for the categories code - 4401, 4403, 4406 and 4407. According to the Annex to the mentioned Regulation, these categories refer to fire wood, raw wood, wood sleepers for railway or similar and timber longitudinally sawn or split with a thickness of over 6 cm.

[21]In accordance with the provisions of the art. 6 of Regulation no. 995 /2010.

[22]See Regulation (EC) no.2173 / 2005 of December 20th2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (FLEGT = Forest Law Enforcement, Governance and Trade in forestry)

The lawfulness of cutting timber originating from the EU member states is certified through documents released according to the law applicable on their territory, in accordance with the provisions of the Regulation, and the legality of the timber harvest – legal provenience – is attested by FLEGT licenses and CITES certificates [23], as provided in article 3 of the Regulation, and documents issued by exporting countries in accordance with the applicable legislation their territory[art.6 paragraph(2)-(3)].

The Government Decision no. 470/2014 is sanctioning with a fee not only the lack, but also the misuse of a "due diligence" system. Starting with January 1st 2015 it is forbidden to exploit standing timber by traders not using a "due diligence" system. Also, the Government Decision mentions sanctions regarding the lack of use or misuse of the SUMAL system.

We also mention the fact that recently was adopted the *Government Decision no. 845/2015 regarding the setting of certain obligations and sanctions incumbent on the agents who introduce for the first time timber products on the market, according to the Regulation (UE) no. 995/2010 of the European Parliament and Council from October 20th2010 establishing the obligations incumbent on the agents who introduce on the market timber and timber products*[24],through which the obligations and regulations incumbent on the agents who introduce for the first time on the market timber and timber products are tightened, establishing the sanctioning regime for the agents not respecting the obligations mentioned in art.6 from the EUTR Regulations.

In conclusion, in the context of the increasing crime phenomenon of illegally cutting timber, the creation of an integrated information system was really necessary, in order to provide information related to the whole tracking and identifying timber, from the moment of harvesting it in the woods, exploitation and marketing, until its final processing or export.

The EUTR Regulation is instituting an essential obligation for the agent, namely to ensure he is not introducing on the market illegal timber, putting into practice a "due diligence" system. Thus, the SUMAL system represents a necessary and efficient mean of controlling the introduction on the market of illegal origin timber and constitutes the basis of the "due diligence" system intended by the (UE) Regulation no. 995/2010.

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[23]In accordance with paragraph 10 and article 3 of EUTR Regulation, the CITES permits for export shall be granted only if a CITES-listed species has been harvested, inter alia, in accordance with the national law of the exporting country. In this sense the timber of species listed in Annexes A, B or C to Regulation (EC) no. 338/97 of December 9th1996 on the protection of species of wild fauna and flora by regulating trade therein should be considered legally harvested provided it complies with that Regulation and any implementing provisions thereof.

[24]Published in the Official Gazette no.771 ofOctober 15th2015.

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SOME ASPECTS REGARDING THE EUROPEAN SOCIAL DIALOGUE

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ABSTRACT

The concept of social dialogue is approached differently at international level. According to the definition proposed by the International Labour Organisation, the social dialogue represents the voluntary information, consultation and negotiation act issued in order to negotiate agreements between the social partners or to negotiate collective agreements. As a concept adopted at EU level, the social dialogue, established by the Treaty of Rome in 1957, is a process of continuous information and consultation between unions and employers, so as to reach understandings regarding the control of certain economic and social variables, both in macroeconomic and microeconomic level. No matter how this concept is understanding, the social dialogue is associated with the transition from a culture of conflict to a culture of partnership with consideration of the common interests of the social partners involved in a broader process of "social cooperation".

KEY WORDS: SOCIAL DIALOGUE, TRADE UNIONS, EMPLOYERS, SOCIAL PARTNERSHIP, COLLECTIVE AGREEMENTS.

INTRODUCTION

Worldwide, the social dialogue is considered a very useful tool in solving serious social problems, consequences of globalization. It is also used to establish how the resources are distributed, the costs and benefits of economic exchanges. In this respect, the state is interested to involve representative organizations of employers in making decisions, allowing them, in this way, to express opinions and to participate in the elaboration and implementation of economic measures, of general or particular order[1].

Thus, the first attempts at resolving some labour conflicts through negotiations between employers and employees are dating back to the nineteenth century. Only at the end of World War I, once with the establishment of the International Labour Organisation, we can talk about the birth of the principle of social dialogue (partnership) and of collective bargaining as techniques for solving specific problems of the employment relationships[2]..

The social partnership was regulated for the first time in Europe, especially by the Economic and Social Council which played an important role in covering in a climate of peace and understanding in society of periods of crisis in several countries, such as: France, Italy, Belgium and Holland. Subsequently, the present system has been adopted by some other countries, namely Australia, Japan, etc.

When referring to social partnership, it is essential to focus the efforts of social partners in order to overcome the crisis and stabilize in the same time the socio-economic situation.

Internationally, about social dialogue and collective bargaining, it can be spoken only after World War I, more precisely, since 1919 when the International Labour Organisation was created (by the Peace Treaty of Versailles). However, the true consecration of collective bargaining was done by the Declaration of Philadelphia, adopted in 1944 as an addendum to the Constitution of the International Labour Organisation, in which it was also mentioned "effective recognition of the right of collective bargaining and cooperation of management and labour, in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic policy". The requirement of social dialogue was synthesized in this important act in an imperative formulation: "the representatives of workers and employers, cooperating on an equal footing with those of governments, join with them in free discussions and democratic decision, with a view to the promotion of the common welfare".

Through the Convention no. 98/1949 on the implementation of the right to organise and to bargain collectively – ratified by Romania in 1958 – the General Conference of the International Labour Organisation has made an important step on the line of strengthening the social dialogue, aiming at "promoting and encouraging the full development and utilisation of machinery for voluntary negotiations of the collective agreement between the social partners with a view to the regulation of terms and conditions of employment by means of collective agreements".

The Council of Europe took the same position as the International Labour Organisation. In 1961, in Turin, the Council of Europe adopted the European Social Charter, providing a total of 31 guaranteeing fundamental rights, including the right to collective bargaining. In this respect, Article 6 of the Social Charter establishes the objectives of the social dialogue: joint consultation on matters of common interest, negotiation of the collective labour agreement, conciliation and voluntary arbitration for the settlement of any labour disputes.

The use of some procedures to ensure effective consultations between representatives of the Government, employers and workers has been the subject of numerous Articles of the Convention no. 144/1976 of the International Labour Organisation, regarding the tripartite consultations to promote the implementation of international labour provisions.

The jump from the recognition of the subjective right of social partners to organize and conduct negotiations to the awareness of the importance of negotiation, making it effective and operative, was conducted by the International Labour Organization through the adoption of Convention no. 154/1981 on promoting collective bargaining, adopted on 19 June 1981. This Convention was ratified by Romania by Law no. 112/1992, and certain goals were set in order to be respected, promoted and fulfilled. So, in art 5 of the mentioned law there is the idea that the collective negotiation must be available for the entire employee and all the employers from all branch of activities refereed and the collective negotiation must be progressively extended to all activities stipulated in convention. Also, it is necessary to encourage the development of the collective negotiation procedure rules between the employer and employee representatives, because the collective negotiation can be prevented by the invocation of lack of procedure rules or by the fact that these rules are insufficient or unclear. The last law objective is that the authorities and procedures that regulate the labour disputes must contribute to promote the collective negotiations.

The European Union adopted in December 1989 the Community Charter of the Fundamental Social Rights of Workers, which enshrines among the fundamental rights the right to information, consultation and negotiation, too.

By the Maastricht Treaty, targeting the social policy, it has been considerably strengthened the role of social partners at European level. The procedure of bargaining and consultation introduced by this treaty was drawn up by the Union of Industrial and Employers' Confederations of Europe (UNICE), the Organisation of Public Employers (CEEP) and by the European Trade Union Confederation (ETUC), during the social dialogue. It was subject to the Intergovernmental Conference approval in 1991. At the same time, by the Maastricht Treaty, the role of employers' organisations and of employees recognized as "social partners" received formalization at European level, for the first time in the history of European integration.

Specifically, the social dialogue is regulated at European level by Articles 151-156 of the Treaty on the Functioning of the European Union (TFEU). In accordance with Article 151 TFEU, the promotion of dialogue between management and labour is recognized as a common objective of the EU and Member States. The aim of the social dialogue is to improve the European governance by involving the social partners in the decisional and implementation process.

BIPARTITE SOCIAL DIALOGUE

Bipartite social dialogue, in particular, may be exercised at sectorial, inter-sectorial (or multi-industrial) and inter-professional level. The last situation is particularly important at European level where the issue regarding national diverging opinions (even within the same association) cannot be controlled. These three levels of application use different procedures and generate separate outlets. A sectorial agreement is almost always, in national experiences, a contractual agreement that defines the dynamics of wages, working hours, working conditions and other details compatible – as the rest of the understanding, too – with national laws. At European level there are still few cases of sectorial agreements that can be considered close to the national model of contractual agreements; there is no doubt regarding the fact that a contractual European area will be formed gradually. Nevertheless, since its inception, the bipartite social dialogue took the form of gathered opinions, statements and recommendations and the like, all instruments that are not accompanied by contractual obligations.

In 1992, the Social Dialogue Committee was created as the main forum for bipartite social dialogue at European level. Currently, the Social Dialogue Committee meets three or four times a year and is composed of 64 members (32 representing employers and 32 workers) either from European secretariats or from the national organizations. At the same time, the Single European Act created the legal basis for the development of a "social dialogue at the community level". In October 1991, UNICE, ETUC and CEEP adopted a joint agreement calling for mandatory consultation of the social partners in the preparation of legislation on social affairs and the possibility for social partners to negotiate framework agreements at Community level. The request was confirmed in the agreement annexed to the Maastricht Protocol on Social Policy, signed by all Member States except the United Kingdom. At national level, the social partners have benefited, thus, from the possibility to implement directives by a collective agreement.

Assimilation of the Agreement on Social Policy by the EC Treaty, following the entry into force of the Treaty of Amsterdam, has finally enabled the application of a single framework for social dialogue in the EU. The inter-professional results of the process were adoption of framework agreements on parental leave (1995), part-time work (1997) and fixed-term work (1999), implemented by Council directives.

At EU level, according to Article 154 TFEU, the Commission must consult the social partners before taking any action in the social policy field. The social partners may then choose to negotiate among themselves an agreement on the subject of the consultation and stop the Commission's initiative. The negotiation process can take up to nine months and the social partners have the following possibilities: they may conclude an agreement and jointly ask the Commission to propose that the Council adopt a decision on implementation, or having concluded an agreement between themselves, they may prefer to implement it in accordance with their own specific procedures and practices and those of the Member States ('voluntary' or, later on, 'autonomous' agreements), or they may be unable to reach an agreement, in which case the Commission will resume work on the proposal in question.

Negotiations between the social partners on a framework agreement on temporary agency work ended in failure in May 2001. Thus, in March 2002, the Commission adopted a proposal for a directive based on the consensus which had emerged among the social partners. After a modification of the proposal in November 2002, the process culminated in the adoption of Directive 2008/104. Similarly, after the social partners had expressed their unwillingness to engage in negotiations, in 2004 the Commission put forward a proposal on the revision of Directive 2003/88/EC concerning certain aspects of the organisation of working time, including recent developments such as on-call work and flexible weekly working time. Parliament, the Commission and the Council were subsequently unable to agree on the issue, and the European social partners tried to find an agreement during a year-long negotiation process, which also broke down in December 2012 due to major differences on the treatment of on-call time as working time. It is therefore now up to the Commission to put forward a new proposal.

From 1998, following a Commission decision to establish specific bodies (Commission Decision 98/500/EC of 20 May 1998), sectoral social dialogue was also strongly developed. Several committees were created in the main economic fields and they produced valuable results. Sectoral social dialogue produced three European agreements on the organisation of working time for seafarers (1998), on the organisation of working time for mobile workers in civil aviation (2000) and on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services in the railway sector (2005).

These agreements were implemented by Council decision. The 'Agreement on workers' health protection through the good handling and use of crystalline silica and products containing it', signed in Aprilie 2006, was the first multi-sector outcome of the European social partners' negotiations. In 2014, the Council implemented, by means of a directive, a sectoral agreement concerning certain aspects of the organisation of working time in inland waterway transport from 2012.

In April 2012, the social partners in the hairdressing sector concluded an agreement on clear guidance for hairdressers to work in a healthy and safe environment throughout their careers, and requested a Council implementing decision. Since then, the matter has got no further than the Commission, which announced in its REFIT Communication of 18 June 2014

that it would not be submitting a proposal to the Council. This suggests that the Commission's role is evolving from that of an intermediary body to that of a player with its own tools, namely impact assessments to be conducted before deciding to turn a sectoral agreement into a directive, taking into account whether the Council is prone to agree on the directive, bearing in mind the principles of representativeness of social partners, subsidiarity and proportionality.

The agreement on teleworking concluded in May 2002 was implemented for the first time in accordance with the procedures and practices specific to the social partners and the Member States. 'Autonomous agreements' were also concluded by the social partners on work-related stress and on the European licence for drivers carrying out a cross-border interoperability service in 2004, as well as on harassment and violence at work (Aprilie 2007) and on inclusive labour markets (March 2010).

Following the changes introduced by the Treaty of Amsterdam, the consultation process has become even more important, since it covers all the fields now falling under Article 151 TFEU.

With the entry into force of the Lisbon Treaty, a new article (Article 152 TFEU) has been inserted, stating that 'the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy'. Article 53 TFEU also gives Member States the possibility to entrust the social partners with the implementation of a Council decision adopted on ratification of a collective agreement signed at European level.

However, since the economic and financial crisis started, social dialogue has increasingly suffered when crisis measures were implemented, being weakened by its decentralisation, a decline in bargaining coverage and state intervention in the area of wage policy. Against this background, and in view of the finding that the Member States in which the social partnership is strongest have been the most successful in overcoming the crisis, the new Commission undertook in November 2014 to re-launch and strengthen the dialogue with social partners, especially in the new economic governance set-up, as a prerequisite for the functioning of Europe's social market economy.

TRIPARTITE SOCIAL DIALOGUE

As regards the tripartite social dialogue, it should be noted that right from the beginning of the European integration process, it was felt as important that the economic and social actors should be involved in drafting the legislation. The Advisory Committee of the European Coal and Steel Community and the European Economic and Social Committee stand as testimony to this. Since the 1960s, there were a number of advisory committees whose role was to assist the Commission in formulating specific policies. In general, these committees, such as the Committee on Social Security for migrant workers, consist of representatives of national organizations of employers, of trade unions and representatives of the Member States. Since 1970, an important forum of tripartite social dialogue at European level was the Standing Committee on Employment, composed of 20 representatives of social partners, derived equally from trade unions and employers' organizations. Reformed in 1999, the Committee was fully integrated into the coordinated European strategy for employment. On the basis of joint contributions of the social partners at the summit in Laeken in December 2001, the Council launched a Tripartite Social Summit for Growth and Employment in March

2003 (Decision 2003/174 / EC of the Council), which replaced the Committee for employment. Its role is to facilitate continuous consultation between the Council, Commission and the social partners on economic, social and employment issues. Formalizing a process that develops since 1997, the summit currently includes the present Presidency of the EU Council and the two subsequent Presidencies, the Commission and the social partners. The three Council presidencies are normally represented by the Heads of State or Government and by the Ministers of Labour and Social Affairs. The representatives of the social partners are divided into two delegations of equal size, consisting of ten employees' representatives and ten employers' representatives, paying special attention to the need to ensure a balanced participation between men and women. Each group is composed of delegations of the European inter-professional organizations, representing either general interests or particular interests of supervisory and managerial staff and small and medium enterprises in Europe. Technical coordination is ensured by the ETUC for the employees' delegation and by UNICE for employers' delegation. Following the ratification of the Lisbon Treaty, the role of the Tripartite Social Summit for Growth and Employment Work is currently recognized in Article 152 TFEU.

ROLE OF THE EUROPEAN PARLIAMENT REGARDING SOCIAL DIALOGUE

Parliament has taken the view that social dialogue is an essential element in the traditions of the Member States and has called for a greater role for the 'trialogue' at European level. Its Committee on Employment and Social Affairs has extended frequent invitations to the social partners at EU level to present their views before a report or opinion on any relevant issues is delivered. It has also often reminded the Commission of the need for a coherent industrial policy at European level, in which the social partners should play a key role. The Lisbon Treaty has introduced a clear right for Parliament to be informed about the implementation of collective agreements concluded at Union level (Article 155 TFEU) and about the initiatives taken by the Commission to encourage cooperation between the Member States under Article 156 TFEU, including matters relating to the right of association and collective bargaining between employers and workers.

In the midst of the economic crisis, Parliament has reiterated the fact that social dialogue is vital in order to achieve the employment targets set out in the EU 2020 Strategy (2009/2220(INI)). In January 2012, it stressed that, in focusing on fiscal consolidation, the Annual Growth Survey's recommendations would hamper not only job creation and social welfare, but also social dialogue as such. Furthermore, in its resolutions on the 2014 European Semester cycle, Parliament once again stressed the importance of social dialogue and called for a reinforcement of the role of social partners in the new economic governance process. Regarding the economic adjustment programmes in the countries most affected by the crisis, Parliament, in its resolution of 13 March 2014 on employment and social aspects of the role and operations of the Troika (ECB, the Commission, IMF) with regard to euro area programme countries, stressed that the social partners at national level should have been consulted or involved in the initial design of programmes. [3]

In European countries, the social dialogue was enacted in the years following the Second World War, especially under the shape of the Economic and Social Council, which played a special role in completing a social truce periods of the crisis in countries such as

France, Italy, Belgium, Holland. If during the years 1960-1970 the forms of the Economic and Social Councils were felt in terms of economic developments in the context of social peace, after 1970, once with the oil crisis and the increasing unemployment phenomenon, the tripartite negotiations have experienced a setback, losing its effectiveness. Thus, it is explained the fact that bipartite negotiations at branch and enterprise level settled and consolidated on the right place of tripartism. One typical example is represented by Germany.

Although it was said that tripartism is specific to European countries, important national agreements on wages and incomes were achieved in Australia, and Japan holds consultations periodically in the Conference and Roundtable of Industrial and Labour Issues (Sanrokon).

Returning to Europe, it must be mentioned the crucial role that the Economic Council plays in Denmark (where the public authority is very decentralized), examining the economic situation of the country twice a year, scored as an extensive network of institutions with a bipartite and tripartite structure.

In Finland, the Economic and Social Council meetings are conducted even monthly and it makes consultations on various economic and social problems. In the same way works the Economic and Social Council of Spain. After 1990 they were created a series of tripartite bodies in the countries of Central and Eastern Europe. Thus, in Poland, issues of economic and social interest are monitored by the Tripartite Commission for Social and Economic Research; in Hungary it was created the Reconciliation of Interests Council (recognized by the Labour Code of 1992); in Russia, the Tripartite Commission for Adjusting Social Affairs and Labour was founded in 1992; in Slovakia, the Council of Economic and Social Agreement is working to this end, etc.

These national bodies as the "Economic and Social Council" play an important role in the legislative activity. For example, in Italy, the National Council for Economy and Labour has the constitutional right to submit draft laws to parliament. In the Netherlands, the government asks the Economic and Social Council's opinion on the draft law with social character, a procedure that is common in Spain, Denmark and Belgium, too.

In Councils of an economic and social nature, the wage issue is also debated: the minimum wage is determined by such agreements and consultations in the Netherlands, Belgium, Greece, Hungary, Poland, Bulgaria etc. In France, collective bargaining issues are debated in the National Commission for Collective Bargaining, which has a particularly important role in preparing draft laws on industrial relations[4].

Over time, it was observed that for the functioning of tripartism, the institution characterized by the existence of three parties – government, employers' representatives and strong enough unions is not sufficient. The positive attitude to consultation and cooperation, the constructive attitude of the parties involved in finding efficient solutions for the economic and social problems that have come to the negotiating table, all these are strictly necessary.

Strengthening democracy and preserving social stability are related in this way by the wisdom of the social partners, according to which overcoming divergent interests of the moment is a long-term common target. Consultations, cooperation and negotiation aim at formulating a policy to promote the common welfare.

Therefore, there is a triple interaction between the organizations of employers (employers) and workers – social partners and public organizations or entities, i.e. tripartism. This term means transactions, negotiations that take place between the State – represented by

the Government – employers and workers, regarding the formulation and implementation of the economic and social policy.

In conclusion, social dialogue encompasses all forms of negotiation and consultation, as well as exchange of information between representatives of the state, employers and employees on topics of common interest of economic and social order.

The concept includes the traditional term of professional relationships, bipartite collective bargaining at the unit or branch of activity, and the relations between social partners and the State. It also includes the tripartite cooperation on labour market issues and it takes place in enlarged tripartite bodies.

That being said, the bipartism and the tripartism are the pillars of the social dialogue. Thus, bipartite relations (between the social partners) are essential for tripartism to be effective. It can be concluded that, after the level at which it is performed; the social dialogue takes place at national, branch and unit level[5].

The dialogue between social partners, in fact trade unions and employer's representatives, is an axiom of a social and economic development of a law state, in our world. In juridical doctrine it was said the social dialogue represents a concrete way to realize the democracy, in economic and social field, because we have to integrate all these in the big frame of the political democracy.

But, in the real economic society, the employees and the employers have a lot of opposite options; all these leading to the collective conflicts which have the source in diametrically opposed positions that they have in work field. That's way it is fundamental to have a balance in collective work relationships, because these balance creates the social pace.

According to the Romanian law, the final end of the social dialogue is the social pace, but we have to go beyond these idea. In fact, the social dialogue and the social pace are not the targets itself. In reality, their existents contribute to the durable economic development of society, to insure decent standard of living for the citizens. For all these reasons it is necessary for the social dialogue to be a permanent component of a social life and, especially, it has to be free of any constraints and not to be influenced by any political changes in the society [6].

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GENERAL PRINCIPLES OF INHERITANCE LAW IN THE ROMANIAN LAW AND THE MUSLIM LAW

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ABSTRACT

This article discusses the general principles of legal regulation of inheritance of the Civil code in force and their comparison with those prevailing in Muslim law. The Muslim law of inheritance ab intestat -the only "legal one" because really the Muslim law is not recognized in "testamentary succession"- it produces awe to the one who discovers. Its technique, but mostly the principles with which they are at the base and the spirit that it animates (it might not be without regard for the sacred), constitute difficulties for lawyer largely influenced by French law. More than in any other system of law, we need to look in history, not so much due to tracking descendants, about which we know quite a bit, as well as with the purpose to avoid countermeasures meanings in terms of the spirit that animates this right.

KEY WORDS: *MUSLIM LAW, PRINCIPLES OF LEGAL REGULATION OF INHERITANCE, SHARI`A, THE QURAN, GROUPS OF HEIRS*

PRELIMINARY CONSIDERATIONS REGARDING THE LEGAL SUCCESSION IN ROMANIAN LAW AND THE MUSLIM LAW

The Muslim right "fiqh" not within the law, in the sense that we are accustomed to "modern", meaning of this expression, that is that it is not a right in the traditional sense.

Fiqh means all those prescriptions, which according to the will of God must lead man in his religious, moral and political life, so called "the doctrine of human duties". It is an "ideal", to all Muslims, we see tangible results that almost everywhere, just like "dismemberments" in this legal system built for centuries by scholars of Islam. Every Muslim state is based more or less on its principles, it generates its own rules and is no doubt that Fiqh has provided Muslim peoples the essence of their legal institutions in a positive way and has rules that even if there is a mixture of religion, morality and law, they do not lose this first character.

Understanding the mode of formation of the rules is essential in deciphering the doctrinal controversies, the multitude of conflicting views and at the same time the impossibility of giving free legal reasoning, paradox is only apparent and that is explained by Muslim history law and, in particular, its sources. In Muslim countries, the succession law is a sector that is appropriate to all and against whom no most legislators do not stand up front while acknowledging the necessity of submission. The explanation is related to roots closely linked to the matter of Qur'anic law.

An essential part of Muslim law, the succession law has remained in the modern laws strongly rooted in tradition: inequality between parties, men and women, the fractions

assigned to fardh rules laid down in the Koran, the hermaphrodite, the "special cases" resolved by the immediate successors of the Prophet, the "daul" arithmetic calculation procedures of the parties that have originated in the middle ages.

Giving reasons on a traditional legislation from Tunisia, Morocco, Senegal, Algeria, Egypt, Syria, Saudi Arabia and other Islamic States have contributed in a way.

From the laws of the various Muslim States, we chose as reference point the Algerian Code for this study, which reflects a particularly classic legislation rules.

Algeria's Constitution proclaims Islam as the State religion, in which the legislator provides that in the absence of legal provisions to make reference to the provisions of the "*Shari`a".*

Shari`a means the combination of the general and common norms but with traditional and special provisions applying to all Muslim States in a proportion which can vary between 10% and 90%, depending on the size of each State's secularity, the rest includes legal regulations of the respective country's legislature.

Shari`a features:

Fiqh = is the science of practical knowledge of the laws, more exactly *Shari`a* applied.

I. The Qur'an
II. Sunna
III. Ijmaa

Succession matters can be found as it follows:

1. *The Qur'an*: *Women Surat* - verses 7; 8; 11; 12; 176.
Surat al–Anfal – verse 75.
2. *Sunna: Hadith*
3. *Ijmaa* –represents the decisions agreed upon in unanimity of important people around the Prophet Muhammad.
4. *Ijtihad* – represents interpretation of important people around the Prophet Muhammad.
5. *The Law* (the secular one) regulates in detail the sequence which is specific to each Muslim state.

In conclusion, we can say that the top four sources of materials succession in the Muslim law are common to all Islamic countries while the latter secular law is specific to each state.

In the Muslim succession law, the sacred dates do not reduce the general indications. Prescriptions are not default to the principles of action, leaving considerable freedom to those in charge to apply it, but rather treated the whole thing in detail leaving no place for interpretations. Most imperatives are very clearly expressed, they give solution to practical cases and are made in such way that no other solution can intervene. Whether it's from the Quran or the Sunna, a relatively small number of rules led to a making it difficult for the lawyers who made a tremendous effort to build, based on such sources, a coherent set.

The Quran – is the revealed Word of God received by the Prophet, this being a sacred book. Its authority cannot be discussed and the solutions which it contains relate to everybody. Legal order is based in large part on it, although it is not a code, and the justices should not cite it to justify their decisions.

Sunna - has the appearance of short *hadith* stories containing the list of witnesses attesting to the the continuity and reliability of the testimonies, and the second part containing the tradition itself, that is, the word of the Prophet.

These *hadith*-s as well as the *Quran* underpinn the establishment of the most important principles of Muslim law and the activities of the various schools. They form the Shari'a or shar which means path, the divine law.

Only on relatively these few such sources, a coherent system was built which keeps the *fiqh* and the intelligence effort of jurists to complete the *Shari'a* and give a form of Islamic law.

There is yet another aspect of Muslim law that must be disclosed, namely, that have developed four schools whose founders have tried different basic rules. Thus we can distinguish the following schools:

1. *Hanefit school* – founded by Abu Hanifa (767)
2. *Malekit school* – represented by Malek Ben Anas (795)
3. *Shafeit school* – founded by Al-Shafei (820)
4. *Hanbalit school* – founded by Ibn Hanbal (855)

The modern era shook the Muslim law to its foundations. This happened in the first place, through contacts with Europe, then by introducing "Western" codes or "Western-inspired" codes. In this context we question, if Muslim countries accept or refuse foreign influences.

The answer to this question will be the following: it is true that family law has always remained very resistant to foreign influences which made even more sensitive the dichotomy between the two legal systems and the need felt by Muslims to give it an even greater importance. In relation to the right to inherit, this is hardly accessible to modern legislators because of clarity of expression from the *Quran* and the *Sunna*. That's why you might say that in this area, the contemporary codes are remarkable close to the classic regulations.

The Muslim inheritance law is not only a technique of assigning parts of the inheritance. It reflects a spirit that translates the concept that a company has towards the relationships that exist among its members. It reflects the relative importance of its institutions and the idea of their significance. It is found at the crossroads of goods and families, it is a witness to the beliefs, it attests the priorities set out in a society.

Putting at stake the ties of blood, or alliance, the Muslim inheritance cannot be indifferent to the rules that dominate these links, not just because you can't understand and appreciate failing, but because certain issues that it raises, cannot be solved without their knowledge.

For this reason, it is necessary to go beyond the strict framework of the law of succession and the approach of the three recognized causes of fiqh: marriage, kinship and patronage.

The Muslim law confers legal inheritance to persons that are part of these categories but in actually inheritance is according to principles of succession for the inheritance laws.

It should be noted that no Muslim recognizes a will or a testament, therefore there will be no testamentary inheritance. In some situations, when the last wish manifested by someone that his patrimony shall be shared it can be considered as a testament to heirs on the condition that these last ones accept it. This testament may be verbal or written, it has no legal regulation and, hence, being left to the heirs the accepting of the conditions imposed by the deceased or not taking him into consideration and therefore following the regulations of legal inheritance.

In the Romanian civil law, the inheritance is legal where the transmission takes place under the inheritance law, in favor of the relatives of the deceased and the surviving spouse, in the order determined by law and in the proportions laid down by law.

The legal inheritance is in the regulation of the Romanian Civil code, "the most natural way of the transmission of the assets and liabilities of a deceased". This results from the fact that the legacy of the testamentary established by de cujus, is constrained by the law through a number of restrictions, the most important of which is the reserved portion.

The heritage institution is conceived within the context of legal inheritance -as a family legacy, and only in the case of vacant estate heritage this is collected by the State. Therefore, the law calls the close relatives of the deceased - from marriage, out of wedlock or adopted children-as well as the surviving spouse of the deceased. Thus, the regulation of the

legal right of our heritage is founded on kinship existing between the deceased and the people remaining alive, whether it be blood or kinship.

In the matter of the General principles of inheritance law, the solution proposed by the New Civil code maintains the fundamental rules that have been outlined and which were found in the Civil code and regulation from 1864.

According to art. 963 para. 1 of the Civil code, the legal legacy comes in order and with the rules laid down, the surviving spouse and the relatives of the deceased, the descendants, and the collateral ascendants, where appropriate.

The relatives of the deceased with general legal succession are not called all together and in the same time for the inheritance, the legislator makes a specific order calling the heirs. For this purpose, two scientific-technical criteria are used: the group of heirs and the degree of kinship.

The group is made up of a cathegory of relatives (eg descendants of the deceased) who collectively exclude categories or is excluded from it, even if relatives from the excluded category are nearest in degree than those of the called category.

The kinship is a number that represents direct line births from one person to another, and on the sideline, all births from a common ancestor and down from a relative to the other relative to it.

On the basis of classes of heirs and the degree of kinship three principles of legal inheritance were developed:

- the principle of the classes of heirs
- the principle of the degree of kinship
- the principle of equality between relatives of the same class and the same degree of kinship

A. The principle of the classes of heirs

The Civil code has established four legal groups of heirs:

a) group I, the descendentans, made of children, grandchilren, great grandchildren and so on without a limit of the degree;

b) group II, a mixture of the privileged ascendants (parents of the deceased) and the collateral (brothers, sisters of the deceased up to including the IVth degree);

c) group III, of the ordinary ascendants, (grand parents, great grandparents, and so on without a limit of this degree);

d) group IV, the ordinary collaterals (uncles, aunties of the deceased, first degree cousins and brothers and sisters of the grandparents of the deceased).

Under this principle, the relatives are called to the inheritance in the order of the classes of heirs. Hence, first called to inherit is class I of relatives of heirs, excluding heirs from any other class. In the absence of class I successors, relatives in class II of the heirs are called who will exclude from the inheritance the inferior relatives. The class of the ordinary ascendants will only happen in the absence of heirs of the first two classes, and the last class of heirs may inherit in the absence of successors from all other classes.

If after disinheritance, the relatives of the deceased from the closest class can not collect the entire inheritance, then what it remains shall be awarded to relatives qualifying for the subsequent class to inherit. For example, if all relatives of a class are disinherited legacy is gathered by relatives in subsequent class, under the condition of respecting the right as a reserve of reserved heirs. Thus, if the deceased had disinherited a whole class of descendants after assigning legal reserve for them, the inheritance is assigned to class II of heirs.

As an exception to this principle, the widow of the deceased, who is not related to him and is not part of the class of heirs, comes into the contest with any of these classes; therefore, he does not exclude any class of heirs, but also not removed from the inheritance of any of the classes, even the first called by the law of inheritance.

B. The principle of the degree of kinship

According to this principle, covered in art. 964 par. 3 of the Civil Code, within each class, the nearest degree relatives of deceased relatives remove relatives from farthest degree, unless the law provides otherwise.

For example, children of the deceased, the Ist degree of kinship, removes the grandchildren, who are second degree relatives to the deceased; brothers and sisters of the deceased, second degree relatives remove the grandchildren of brothers; uncles and aunts of the deceased, relatives of third degree, remove cousins of the deceased, who are fourth degree relatives with the deceased.

The law has two exceptions from this principle:

- in group II, the parents of the deceased, first degree relatives, do not remove the brothers and sisters of the deceased, second degree relatives, and their descendants, relatives of grade III or IV, but come together to inheritance, gaining statutory rates according to the law;

- representation of an heir, when someone in succession further in rank, climbs into his ascendents rights to pick the side that would be due to him, if he hadn't been unworthy for the deceased on the date of the opening of the inheritance. Thus, a nephew of the deceased (relative of IInd degree) will take his part of the legacy, which would have been for his father who died (son of the deceased), even if for the inheritance is called another son of the deceased (a relative of the first degree); descendants from brothers and sisters go up in place and degree of their ascendent to collect part of the legacy that would be their share.

C. The principle of equality between relatives of the same class and degree

According to this principle, if relatives called from a class to inherit are of the same degree, they divide the inheritance in equal shares, if the law does not stipulate otherwise. Thus, if for the inheritance of the deceased two children are coming (both are part of the first class and are relatives of the first degree with the deceased), they divide the inheritance in equal parts, so they will each acquire half of the inheritance.

There are two exceptions of this principle:

- division of the heritage line, when for the inheritance come relatives of same degree as representing. In this situation, the inheritance is divided and each representative (descendent) that came to inheritance in line, that is the part for the ascendant, that it represents.

- dividing lines of inheritance, where brothers and sisters come from different parents when they inherit each other, although of equal degree, brothers and sisters of the deceased both maternal and paternal will take a larger share than brothers and sisters only paternal or maternal, benefiting from a share of the paternal and maternal lines, equality is kept only between brothers and sisters on the same line.

Hereditary succession devolution in Muslim law has many original features, differing in the rules enshrined in our law.

Quran brings together the right of succession to certain heirs who were excluded from the succession until then, the pre-Islamic period is marked by the strong principle of inheritance of male vocation to the exclusion of women from inheritance.

In this context, the Qur'an has given birth to a new possibility of heirs, the heirs of the named parts beside fardh heirs with a natural vocation called aseb.

Along with these categories, the Muslim laws recognize the right of the heirs to the deceased persons related to inheritance contained in the category *dhaui al-arham* heirs.

The Algerian Family Code establishes in art. 139 the category of heirs:

a) reserved heirs (*fardh heirs*);

b) universal heirs (*aseb*);

c) blood heirs or of the same uterus (*dhaui al-arham*).

Further, the Algerian Family Code states (art. 140-143) persons belonging to these categories, their rights and the principles of hereditary devolution.

According to the Qur'an, the general principles of hereditary succession in Muslim devolution law are as follows:

A. The principle of *priority of class of heirs*

B. The principle of the priority of *degree of kinship* of the same class of heirs

C. The *male* principle

D. The principle of the connection between relatives of the same class of heirs

These general principles of the transfer on hereditary succession operate on all three categories of heirs announced, joined by specific rules of each category of heirs.

A. The principle of priority of class of heirs

The Muslim law has a very particular vision on the criteria for determining the classes of heirs. Thus, the legislator expressly determines three *categories* of heirs that includes people from several "classes" of heirs that would correspond to our right. Within each category of heirs *fardh, aseb and dhaui al-arham* heirs, we distinguish classes grouped by different criteria. The Algerian family code defines who belongs to each category of heirs.

1. Reserved heirs (*fardh*) according to art.140 of the Code, are those whose share of succession is legally determined by assigning parties. The concept of inheritance "reserved" does not overlap the concept of heirs regulated in our civil law. In Muslim law the notion of "reserved" refers to a part (that is fardh) of heritage that is precise and determined by law, the due share of each heir in this category.

Parties are legally determined in a number six: half, quarter, optima, two thirds, one third and one sixth.

Differences in rank and power to go kinship bond within each class of this category of heirs, exclusions can be total or only partial materializing an order of preference of classes of heirs.

The Algerian family code distinguishes between male heirs and reserved female heirs in art. 141 and 142.

Male reserved heirs are: father, paternal ascendancy - whatever its degree of kinship, husband, brother and uterine brother.

Female reserved heirs are: daughter, descendant of son - whatever their relationship, mother, wife, father and mother ascendant - whatever their relationship, good sister, sister inbred and uterine sister.

2. Universal heirs (*aseb*). According to Article 150 of the Algerian family code "universal heir (*aseb*) is entitled to all succession where there is another heir or what remains after the division of the inheritance reserved heirs' parties (*fardh*)". *Aseb* heir gets nothing if the division of inheritance succession lies with the reserved heirs.

Of these legal rules it follows that according to the order of preference to the call to the succession, *aseb* heirs will come to inherit only if the distribution of the parties as to the proper *fardh* heirs remains something of an inheritance. This statutory provision, however, is more complex than just an expression because the thesis according to which the *aseb* heirs come to inheritance provided have remained "something" following the sharing of *fardh* heirs, it refers to classes of heirs that are part of this category, but having a bond of kinship "in force". The provisions of the law are coming just to supplement the provisions of the Quran which puts heirs in the highest ranking in this category, of course, those with a very close kinship ties and male.

According to art. 151 of The Algerian Family Code, the universal heirs (*aseb*) divide in three classes:

a) universal heir – *aseb* – through himself
b) universal heir – *aseb* – through other
c) universal heir – *aseb* – with other.

Aseb heirs are relatives on the male side and of the male gender.

This category of heirs has special rules that determines the exact succession for each class of heirs based on a preference order.

3. Heirs by uterus or by blood (*dhaui al-arham)*

This category includes the rest of the relatives who do not belong to either of the first two categories mentioned, *fardh* and *aseb*. Here we encounter the division into four classes of heirs, who will find the specific vocation of the legacy, on pre-announced rules specific to this category of beneficiaries.

B. The principle of degree of kinship between same class of heirs

This principle finds its application in each of the categories of heirs. It is a basic principle of the right to inherit as a Muslim and operates similarly to ours. According to this principle, a relative closer to the deceased may exclude from inheritance a relative that is further.

C. The male principle

This principle draws its origin since the preislamic period, the right to inheritance being admitted only to male persons, outlining a succession law granted exclusively to men. The Qur'an, however, keeps this principle, gives another sense, the one of benefit from a double part of the legacy, so the called male heir will inherit alongside a female heir of the same class and same degree of kinship and take double of what the woman receives.

For example, if the deceased leaves behind a son and a daughter, the son will take 2/3 of the inheritance and the daugher 1/3. If the husband dies, the woman who is a now a widow will receive ¼ of the inheritance, but if the other way round, the male widow will receive ½ of the inheritance.

D. The principle of the bond between relatives of the same class of heirs.

The words "bon connection" defines a situation in which equality of kinship, the link group of collaterals may not be the same. In this case, the good brothers will exclude the brothers from the same father, the descendants of the good brothers will exclude descendants of the brothers of the same brothers decendants.

In conclusion, we may state that as a result of the determination of the categories of heirs called to the inheritance, the application of general principles and special principles governing different categories and classes of heirs will give "winner" heirs in each category, thus allowing the determination of those who are called to the inheritance.

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THE COUNCIL OF EUROPE AND ITS MECHANISMS FOR PROTECTING AND GUARANTEEING HUMAN RIGHTS

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ABSTRACT

The Council of Europe represents the main regional/European international intergovernmental organization in which the most efficient mechanisms for guaranteeing and protecting human rights have been initiated and developed.

The mechanisms implemented by this organization, aiming to protect and guarantee human rights, established through the conventional judicial tools adopted by the Council of Europe are: The European Court for Human Rights (jurisdictional mechanism), established by the European Convention on Human Rights, the conventional non-jurisdictional mechanisms for monitoring, as well as the system of regularly reporting and that of the collective complaints, employed by the European Committee for social rights, created based on the European Social Charter and its two protocols of 1991 and 1995, and the preventive control based on inquiries carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, based on the European Convention of the Prevention of Torture.

Added to these some extra-conventional mechanisms are considered, such as The European Commission against racism and intolerance and The Commissioner for Human Rights at the Council of Europe.

KEYWORDS: *COUNCIL OF EUROPE, PROTECTION MECHANISMS, GUARANTEEING, HUMAN RIGHTS.INTRODUCTION*

INTRODUCTION

Generally, compared to the human rights protection system of the United Nations Organization, the mechanisms of the Council of Europe for protecting and guaranteeing human rights offer the *image of a more integrated system*, with additional possibilities of reparatory compensations in cases when violations of human rights have occurred[1]. While the UN system is very cautious in recognizing the possibility for willing states or individuals who had been prejudiced to question how some of the human rights are being implemented in practice, the European system takes further steps, establishing several procedures through which the states can be summoned and forced to provide explanations and, in the end, to execute certain verdicts that have ruled that human rights violations had taken place against their citizens. In such cases, the states can be forced/condemned to provide reparatory compensations and to adopt measures in order to reestablish the rights to the persons whose fundamental rights had been violated.

At first, the European system for protecting human rights enacted by the Convention on defending Human Rights and Fundamental Freedoms comprised three bodies: The

[1] Duculescu Victor, Legal protection of human rights, Publishing House Lumina Lex, Bucharest, 1994 p.94; Tănăsescu Tudor, International protection of human rights. University Course, Publishing House Sitech, Craiova, 2015, p.91; Scăunaș Stelian, International law of human rights. University Course, Publishing House All Beck, Bucharest 2003, p.54

European Commission of Human Rights, The European Court of Human Rights (*jurisdictional mechanism*) and The Committee of Ministers of the Council of Europe.

At the level of the Council of Europe, the judicial Control of the European Court of Human Rights is supplemented by other non-jurisdictional conventional mechanisms, such as *the system enacted by the European Social Charter and its protocols*, that imply the procedure of control carried out based on reports and the procedure of collective complaints[2], or the *preventive control based on inquiries carried out by the European Committee for the Prevention of Torture and of other Inhuman or Degrading Treatment or Punishment*, enacted through the European Convention of the Prevention of Torture and of other inhuman or degrading punishment or treatment, in 1987. At the same time, some extra-conventional mechanisms can be noticed, such as the *European Commission against racism and intolerance or The Commissioner for Human Rights* at the Council of Europe.

According to Art.20 of the European Convention on Human Rights[3], The European Commission on Human Rights was made up of a number of individually elected members equal to that of the Convention's member states. The members of the Commission were elected by The Committee of Ministers of the Council of Europe, based on a list drawn by the Bureau of the Parliamentary Assembly. The mandate of the Commission lasted 6 years and its headquarters was in Strasbourg. The Commission elected its president and its two vice-presidents for a three-year mandate.

The Commission could be notified through requests, forwarded to the General Secretary of the Council of Europe by private individuals, natural or juridical persons, regarding supposedly violations of the Convention's provisions.

The Commission worked in plenary sessions or in chambers of seven members each or in committees made up of at least three members. The Commission could verdict the following:

- turn down the request;
- accept the request, followed by drawing up a report, should an amiable solution was reached in the case. The report was forwarded to the interested involved states, The Committee of Ministers and the Secretary General of the Council of Europe, in order to be released;
- should no solution be reached, a report comprising possible deemed proposals would be drawn up and sent to The Committee of Ministers and the interested states, without the possibility of being released;
- should the case be sent to the European Court of Human Rights in 3 months' term from forwarding its report to The Committee of Ministers, the latter would decide whether there had or hadn't been a violation of the Convention and, if affirmative, would set a deadline up to when the involved state should implement the measures drawn by the decision of the Committee of Ministers.

In the initial form set by the Convention, The European Court on Human Rights could be notified, after the Commission had taken notice of the failure of an amiable solution, in three month's term, by the Commission, the state whose citizen is the victim, the state that had notified the Commission, the state involved in the case or by the private individuals, natural or juridical persons, who had notified the Commission.

Therefore, the Commission worked as a "filter" of access to the European Court on Human Rights, which made this mechanism of receiving and evaluating notifications to work difficultly[4]. This is the reason why the additional Protocol no.11 to the European Convention

[2] Miga-Beşteliu Raluca and colab., International protection of human rights. Courses notes, Edited by S.C. Universul Juridic, Bucharest, 2008, p. 270

[3] Text, in Vida Ioan, *Human rights in international regulations*, Publishing House Lumina Lex, Bucharest 1999, p.289

[4] The number of requests addressed to the Commission after 1990 made more difficult settlement procedures. If in 1993 the Commission registered 2,037 cases in 1997 the number of cases has risen to 47,050.

on Human Rights for reforming the Convention's prior control mechanism[5] was adopted in Strasbourg in 1994, aiming at increasing efficiency in defending fundamental human rights and freedoms. Basically, the initial control mechanism has been simplified through the joining of the Commission and the European Court on Human Rights and by the establishment of a Single Court – The European Court on Human Rights, an institution with a jurisdictional and permanent character.

The Commission continued to exist, according to Protocol no.11, till 31.10.1999, and it took care of the admitted cases, until the enactment of the Protocol.

The Committee of Ministers is a decision making body of the Council of Europe, which organizes intergovernmental cooperation in the fields of interest for the organization. It comprises ministers of foreign affairs from the member states. The Committee can adopt agreements and conventions with mandatory judicial sentencing for the states which had ratified these regulations. This body also observes how the member states comply to the proclaimed human rights standards. The Committee can request consultative vetting from the European Court on Human Rights, on certain legal aspects pertaining to the interpretation of the European Convention on Human Rights and its Protocols. This body is also tasked with monitoring how the states implement the verdicts of the European Court for Human Rights.

CONSIDERATIONS ON THE MECHANISMS OF THE COUNCIL OF EUROPE FOR PROTECTING AND GUARANTEEING HUMAN RIGHTS

A. Jurisdictional mechanisms

1. The European Court on Human Rights.

General view on the organizational structure of the European Court on Human Rights

The present European Court on Human Rights (henceforth referred to as The Court) was first established by the European Convention on human rights and its current form was set through the additional Protocol no.11 to the mentioned Convention, signed in Strasbourg, on May 11, 1994.

The Court comprises a number of judges equal to that of the member states of the Convention (also members of the Council of Europe, at present 47 members), serving an individual mandate. They are elected by the Parliamentary Assembly of the Council of Europe, with a majority of votes, from among the candidates proposed by each state.

The judges are elected for a six-year term, with the possibility of being reelected. On the first election, half of the number of judges will end their term after three years, aiming to renewing half of the term every 3 years[6]. In order to insure this renewing, the Parliamentary Assembly can decide, before proceeding to another election, if one or more mandates may last more or less that 6 years, without dropping under 3 years or extending more than 9 years.

When a judge is elected to replace a judge whose mandate isn't over yet, he must see to his predecessor's mandate.

When turning 70 years of age, the judge's mandate ends, but the judges always hold their seats until their replacement and continue to see to solve the cases that they had been noticed about.

Should a judge find himself in the impossibility of fulfilling his tasks or cannot be anymore notified, the member state that had initially recommended him is invited to propose another judge in 30 days, to nominate another elected judge or propose, as *ad-hoc judge*, someone else suitable to the position of an elected judge.

The judges elect the president, one or two vice-presidents and two section presidents.

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[5] Adopted on 11 May 1994 and entered intor force on 01.11.1998. Romania has ratified the Protocol by Law No.79 of 6 July 1995, Official Gazette no.147/1995

[6] Protocol No.11 to the European Convention on Human Rights and Fundamental Freedoms, art.23. Vida Ioan text op.cit., p.333

Revoking a judge from his position needs a majority of two thirds of the number of judges.

The Court is organized on two categories of structures/sections - administrative and jurisdictional. The administrative structures are:

- The Plenary Assemble of the Court, led by two presidents and one or two vice-presidents;
- The sections led by their presidents.

The jurisdictional structures are:

- The Committees,
- The Chambers; and
- The Grand Chamber.

Added to these three, the Single judge was to be introduced following the enactment of the Protocol no. 14.

The Court works in assemblies, examining the cases brought forth in Committees, Chambers and the Grand Chamber.

The Plenary Assembly of the Court comprises all the elected judges; it has an administrative role.

The President of the Court[7] leads the activity of the Court, represents the Court and assures its relationships with the Council of Europe. He chairs the Plenary Assembly, the sittings of the Grand Chamber and those of the College of the Grand Chamber.

The Vice-president or the vice-presidents of the Court[8] assists the president of the Court and sit in for him on his request or whenever he takes a leave. They are also the presidents of the sections.

The Sections[9], five at number, represent administrative departments of the Court, established by the Plenary Assembly, for a three-year term. Each judge is a member of one of the Sections. The structure of the sections must be balanced in terms of judicial and gender representing. Each section has a president, while two of the five presidents of the sections are also vice-presidents for the Court.

The presidents of the sections[10] are elected by the Plenary Assembly for a three-year term, which can be renewed. They chair the sittings of the section and of the Chamber whose members they are.

The location of the Court is in Strasbourg, also hosting the Council of Europe, but, when necessary, the Court can act in various locations on the territory of the member states of the Council of Europe[11].

As mentioned above, for examining the cases brought forth, the Court works in Committees, Chambers and the Grand Chamber.

The Committees[12] are formed by three judges from the same section, for an established period of 12 months. Each committee is chaired by the main judge of the section. A Committee can declare an individual request, based on an unanimously vote, as unacceptable or can rule it out, when such a decision can be taken without the need of complementary examination, this being the final verdict. The committees can't rule in cases between states.

The seven-judge chambers[13]. For each case, the chamber comprises the president of the section and the rightfully judge, elected on behalf of a state involved in the case (the national judge). The elected judge can be replaced by an ad-hoc judge. The chambers can rule

[7] Regulation..., document cit., art.9
[8] Ibidem, art.10.
[9] Ibidem, art.25.
[10] Ibidem, art.12.
[11] Ibidem, art.19.
[12] Ibidem, art.27.
[13] European Convention on Human Rights, Vaida Ioan text, Human rights and international regulatiuons, op.cit., art.27, par.1.

on the acceptance of the case, as well as on the matter of the individual requests, should the Committee doesn't rule them as unacceptable or doesn't dismisses them from the Court, as well as on the acceptance and the basis of the requests put forth by the states.

The Grand Chamber[14] is formed by 17 judges and 3 deputy judges, for a three-year term. Part of the Grand Chamber are compulsory the president and the vice-presidents of the Court, the presidents of the Chambers and other judges nominated according to the Regulation of the Court, as well as, as rightful member, the judge elected on behalf of the stated involved in solving the differences. The Grand Chamber rules on the individual requests or on the cases between states when the case had been deferred to it by a Chamber, as effect of its declining of competency or in case of remittance by any of the parties, in three month's term from the ruling of the Chamber.

The Clerk of the Court[15]. In its activity, the Court is assisted by a body of clerks, led by the *Clerk of the Court,* elected through secret vote, with an absolute majority, by the Plenary Assembly, from among the candidates with a high moral profile, holding the required judicial, administrative and linguistic knowledge in order to work as court clerk. The election is for a five-year term, with the possibility of renewal.

The Clerk of the Court is assisted in his work by two deputy court clerks.

The Clerk has the following tasks:

- assists the Court in its work;
- is in charge of organizing the records and the activities of the body of court clerks;
- insures the security of the archives and intermediates communications and the notifications forwarded or issued to/by the Court;
- answers the requests of information with regard to the Court's activity, especially those coming from the press, while respecting the rules of confidentiality.

The body of court clerks works according to the general regulations established by the Clerk and approved by the president of the Court.

The body of court clerks comprises the *sections' bodies of court clerks*, equal as number with the number of the sections of the Court, and the administrative and juridical services that the Court requires in its activity.

The Court rules[16] inside the council room, secretly, and only the judges take part in the ruling, along with the court clerk, other agents of the court clerk body and interpreters, according to the situation. Before voting, the judges of the Court must express their opinion.

The rulings of the Court are backed by a majority of votes from the judges who are present.

The decisions and the verdicts of the Grand Chamber and the Chambers are adopted with a majority of the votes of the judges who are present and no refraining is allowed in matters pertaining to the acceptance or the basis of the case.[17]

The decision of the Grand Chamber is final and that of a Chamber becomes final should the parties declare that they will not request the forwarding of the case to the Grand Chamber or will not have it forwarded in three year's term from the ruling or in the case when the Grand Chamber doesn't approve resending the request.

The final verdict of the Court is conveyed to the Committee of Ministers, which supervises its implementation. The consultative vetting of the Court in judicial matters regarding the interpretation of the Convention can be released only upon the request of the Committee of Ministers.

The competence of the European Court on Human Rights.

[14] Ibidem, art.24.
[15] Regulation..., doc.cit., art.15, 17 and 18
[16] Ibidem, art.22.
[17] Ibidem, art.23.

The competence of the Court comprises all the issues pertaining to the *interpretation and the enactment of the* Convention and of its Protocols, as follows[18]:

- any member state may notify the Court over any violation of the provisions of the Convention and its Protocols that another member state may have reportedly committed (cases between states)[19];
- by notification in a request coming from *any individual*, any *NGO* or any *private group claiming to be victims* of the violations of the rights acknowledged by the Convention or its Protocols (individual requests) committed by any signatory state. This right can't be hindered in any way by the signatory states[20];
- the Court *can offer consultative vetting, at the request of the Committee of Ministers* of the Council of Europe, on judicial matters regarding the interpretation of the Convention and its Protocols[21].

* *

The individual complaints have led to an over burdening of the European Court and, in the context, to a lack of efficiency in its activity, because the system conceived by the Protocol no. 11 hadn't had in view the notifying of the Court by such a large number of petitioners[22].

Under the circumstances, the Protocol no. 14 attempts to increase the efficiency of the control system by rethinking the modus operandi of the control mechanism.

Thus, through this document (Protocol no. 14) a new *jurisdictional* institution is established - *the single judge* – who adds up to the Committees, the Chambers, the College of the Grand Chamber and the Grand Chamber. The single judge will take over the tasks of filtering the individual requests from the Committees and can declare them as inadmissible. The Committees are extending their competence and can examine individual requests on the matter, should the interpretation or the applying of the European Convention or of the Protocols is object to an established jurisprudence of the European Court. Protocol no. 14 also introduces a new special condition of admittance, namely it is requested the complainant to have suffered an important damage as effect of the reportedly human rights violation, excepting the case when respecting the human rights imposes an examination of the matter of the cause or when the cause of the complainant hadn't been properly examined by a national court.

The additional Protocol no. 14, was enacted following its ratifying by all the member states of the Convention for defending human rights and fundamental freedoms (in 2008, out of the 47 member states 46 had ratified it).

* *

The languages in which the verdicts are written are English and French, except for when it is decided that other official languages must be used.

The verdicts *are signed* by the president of the Court and by the court clerk, are read in open sitting by the president or by a judge assigned by the president and are conveyed to the Committee of the Ministers, to the parties involved, to the Secretary General of the Council of Europe, to third intervenient parties and to any other directly interested person[23].

The final verdicts of the Court are released under the authority of the court clerk, who is also in charge of releasing the official compendium of the Court's verdicts and decisions.

The parties involved in the case solved by the Court can request, in one year's term, the *interpretation of a verdict*. Should the request be accepted the parties are invited to present

[18] European Convention on Human Rights, doc.cit., art.32
[19] Ibidem, art.33.
[20] Ibidem, art.34.
[21] Ibidem, art.47.
[22] Vezi Miga-Beșteliu Raluca and colab., op.cit., p.264
[23] Regulation doc. cit., art.77.

written objections and to present them in front of the chamber, who decides through a verdict[24].

Upon the request of the party that had put forth a petition or upon appointment, the president of the chamber can offer judicial assistance for the defending of the cause. If this assistance is offered, the petitioner will also benefit of it in front of the Grand Chamber[25].

The judicial assistance can't be provided *unless it is necessary* for the proper development of the cause and unless the petitioner doesn't have sufficient financial means in order to totally or partially support the costs implied by the sustaining of his cause[26].

In order to establish if the petitioner holds or not sufficient financial means, he will fill in a *declaration* indicating his resources, valued goods, financial obligations towards persons who are in his custody and any other financial obligation[27]. This declaration will be *certified* by the internal competent authority or authorities. At the same time, the member state involved is invited to present its written observations. Following this procedure, the president of the chamber decides on admitting or refusing the judicial assistance and the court clerk will inform the interested parties.

Upon the request of *The Committee of Ministers* of the Council of Europe, the Court can offer *consultative vetting* on judicial problems regarding the interpretation of the Convention and its Protocols[28].

The Convention makes clear the fact that this vetting can't refer to issues concerning the content or the extending of the rights and liberties provided by it and its Protocols or to matters that might be acknowledged as effect of making an appeal according to the Convention.

The consultative vetting, as well as the Court's verdict considering that the vetting is not in its competence, is *signed* by the president of the Court and by the court clerk and is filed to the Court's archives and then is *conveyed* in legalized/certified copies to the Committee of Ministers, to the involved member states and to the Secretary General of the Council of Europe[29].

The Revised European Social Charter replaces, for its member states, the European Social Charter and its protocols.

B. The non-jurisdictional European control mechanisms

1. The control mechanisms introduced by the European Social Charter and its two protocols of 1991 and 1995.

The additional Protocol of 1995, establishing a system of collective complaints, has also continued to be applied to the Revised European Social Charter as an additional protocol.

♦ *In order that the member states respect the provisions of the European Social Charter and of the Revised European Social Charter, a control mechanism had been established, implying two control procedures*: the control procedure based on reports and the procedure of collective complaints.

The control procedure based on reports

Through the protocol of amending the Charter in 1991 a Committee of Independent Experts was established (which replaces, upon the request of the Committee of Ministers, the Committee of experts), having 9 members elected by the Parliamentary Assembly of the Council of Europe on a six-year term, from a list of experts proposed by the member states.

[24] Ibidem, art.79.
[25] Ibidem, art.91.
[26] Ibidem, art.92.
[27] Ibidem, art.93.
[28] Convention..., doc.cit., art.47.
[29] Regulation..,doc.cit., art.90.

The members carry out their mandate individually, in total independence. *The control procedure implies the obligation that the member states present a report on the implementing of the accepted Charter's provisions (Part II) twice a year*. *At certain times and upon the request of the Committee of Ministers, the member states also present reports to the Secretary General of the Council of Europe on the provisions of the Charter that they didn't accept, either upon ratification or later on*. The state reports are examined by the Committee of Independent Experts. Following the examination, the reports and the observations of the Committee of Independent Experts are sent to a Governmental Committee that had also been established based on the Protocol for amending the Charter, as a body which replaces the Subcommittee of the Governmental Social Committee. Based on the reports and observations of the Committee of Independent Experts, as well as on the comments of the invited observatories, The Governmental Committee, comprising a representative of each member state (the Revised European Social Charter), prepares the resolutions and recommendations for the Committee of Ministers of the Council of Europe regarding the situations noticed in the states' practices, including those related to the violation of the assumed obligations.

At present, the Committee of Independent Experts is denominated as the European Committee of Social Rights[30].

The procedure of collective complaints.

It was introduced by the additional Protocol to the European Social Charter in 1995 and came into act in 1998.

According to art. 1 of the Protocol of 1995, *the following entities are entitled to make collective complaints* regarding the violations of the provisions of the European Social Charter and of the Protocol of 1995, namely of the Revised European Social Charter:

- *international business organizations and organizations of employees* invited at the reunions of the Government Committee;
- *other international non-governmental organizations having consultative status to the Council of Europe*;
- *representative national organizations of employers and employees.*

The procedure has two phases, that of examining the admittance of the complaint, resulting in a decision regarding the admittance, and the phase of the examination of the matter.

The complaint must be forwarded in written form and will comprise the data which is necessary for identifying certain improper implementations of the Charter. The complaint forwarded to the Secretary General of the Council of Europe will be sent to the Committee of Independent Experts.

The member state against which the complaint is formulated will be informed.

Should the complaint is admitted, the Committee will inform the member states of the Charter and request the state involved and the petitioning organization to make observations on the matter.

The Committee of Independent Experts draws a report comprising its conclusions on the invoked base of the petition; the report is sent to the Committee of Ministers and is communicated to the petitioner and to the member states, with no possibility of release.

Based on the report of the Committee, the Committee of Ministers adopts *a resolution* or, a *recommendation*, should it notices an improper implementing of the Charter. The document issued by the Committee of Ministers, along with the report of the Committee of Independent Experts, can be released by the Parliamentary Assembly.

2. The preventive mechanism used by the European Committee for the prevention of torture and of other inhuman or degrading treatment or punishment. The Committee was designed as a body with competence in assessing the treatment of detainees, in order to insure

[30] Vezi Miga-Beşteliu Raluca and colab., op. cit., p.273

increased protection against bad treatment, by carrying out inspections[31]. In fulfilling its mission, the Committee cooperates with the assigned national authorities of the member states of the European Convention for the prevention of torture and of other inhuman or degrading treatment or punishment.

The Committee for preventing torture comprises a number of members equal to that of the member states of the Convention (47 at present), chosen from among the personalities with a high moral profile, known for their competence in the field of human rights. The members are elected for a four-year term, with the possibility of being two more times reelected with an absolute majority by the Committee of Ministers of the Council of Europe. Each state proposes three candidates. The sessions are confidential.

The monitoring mechanism used by the Committee is based on the inspections carried out by at least two members of the Committee in the member states. The intention of the Committee of making an inspection call must be notified to the government of the state involved.

The Committee can have free discussions, with no witnesses, with the detainees.

The results of the inspections can be conveyed to the Committee, either directly, on the spot, to the assigned national authorities or through a report drawn by the Committee following each inspection. The report comprises the findings, taking into consideration all the observations made by the member state. The report is sent to the member state along with the recommendations that the Committee deems as necessary. The Committee can suggest an improvement of the conditions of the detainees.

If the member state refuses to cooperate or to enhance the situation of the detainees in concurrence with the recommendations of the Committee, the latter can decide, with a majority of two thirds of its members, to issue a public declaration on the matter.

Annually, the Committee presents to the Committee of Ministers a general report of its activities, respecting the requirements of confidentiality.

THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

It was created following the summit in Vienna in 1993, the first high-level reunion of the state and government leaders of the member states of the Council of Europe. In 2002, the Committee of Ministers of the Council of Europe adopted a new statute for this Commission. According to the new statute, the Commission has the following main tasks:

- to examine the legislations, the policies and the other measures taken by the member states aiming at countering racism, xenophobia, anti-Semitism and intolerance, as well as their effects;
- to study the international pertaining judicial tools in the field, with the aim of consolidating them.

The Commission monitors within a control framework all the member states in matters pertaining to the racism, xenophobic, anti-Semitic and intolerance phenomena and *draws reports* with analyses of the state of facts and the optimal proposals to solving the identified problems.

The Commissioner for human rights. The institution of the *Commissioner for human rights* was established by the Resolution (99) 50 of the Committee of Ministers of the Council of Europe on May 7, 1999. According to the resolution, the Commissioner is a non-jurisdictional institution, designed to promote education, knowledge and respect for human rights in the member states of the Council of Europe, as they are stipulated by the judicial instruments of this international organization.

[31] Vezi Miga-Beşteliu Raluca and colab., op.cit., p.285-289; Niciu Marţian, Public International Law, Publishing House Servosat, Arad, 2004, p.218-220.

The person who occupies this position is elected by the Parliamentary Assembly, with a majority of votes, from a list of three candidates drawn up by the Committee of Misters. The candidates can be proposed by the member states and must hold the citizenship of one of these states. The mandate of the Commissioner is six years, without any renewal.

Among the tasks of the Commissioner, as stipulated in art.3 of the Resolution (99) 50, we highlight:

- promoting education and knowledge of human rights in member states;
- contributes to promoting genuine respect towards human rights in member states;
- gives advice and information about protecting human rights and preventing their violation;
- facilitates the activities of national ombudsmen or of the similar human rights institutions;
- identifies possible deficiencies or non-concordances in the laws or the practices of the member states, pertaining to respecting human rights;

Whenever he deems necessary, the Commissioner can write reports on certain issues in his tasked field of activity and have them forwarded to the Committee of Ministers or the Parliamentary Assembly and the Committee of Ministers. The Commissioner also presents a yearly general report to the Committee of Ministers and the Parliamentary Assembly.

The member states are obliged to facilitate the independent and effective activity of the Commissioner in fulfilling his tasks, especially pertaining to his contacts when gathering relevant data. The Commissioner can make direct contact with the governments of the member states of the Council of Europe.

The documents of the Commissioner for Human Rights are: *the recommendations, the opinions and the reports*. The Committee of Ministers can authorize the release of any recommendation, opinion or report it receives.

Within the framework of the activities carried out by the Commissioner, organizing *seminars and conferences* with the aim of promoting education and maintain the relationship with other structures and organizations involved with human rights must be mentioned.

CONCLUSIONS

♦ *The Council of Europe represents the institutional framework in which the most efficient mechanisms for protecting and guaranteeing human rights have been initiated and developed.*

♦ Referred to their tasks, the *mechanisms* of the Council of Europe, *have either jurisdictional roles* (e.g. The European Court on Human Rights) or *recommendation/advisory roles*, with no judicial power towards the member states. They have regional competence and are developed in close relation with those belonging to the United Nations.

♦ *The Mechanisms of the Council of Europe* pertaining to human rights *are represented by: The European Court on Human Rights, The European Committee for Social Rights, The European Committee for the Prevention of Torture and of other Inhuman and Degrading Treatment, The European Commission against racism and intolerance and the Commissioner for Human Rights of the Council of Europe.*

♦ *The Mechanisms of the Council of Europe for the protection and guaranteeing of human rights* created, mainly by conventional judicial tools adopted by this organization, *use practices* (solicitor's procedures and consultative vetting, regularly reporting, complaints, preventive control, etc.) *based on which the states can be summoned and obliged to explain,* and, *in the end, abide to recommendations or execute certain verdicts that have identified human rights violations against their citizens.* In such cases, they can be obliged/sentenced to offer reparatory compensation and take measures towards reestablishing the rights of the individuals whose fundamental rights had been violated.

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THE TESTAMENT UNDER ROMANIAN CIVIL LAW PROVISIONS

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ABSTRACT

The normative dispositions that we will refer to in this paper, are found in The Romanian Civil Code, in the 4th Book, called "About Inheritances and Liberalities", 3rd Title, called "Liberalities", 3rd Chapter "The Testament", articles 1034-1099. It is a very important civil institution, usually used, when a person wants to prefer somebody to collect the inheritance, a part of the inheritance, or a specific good from his estate. By article 1034 from RCC[1] "the Testament is the unilateral, personal and revocable legal act, through which a person, named testator, will decide, using a legal form, about his estate and other wills, for the time he will not be alive anymore". In the doctrine we find different opinions in connection with the content of the will (testament), in connection with the juridical nature of it, or in connection with the form vices or with the fundamental vices impact over the validity of the testament. The discussions are very extensive, so this is one of the reasons that we took in consideration for realizing this scientific paper. We will present also different types of testaments that we have provisioned in Romania, how the testament is proved under the Romanian legislation and how it is interpreted.

KEY WORDS: TESTAMENT, TESTATOR, ESTATE, CIVIL CODE, LEGAL ACT.

INTRODUCTION

The normative dispositions that we will refer to are found in The Romanian Civil Code, in the 4th Book, called "About Inheritances and Liberalities", 3rd Title, called "Liberalities", 3rd Chapter "The Testament", articles 1034-1099. It is a very important civil institution, usually used, when a person wants to prefer somebody to collect the inheritance, a part of the inheritance, or a specific good from his estate.

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WHICH ARE THE LEGAL CHARACTERS OF THE TESTAMENT?

It is a legal act – a manifestation of will, made with the purpose of producing legal effects [2].

It is a unilateral legal act – so it is valid when one will is expressed, of the person who leaves the testament (the will), no matter of the recipient will.

It is a personal legal act – it cannot be concluded by representation or by the legal guardian consent.

It is a solemn legal act – can be concluded just in the legal forms provided by the law, under the sanction of absolute nullity.

It is a legal act for death cause (in Latin – mortis causa) – because the effects are produced only after the death of the testator (of the person who leaves the testament). The recipient (beneficiary) of the will has no rights during the testator life.

It is a revocable legal act (essentially) – the testator can revoke the testament in a freeway, anytime without the obligation of explaining the facts that determined him to revoke it.

THE CONTENT OF THE TESTAMENT

In the content of the testament we can have: legacies, which can be: universal legacies, with universal title legacies and with particular title legacies; there can be also facts in connection with disinheritance in the frame of the law; in the testament there is the possibility of nominating a testamentary executor; some obligations for the beneficiaries of the testament; revocation of an early testament; the ascendant division, which is the division made by the testator between his descendants, for the whole succession or just for a part of it.

In the testament we can also find the recognition of one child by his mother or by his father. Also, we can find provisions in connection with the funerals, by art. 80 Civil Code. There is also the possibility to name by testament a legal guardian for the testator's children or contrary, to refuse to one person to become a legal guardian (articles 113, 114 Civil Code).

The testator can agree or not agree by the will, that after his death, his organs to be donate. He can propose by the will that after his death a foundation should be made with a specific purpose.

These are just some examples of what a testament could contain, but there are more possibilities.

If we are talking about the consent, as an essential element of any juridical act, that represents the will of the author, also in testament case is the primordial element. Art. 1038, al. 1 and 2 Civil Code, corroborated with art. 1204-1224 Civil Code, are proving these affirmations.

So, the will of the testator must be free and with no vices for the legality of the testament. The lack of consent (unilateral will manifestation), in connection with the testament, is sanctioned with the absolute nullity. Motivation for this is: the consent is an essential element; if this element is missing the juridical act cannot exist.

In testament area, the testator consent has to be serious, free and expressed with real

knowledgeably. If the consent, when the testament is made, is flawed by error, deception or violence, the testament can be asked for being annulled. The most situations, in testament area, are the ones in connection with the error and violence. For this we apply the common (domestic) law rules.

If we are talking about the deception in our specific area, this can bring to the annulment of the testament, even if, the deception ways haven't been made by the beneficiary of the testament and also unknown by him. The ways for it are the conspiracy and suggestion

(maneuvers used for convincing the testator to make a generosity, which in other circumstances he wouldn't have done it).

What is the conspiracy? – That maneuver (fraudulently) used by a person, to win the trust of the testator and cheat his good will, to determine him to make a generosity for the cheater.

What is the suggestion? – That hidden way (tendentious, hidden) placed in the head of the testator, for convincing him to make a testament, which he wouldn't have made it by his own will. For example: slander launching about the relatives.

When we are talking about deception we have to analyze: if the used methods were really injured (with fraud) and the result is really the alteration of the testator will. The conspiracy and suggestion must have been direct and overwhelming for the injury of the testator will.

By the practice, we can take in consideration, the next type of situations: the testator sequestration, the correspondence interception, removal of friends or relatives, because of the slanders or insults, the influence abuse or authority abuse.

Another element of the testament is the object. The object of the testament has to be determined or at least determinable; also it has to be licit. The sanction for not being as we said is the absolute nullity.

The object of the testament is licit when it is possible in accordance with the law and it is not against to the public order and good behavior.

In this order, in connection with the elements of the testament we have to talk about the purpose of the testament – or the cause. The cause (the purpose) is, practically speaking, the motive that is conducting the testator to some specific content of the will (art. 1235 Civil Code).

For being valid, the cause has to fulfill the conditions provisioned by art. 1236 Civil Code: to exist, to be licit, and to be moral.

The cause is illicit when it is against the law and public order, it is immoral and against the good behavior.

The lack of the cause means relative nullity for the testament. The illicit cause or the immoral cause means the absolute nullity of the testament (art. 1238 Civil Code). The validity of the cause is appreciated at the moment of testament opening and it is analyzed separately for each legal issue of the complex testament.

The cause is false, when the purpose representation, is not in accordance with reality. For example, the testator is thinking that the beneficiary of the will is his son.

The cause is illicit when the wanted purpose is against the provision of the law. For example: an imperative legal provision is ignored.

The cause is immoral when it is against the good behavior.

The falsity of the cause, illicit character of the cause and the morality of the cause most be proved by the persons who are attacking the will. The illicit character is very easy to prove, but the falsity or the immorality is very hard to prove.

A special place is taken by the capacity in connection with the testament.

The capacity is treated specially. The rules are about the testament but also about donations. The applicable principle is that any person can make and get "free gifts" (in our case important goods – called liberalities), but of course in accordance with the provisions of the law.

The capacity condition is taking into account at the same day when the testator is expressing his will (he also has to have capacity to make a testament). The condition of capacity to be the beneficiary of a will must be fulfilled on the succession opening date.

Note: the will made in the favor of some administrative territorial institution, with the task of building a hospital and giving after also the inheritance goods to the built hospital, it is a valid testament (even is the situation of a new juridical person who is not born yet). The person who gets the inheritance exists (the administrative territorial institution) who has civil capacity to the moment of the inheritance opening.

If we are analyzing the lack of the exercise civil capacity of the testator, we will invoke the provision of art. 988 Civil Code: The person, who has no exercise civil capacity or has a limited exercise civil capacity, cannot make a testament, with the exceptions provided by the law.

Under the sanction of the relative nullity, even after getting full exercise civil capacity, one person cannot dispose in the favor of his ex legal guardian or his legal representative, before these persons weren't discharged by the court in connection with the administration of the goods of the person (who is suppose to become the testator).

The exception for the mentioned situation is when the legal guardian or the legal representative is a relative.

We consider that the person who has no legal capacity or has a limited legal capacity cannot dispose of the goods thorough liberalities (testament or donation).

So, we need to underline some issues:

The minor cannot dispose through a testament, in any case – it is a protection measure;

One person cannot dispose in the favor of his ex legal guardian or his legal representative, before these persons weren't discharged by the court in connection with the administration of the goods of the person;

From the goods of the person who is under court order interdiction, the descendents can get their part just with the permission of the family council and with the authorization of the guardianship court.

TYPES OF TESTAMENT

From the beginning we have to precise that the testament forms have limitative character, so, the testator will can be expressed just in the frames of the law. So, as we said before, by art. 1034 Civil Code, the testament is a solemn act, so if this requirement is not fulfilled, we get in the situation of absolute nullity. This is an ad validitatem condition, so if it is nor respected, we do not have a valid legal act. The testamentary disposition it is a solemn act, but through this it is not necessary all the time the authentic form.

In Romanian Civil Code we find three types of testaments:

Ordinary wills (holographic or authentic) – article 1040 Civil Code;

Privileged wills – article 1047 Civil Code;

Sums and deposit valuable wills – article 1049 Civil Code.

We find two form conditions for all the types of the wills: the written form and the interdiction of the mutual testament. For this, we want to precise that, nor the testator major force, or his physical impossibility cannot remove the written form exigence. The written

form cannot be replaced with the recordings or other modern procedures. This thing, in Romanian legislation is motivated by the fact that can be hiding a lot of frauds.

Holographic testament – the etymological origin comes from the Greek language: holos-whole; grafo-to write. The legal provision is article 1041 Civil Code: "under the sanction of absolute nullity, the holographic testament has to be written, dated and signed by the testator hand".

So we observe, by the text of the law, that this type of testament must fulfill three cumulative conditions:

The whole text of the testament must be written by the hand of the testator;

The date of the legal act must also be written by the hand of the testator;

To be signed by the hand of the testator.

The lack of one of three conditions is making the holographic testament not valid, so the sanction will be the absolute nullity.

The advantages of the holographic testament are the followings: can be made by any person who can write; it is very cheap because there are not notary taxes; can be made by a testator anytime and anywhere, without to be needed a witness; the secret over the testament contend is absolute; can be easily revoked.

The disadvantages of the holographic testament are the followings: can be easy hide or destroyed after the testator death; can be rigged very easy in compare with other testament forms; the willing of the testator can be flawed by deception; it is very easy to be challenged; can contain provisions which are poor drafted, that can lead to a difficult interpretation.

There are some issues that we would like to present in connection with the signature. This has to permit the identification of the testator. There is no use the stamps, the seals, the fingerprints. The testament in this situation will be not valid. The signature does not have to have both the name and surname, it is necessary to be the one which is usually used by the testator.

In connection with the opening on the holographic testament, before its execution, this will be present publicly to be validated for non-changing. The opening of the testament and the state of the testament will be registered in a minute. In the end of the procedure, the original of the testament will be given to the heirs if there is a settlement in this case, otherwise the court will decide about it – article 954, 1042 Civil Code.

Authentic testament – the provisions for this type of testament are articles 1043-1046 Civil Code. The testament is authentic when it was logged by a public notary or by another person invested by the state [3], in accordance with the law. During the authentication, the testator can be assisted by one or two witnesses. The presence of the witnesses is not obligatory.

The advantages of the authentic testament are: the large access of the persons to this testamentary form, including the persons who cannot read or write or being in impossibility for writing; to challenge the authentic will is harder; to cheat in this testamentary area is harder; the authentic testament cannot be stolen, hidden, destroyed, because an exemplary of the testament is kept in the public notary office.

The disadvantages of the authentic testament are the followings: the expenses in connection with this are quite important; it is very easy to find the secrets from the testament.

In connection with the procedure for this type of testament, we precise that the testator has to present himself in front of a public notary, where he dictates the dispositions in connection with the will. The public notary is writing the testament. After he writes the testament the public notary will read the testament or he is giving to the testator to read it himself, fact that will be precise in the legal document. After the reading of the testament, the testator will declare that the content of the will is expressing his real wishes. After these procedures the testator will sign the document and also the public notary will sign it and legalize it. After that, the testament will be registered in the national notary register, which is kept in electronical regime (article 1046 Civil Code).

If there are some special situations [4], as: the testator cannot write, read, he is deaf, ha cannot speak, he is blind etc., these will be underlined in the legal act. In these situations the presence of two witnesses is obligatory.

The privileged testaments [5]- this category is provided in article 1047 Civil Code. We have some special situations as:

When there are some epidemics, disasters, wars or any other similar situations, the procedure will take place in front of a competent functionary of local civil authority.

The procedure will take place in front of a ship commander if the testator will be on a Romanian ship, and the situation is similar if the testator will be in a Romanian plane.

If the testator is a military and he cannot address to a public notary, he will be able to make a will in front of the military unit commander.

If the testator is hospitalized in a sanitary institution where a public notary has no access, he will be able to go in front of the manager or his replacement in order, to make a valid will.

For all the situations that we mentioned before, there is obligatory the presence of two witnesses.

The privileged testament has to be signed by the testator, the two witnesses and the person in charge by the case. If one of them will be in impossibility to sign it will be written in the document. This type of testament will be caduceus in 15 day from the date when the testator would have the possibility to make an ordinary type of testament (holographic or authentic).

We have a particular case, revealed by article 1048, al. 2 Civil Code – when the testator is recognizing a child, the caducity is not interfering, even if the rest of the will dispositions will become caduceus.

Sums and deposit valuable wills – the legal provision for this institution is in article 1049 Civil Code.

The specialized institutions cannot hand the sums or the deposits just after a Court Order, or based on the inheritance certificate. It is important to know that the credit institutions have the mission to communicate for instance the testament dispositions to the National Notary Testaments Register.

THE CONJUNCTIVE TESTAMENT

This issue is tight by the will of the testators and regards a legal interdiction. What do we have to know?

Under the sanction of absolute nullity of the will, two or more persons cannot dispose through the same will, one for the other one or for a third person – art. 1036 Civil Code. The "Law maker" (legislature) is granting in this manner, the personal, unilateral and revocable character of the testament. If this interdiction wouldn't exist, the testament would have a contractual character.

We would like to present some practical issues:

The spouses cannot make testament for each other using the same legal act, they have to make different testaments;

If on the same paper appear two testaments, with different contents, both are valid (but they have to be signed separately) – there has to be analyzed if it is an intellectual merger or just a material one;

It has no importance if on the legal act appears the beneficiary signature (in case of a liberality with a task). It is not considered acceptance. When the succession is opened, the beneficiary can let it go freely for the provision in the testament made in his behalf.

Historically speaking, in Callimachus Code and Caragea Code it was permitted. At the beginning of the Civil Code from 1864, were also admitted the viability of the legal acts fulfilled before.

THE VOLUNTARY REVOCATION OF THE WILL.

If we consider the definition of the will, we can mention that it is an unilateral legal act, essentially revocable. The revocation can be made in two ways, express way or tacit way.

The Law Maker (legislature) provided that the express voluntary revocation (art. 1051 Civil Code), cannot be fulfilled but exclusively by a notary legal act – authentic, no matter if we are talking about a partially or totally revocation, or by an ulterior testament.

The ulterior testament can be made in a different form, not just like the testament which is revoked – we can revoke an authentic testament through a holographic testament.

The verbal revocation cannot produce a legal effect. The authentic revocation will be as once written (noted) by the public notary, in the National Notary Register of the Testaments – which is kept in electronic format.

The tacit voluntary revocation is provided by the law, in art. 1052 Civil Code, that says: the testator can revoke the holographic testament by destroying it, tearing it or erasing it. The erase of one disposition of the holographic will by the testator, involves the revocation of that disposition. The modifications fulfilled by removal (erasing way) have to be signed by the testator.

Destroying, tearing and erasing of the holographic testament (will), known by the testator, also is conducting to the revocation of the will, but only with the condition that the testator to be able to remake the will.

The ulterior testament is not revoking the anterior one just in the limits of the dispositions which are contrary or incompatible with it. The effects of revocation are not removed when there is caducity or revocability of the ulterior testament.

We would like to underline some issues:

The simple crinkle or siphon of the will, cannot be considered revocation;

The ulterior testament is not revoking the anterior one, just in the limits of the dispositions which are contrary or incompatible with it.

The effects of revocation are not removed when there is caducity or revocability of the ulterior testament.

The revocation disposition can be retracted expressly by authentic notary legal act or by will (art. 1053 Civil Code).

CONCLUSIONS

In connection with this institution that we debated, we consider that there has to be applied the rules from the interpretation of the contracts. So we have to identify first the real wish of the testator. The testamentary clause is interpreted for producing juridical effects, and not in the way that we have no effects. When there is a doubt, the interpretation will be in the favor of the legal heirs.

It is a very interesting legal institution in Romania, this is the reason we decide to debate on it. In the end, after the legal issues that are already presented, we would like to make a specification. There are not allowed to be done, in Romanian legislation, liberalities for death cause, just by two legal acts, the donations and the legacies, legal acts that are found in a testament.

The donation – is a contract, that settles that one part, called the donor, is giving (irrevocably) a good, or more goods, to another part, called the grantee.

The legate – is a testamentary disposition, through which, the testator is stipulating that one or more heirs, will benefit from the testator goods after his death.

The conclusion is: this juridical institution is a very important one, with a lot of issues that can be revealed. The testament can co-exist with the legal inheritance in Romanian legislation, but we can also have just testament, or just legal inheritance.

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THE CLASSIFICATION OF COMPANIES REGARDING THE COMMERCIAL ACTIVITY

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ABSTRACT

The article deals with legal forms of companies incorporated in Romania according to different classification criteria with legal relevance, with a different value, and thus differentiated consequences in terms of law.

KEY WORDS: COMPANIES, CLASSIFICATION, ASSOCIATES, SHAREHOLDERS, CONSTITUTION.

INTRODUCTION

Judiciously, the literature has noted that at present, in terms of regulatory classification societies are no longer paid on the basis of the distinction the company - civil society, but the distinction between the company having legal personality (mainly regulated by Law No. 31/1990) and unincorporated company mainly regulated by the Civil Code.

According to art. 2 of Law no. 31/1990, companies with legal personality shall be lodged in one of the following forms: general partnership; limited partnership; corporation; company limited by shares; limited liability company.

The legal text reproduced exhaustively lists the legal forms they may have companies formed in Romania under Law no. 31/1990. Using the premise of these legal forms listing the legal doctrine[1] adopted several criteria for classification societies. Next we highlight those with legal relevance.

[1] O. Căpăţînă, *Societăţile comerciale,* Editura Lumina Lex Publishing House, Bucharest, 1996, p. 62.

1. THE CRITERION ROLE ELEMENT *INTUITU PERSONAE* IN CORPORATION FOUNDATION

By nature or by prevalence element of personal or material, companies are divided into two categories: partnerships and capital companies.[2]

a) partnership

Such companies are called to be established, organized and function in consideration of the identity and professional qualifications of their members. So, their establishment is dominated by the element intuitu personae, so that companies of this kind are characterized by a strong cooperative. And it's natural to be so, because no capital, but striving, trust and cooperation partners to obtain profit interest them and motivate them to associate with each other to achieve finality.[3]

Intuitu personae element is analyzed here as glue companies of its kind. In other words, the company is built on the personality of people each associate and associate status is designed and modelled according to a person to which they are inseparable and that link. Is why this quality is accessible to third parties only with the consent of all partners, the expression of which is otherwise subject and its transmissibility through inheritance.[4]

The rule is that in a business partnership may be driven by each of the partners. Through the instrument of incorporation or by his successor Convention, but associations may stipulate otherwise. The basis of this rule lies precisely in the idea of personal cooperation and mutual trust that should characterize relations between associates.

Companies are belonging to the group of people in society partnerships and limited partnerships. To these, in our view, add and joint ventures, which is a corporate structure without legal personality and legal regulation of which is not found in the provisions of Law no. 31/1990, but in art. 1949-1954 Civil Code and in art. 33-34 of Law no. 15/1990.

Partnerships are distinguished by capital companies to the following specific notes:

- When setting up their decisive element is intuitu personae. Such companies are established only by people who know each other and have each other trust, full and mutual consideration, such as to substantiate, morally, such a trust. [5]

- The liability of members for debts Social is joint and unlimited, which means that if the social creditors are unable to recover claims following assets of the company, they are entitled to proceed on the path forced pursuit against all affiliates or any of its to realize, fully, receivables matured .

- The dissolution of partnerships operate both when intervention dissolution general terms provided by law, and if intervention special terms provided by law. Note that the aforementioned cases of application are applicable only to companies founded on intuitu personae element, in the case of partnerships and Limited Liability Company. And it's natural to be so, because each involves dissolving precisely because it demolishes the moral foundation of society, which is the element intuitu persona.

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[2] Stanciu D. Cărpenaru, *Tratat de drept comercial român*, Ediţia a IV-a, updated, Universul Juridic Publishing House, Bucharest, 2014, p. 147.
[3] Stanciu D. Cărpenaru, *Tratat de drept comercial român*, Ediţia a IV-a, updated, Universul Juridic Publishing House, Bucharest, 2014, p. 147.
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[5] Gh. Piperea, *Drept comercial. Întreprinderea,* C.H. Beck Publishing House, Bucharest, 2012, p. 161.

- conditions for the establishment of society's people are also different compared to those established by law on capital companies, or on limited liability companies. Thus, this law does not require a mandatory minimum capital leaving to the discretion of the parties determining the amount of capital in each case.

Therefore, we believe that in the absence of a legal provision expressly to establish the requirement for a mandatory minimum capital, as a condition to establish a partnership, the founding members are obliged to agree a reasonable capital relative to needs achieving the objective which society is always circumscribed its object of its activity.

The law establishes no minimum required for people to be setting up a partnership. However, taking into account that in our legal system governed neither a single-member company, will conclude that the establishment of any structure requires at least two shareholders.

Referring to limited partnerships, this implicit requirement of the law is nuanced in that here it is necessary to establish, of the two founders, necessarily, one must assume the status of general partner and one limited partner quality.

Finally, the memorandum of unincorporated businesses is restricted to the partnership agreement; there is no need to draw up a company statute. We expressed our opinion that in the absence of a statutory provision to the contrary, nothing precludes the founders agree and preparing a company statute respecting this law provisions on the form and content of status for when such a component of the articles of association required as required for its validity.

b) Capital Companies

The corporations consists of a large number of partners, required capital needs without showing interest personal qualities associates. The essential element is the share of capital invested associate (intuitu pecuniae). [6]

Capital companies assume that essential capital contributed by shareholders, associates, capital having more relevance than the qualities associates.[7] Here the person who associates, their qualities as trust and mutual consideration of them does not matter. In many cases - especially when formation of the company takes place by calling public subscription - associations did not know each other.

In group capital companies, joint stock company (which is a real prototype in the field) and companies limited by shares.

In our opinion, the main notes of specificity in capital companies may be summarized as follows:

- The decisive factor in setting capital companies is the idea of capital, and not the person who associates or her qualities.

- Associations of the capital companies are holders of securities issued by such companies. They are called generic shareholders.

- social liability for the debts of shareholders is limited to the capital contribution subscribed by them. Social creditors cannot pursue debts at maturity without coverage in social patrimonial assets.

- The law establishes mandatory provisions, general conditions for setting minimum capital companies. These conditions concern the minimum number of members, which is set

[6] Stanciu D. Cărpenaru, *Tratat de drept comercial român*,Ediția a IV-a, updated, Universul Juridic Publishing House, Bucharest, 2014, p. 147.
[7] S. Angheni, *Drept comercial. Profesioniştii-comercianţi*, C.H. Beck Publishing House, Bucharest, 2013, p. 74

at two (according to art. 10 par. 3 of Law no. 31/1990) and the minimum initial capital, which is 90,000 lei (cf. art. 10 par. 1 of Law no. 31/1990).

- Finally, the memorandum of capital companies must include two essential components, namely: the partnership agreement and Articles of Association. In this case, editing by founding Articles of Association no longer is optional but is a condition of validity of the constitutive act itself.

2. THE CRITERION ASSOCIATES EXTENT OF RESPONSIBILITY FOR SOCIAL DEBTS

a) companies with unlimited liability

Such companies are called where bear unlimited joint with their entire patrimony for social debts. Belong to this group: society partnerships and limited partnerships.

With reference to the latter is more accurate but requires that the two categories of members who compose it - namely associates and limited partners - have a different scope responsibility for the company's debts. Thus, in what concerns its general partners shall be treated in all aspects of society associates General and, therefore, their responsibility for social debts is unlimited. But limited partners are treated as de facto and de jure, members of the limited liability company and therefore they have limited responsibility for the debts of social benefits. [8]

An emphasis is required, however: although the responsibility of the two categories of partners who formed the company in simple association has a different legal regime, this company fits perfectly into the group of companies with unlimited liability.

In our opinion, this total integration, that doctrine accepts without reservation, is founded on the idea that associates are more representative of society than limited partners, indeed, they include their name on a firm social, they perform management of the company and all they provide the company's management.

b) Limited liability companies

Legal doctrine of limited liability generic names those companies with respect to which the law provides limited liability for the debts of the social partners. Belong to this group: joint stock company limited by shares and limited liability company.

Analysis of the composition of this group is it superficial to the conclusion that between the types of companies that make up this component there is one common element, namely the limited responsibility of the partners, for the rest, capital companies (joint stock and limited partnership shares) and the limited liability company are distinguished by notes of distinction irreducible essential.

However some general features can be retained on companies that make up the group in question:

- Constitutive Act of the companies in this group is made up of the partnership agreement and Articles of Association. One exception to the rule exists, namely the company as a variety of single-member limited liability company whose articles of association consists only of its statutes. One such exception is legitimized by the fact that single-member company being formed with a single corporate involvement in her case there is no question of concluding a bylaw because our legal system contract itself is not allowed.

[8] C. Gheorghe, *Drept comercial român*, C.H. Beck Publishing House, Bucharest, 2014, p. 315.

- in all companies in the group analyzed the law requires a minimum capital as a condition of their constitution.

- Associations of the companies that make up the group we refer to respond to social debt to the extent and value of the subscribed contribution. By consequence, the company's creditors will not be able to watch about the forced recovery of claims that have to society, the associates.

3. THE CRITERION OF CAPITAL STRUCTURE AND ITS WAY OF SHARING BETWEEN PARTNERS

Distinguished legal doctrine in this regard two groups of companies, namely:

a) companies with shares or interest parties

Companies are called collective shares those entities whose share capital is divided into equal fractions called shares. Belong to these group partnerships (society partnerships and limited partnerships) and the limited liability company.

Law no. 31/1990 shares phrase used only in reference to the limited liability company, but as has been noted in the literature[9], society in collective capital fractions may be designated by the expression of interest parties alike. The difference is basically shares of nominal.

Members having shares are entitled to participate in decision-making in the governing bodies of the company, both on the serious issues that interest the very existence of society, such as, the amendment of the constitutive, changing the legal form of the company, termination of society etc., and on its current business problems. On the other hand, when the balance sheet of the company leads to favourable outcomes, associations are entitled to cash regularly, usually at the end of each year of operation, dividends, a percentage of the profit realized. This percentage is consistent with the value of the contribution of each member to the subscribed share capital formation.

However, the assumptions voluntary withdrawal from society, exclusion from society or company dissolution and liquidation, associations are entitled to a share of the assets of equivalent value corresponding social contribution made by each of them.

The shares have a rather restrictive legal regime. Thus, in principle, they cannot be transferred for the benefit of third parties. And it's natural to be so because of partnerships, and limited liability company that is founded by the element intuitu personae, and transmission by third party social party has the effect of replacing one of the original associations with a third party. However, such a requirement contradicts the substitution of knowledge and mutual trust.

However, the character - in principle - transferability of shares is tempered by the legislature in the legal provision contained in Art. 87. 1 of Law no. 31/1990. Indeed, according to the text "transfer of capital contribution is possible if permitted by the memorandum." So the founders through their agreement resulted in the partnership agreement will have freedom to declare cessible shares and implicitly, and to establish the conditions and limitations under which such a transfer can take place.

[9] Stanciu D. Cărpenaru, *Tratat de drept comercial român*,Ediţia a IV-a, actualizată, Universul Juridic Publishing House, Bucharest, 2014, p. 148.

On the same reason is art. 202. p.1 and 2 of Law no. 31/1990, according to which: "The shares may be transferred between partners. Transmission to persons outside the company is allowed only if approved by associations representing at least three quarters of the share capital ".

Whether shares was established by the memorandum or was committed by members of a qualified majority of three-quarters of their total number, if held by acts upon death under these conditions, shares may be acquired by third parties only by means of civil law - that assignment, and not by means of commercial law.

b) Joint Stock Companies

Joint stock companies constitute the basis of a memorandum, which must contain specific elements of the contract by both society and the status of the operation. [10] Generic designation of such companies is issuing shares. Obviously, part of this group limited company and limited partnership by shares. Their specificity is that in both cases the share capital is divided into equal parts equal binding, represented by securities called shares.

And holders of shares - generically called shareholders - as well as holders of shares have the ability to participate in the decisions of the management bodies of the company, both on matters of economic management and on issues cover essential aspects of existence the company and amendment of the articles of association, dissolution and liquidation of the company etc. They also have the rights to participate in dividend distribution that occurs periodically, usually annually if the economic activity of society reflected in its balance sheet leads to profit.

The actions mixes naturally in civil circuit and those of them who have credibility on the bond market are quoted on stock exchanges. And it's natural to be so, because in the case of joint stock companies and limited partnership equity element intuitu personae fade, making the change in ownership of the action to be completely irrelevant legal.

Therefore, the actions are essentially transferable. They benefit from the transfer modalities of commercial law which is nuanced and differ depending on the legal nature of the title. Thus, in the case of bearer shares their transmission is operated by submitting material to the title to the new owner, and if registered shares transfer valid title to the new acquirer involves registering the transaction in the register of the issuing company and the reference in the title of identification data new holder.[11]

4. CRITERION COMPANY'S ABILITY TO ISSUE OR NOT SECURITIES

In harmony with this criterion shall be distinguished:

a) companies issuing securities

Companies issuing securities are those companies which are recognized by law empowering to issue securities. Belong to this category of capital companies (joint stock and limited partnership by shares).

The concept of value a title meaning scored here that has commercial value.

Securities category includes shares and bonds issued by capital companies.

[10] S. Angheni, *Drept comercial. Profesioniştii-comercianţi*, C.H. Beck Publishing House, Bucharest, 2013, p. 74
[11] C. Gheorghe, *Drept comercial român*, C.H. Beck Publishing House, Bucharest, 2014, p. 345.

After the transmission mode, the shares can be nominative, when the content is placed right holder or bearer mere possession of their property title worth. [12] According to art. 91 p. 2 of Law no. 31/1990 kinds of actions are determined by the instrument of incorporation; if this act is missing such a statement, the shares issued by the company are considered bearer.

The law allows the conversion of registered shares into bearer shares and vice versa, but makes performing such operations prior decision of the extraordinary general meeting of shareholders (art. 92 par. 5 of Law no. 31/1990).

As for the transfer of ownership in the case of registered shares, the transmission of ownership occurs by operation made the claim on the title. The legislator leaves, but some freedom founders decisions with reference to determining how the transmission of ownership of registered shares.

a) companies that lack the ability to issue or not securities

Partnerships and limited liability companies have no legal entitlement to issue securities. Corporate securities (which are certificates of party interests in companies of persons and certificates of shares in limited liability companies) issued by these companies do not meet the specific characteristics of the securities.

As company partnerships and limited partnerships, the texts of Law. 31/1990 makes no reference to the capital structure of these companies or, more precisely, in the way he (capital) is divided between the partners. Moreover, art. 87 of the mentioned law speaks assignment of capital contribution if the collective society. However, using such expressions (assignment of capital contribution) suggests that the legislature did not consider a certain structure of capital or a certain way of sharing between members of this society. The same is true in the case of company partnerships, although the text makes no reference cited in this company.

However, the doctrine recognizes[13] that we see a simple omission of law and that if companies in partnerships and limited partnerships, as in the case of a limited liability company, registered capital is split into shares, even if this name is used to refer exclusively to the legislature limited liability company. The author mentions that the company quoted partnerships, capital fractions may be designated by the expression of interest parties alike. The difference of principle shares is nominal.

Therefore, both partnerships and limited liability companies are empowered (implicitly or explicitly) by law to issue titles corporate type certificates for shares, a simple document ascertaining the status of associate and part social belonging proprietor , but they are not securities.

However, the certificate of shares and remains a document of commercial value because it is issued by a company, targeting a structural element of its heritage and is also an evidence of a commercial nature.

CONCLUSIONS

The science of commercial law used several criteria for the classification of companies but we have summarized the presentation and analysis of forms of companies with legal personality established in Romania based on the criteria for classification with legal

[12] S. Angheni, *Drept comercial. Profesioniştii-comercianţi*, C.H. Beck Publishing House, Bucharest, 2013, p. 75
[13] O. Căpăţînă, *Societăţile comerciale,* Lumina Lex Publishing House, Bucharest, 1996, p. 83.

relevance because of the need correct understanding of the legal status of companies to the right choice by members of the establishment of one of the five forms governed by the Companies Laws.

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