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THE PATENT UNIVERSALITY OF INHERITANCE LAW. LEX SUCCESSIONIS BETWEEN LEGISLATIVE TRADITION AND MODERN VALUES

Volume coordinated by

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Section A

THE INVOLVEMENT OF LOCAL PUBLIC ADMINISTRATION IN THE EXERCISE OF SUCCESSION RIGHTS IN THE LIGHT OF THE ADMINISTRATIVE CODE. SPECIAL LOOK AT THE ROLE OF THE SECRETARY GENERAL OF THE ADMINISTRATIVE-TERRITORIAL UNIT

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Abstract

This material aims to analyze the involvement of the local public administration in the succession procedure. The secretary general of the administrative-territorial unit has the central role in this procedure. The powers he exercises in this field were also provided for in the old Law of local public administration no. 215/200 and were taken over by the Administrative Code. I have designed the material so that the doctrinal and legislative dimension of this attribution is addressed, through a brief presentation of the current legal framework, of the significance of the Administrative Code of Unitary Normative Act for the regulation of local public administration, but also of the regime of the legal regime that emerges from the interpretation of the provisions of the Administrative Code.

Keywords: *public administration, secretary-general, administrative-territorial unit, succession rights, attribution*

Résumé

Ce matériel vise à analyser l'implication de l'administration publique locale dans la procédure de succession. Le rôle central dans cette procédure est joué par le secrétaire général de l'unité administrative-territoriale. Les attributions qu'il exerce dans ce domaine étaient également prévues dans l'ancienne Loi de l'administration publique locale no. 215/200 et ont été repris par le Code administratif. Nous avons conçu ce matériel de manière à aborder la dimension doctrinale et législative de cette responsabilité, à travers une brève présentation du cadre juridique actuel, l'importance du Code administratif de l'acte normatif unitaire pour réglementer l'administration publique locale, mais aussi le régime juridique qui émerge de l'interprétation des dispositions du Code administratif.

Mots-clés: *administration publique, secrétariat général, unité administrative-territoriale, droits de succession, attribution*

I. Brief presentation of the current legal framework in the field of public administration regulation

One of the golden dreams, which many of the „sacred monsters" of the administrative doctrine lived, was undoubtedly the codification of public administration. Denied or adulated, the idea of public administration codification crossed political regimes, generations of theoreticians, and after 1990 it went from a „dream" to an objective, being

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assumed not only by specialists[2], but also by politicians, who introduced it into the political objectives they assumed through the governing programs with which they ran and, respectively, won the vote of the electors.

But the need for codification was also felt at the level of practitioners, who had a hard time managing in the „trough" of legislation, which changed according to how frequent political changes were, and who were „burdened" by the „thick cloth" of secondary and tertiary legislation, too often resembling a „cobweb".

That is why the drafting of the Administrative Code, in the years 2018-2019, completed, in a first stage, with a law declared unconstitutional by the Constitutional Court[3], and then with the adoption of GEO no. 57/2019[4] it undoubtedly represented an important step in the evolution of the administration. If Neil Armstrong, the first man to walk on the moon[5] said, 53 years ago, „*One small step for man; one giant leap for mankind",* we allow ourselves to paraphrase this line that is known to have made history, stating that **the adoption of the Administrative Code was, perhaps, a small step for legislation, at a global level, but it undoubtedly represented a leap for the evolution of the public administration in Romania, for the legislation and administrative practice, for the administration staff, and the beneficiaries of the services it provides.**

Far from being a perfect law, its „flaws" can be seen, some, with the „unaided eye", others are discovered in the process of applying the Code, we say that it was a huge *leap* given the fact that **the public administration currently benefits from a unitary regulatory framework, which represents a real support for the administration and the administered, equally.**

The regulation of local public administration can be found in Part III of the Administrative Code, without that part exhausting the scope of the provisions that apply to it. We could say that provisions relating to local public administration can be found in almost all 10 parts of the Code, but the third part is specifically and expressly devoted to local public administration. To give an example, in the first part we find terms and principles that apply to it, in part IV we find the institution of the prefect, which is exercised at the level of administrative-territorial units and the examples could continue.

II. The secretary general of the administrative-territorial unit – leading civil servant with an important role, validated by the history of administration on the Romanian territory

At the level of administrative-territorial units on the territory of our country, starting from the 9th century, there was constantly a public official named at first *notary*, then *secretary*, whose role was essential in the development of the Romanian administrative phenomenon. The position was created in 1860 „*as a body with complex attributions at the level of rural communes...a key figure in the communal administration, in the conditions where, as a rule, communal councilors were chosen more for their intelligence, moral and*

[2] Antonie Iorgovan, *Administrative law treatise,* vol. I, 4th Ed., All Beck Publishing House, Bucharest, 2005, p. 148; Verginia Vedinaș, *A dream that is getting closer to reality,* in RDP no. 1/2018, pp. 16-19; Verginia Vedinaș, *A hope come true – The Administrative Code, i*n RDP no. 2/2018, pp. 13-16.

[3] By Decision no. 681/2019, published in The Official Gazette of Romania no. 190/11 March 2019.

[4] Published in The Official Gazette of Romania no. 555/5 iulie 2019.

[5] With NASA's Apollo 11 mission in 1969.

material qualities and less for their skills in the field of writing and reading, the vast majority being illiterate. „[6]

Various other affiliations were associated with the title of *secretary* over time, which also varied according to the political regime. During the totalitarian regime, the titles of *secretary of the executive office* or *secretary of the executive committee of the people's council* were used[7].

After 1990, the name evolved from *secretary of local or county council, secretary of the commune, city, municipality or county,* to the current *secretary general of the administrative-territorial unit,* which can be found in all categories of administrative-territorial units, including municipal subdivisions. The title of *secretary general* was introduced by the Administrative Code, and it is good that this happened, because it establishes to an even greater extent the special role that he has in the activity of the administration and in the life of local communities. The name becomes common with that of the relatively similar position in the central administration, so that the most important civil servant in the Romanian central and local public administration becomes the **secretary general.** The difference lies in the fact that at the level of the specialized central administration, the secretary general has the status of a **high public servant**, while at the level of the local public administration the status is that of a **leading public servant**. They are also joined by the **secretary general of the prefect's institution**, which was established in 2021[8], but which also existed until 2005, when its abolition was determined by the transformation of the prefect and sub-prefect into *high public servants,* a solution that was returned to under the conditions in which such a status was mainly in the law, and in administrative and governmental practice prefects and sub-prefects continued to be treated as political dignitaries.

The regulation of the secretary general of the administrative-territorial unit can be found in chapter I of title VII of part III, articles 242-243, specifying that applicable provisions in the matter can also be found in other chapters and titles of this part. For example, we invoke Article 136 (9)[9], Article 138 (13)[10] and Article 140 (1) and (3)[11] and the examples could go on. Equally, we find attributions for the secretary general of the administrative-territorial unit in other parts of the Administrative Code, such as, for example, Article 289 (7)-(8), located in Part V of the Administrative Code[12], which regulates

[6] Cristina Feurdean, *The legal status of the secretary of the administrative-territorial unit,* Universul Juridic Publishing House, Bucharest, 2018, p. 125.

[7] The correspondent of the currently existing local and county councils.

[8] By GEO no. 4/2021, published in The Official Gazette of Romania no. 117/3 February 2021.

[9] Article 136 „(9) The secretary general of the administrative-territorial unit/subdivision ensures the fulfillment of the conditions from paragraph (8) and brings to the notice of the local council the case of their non-fulfillment before the adoption of the agenda".

[10] Article 138 „(13) The summary of the debates in the local council meetings, as well as the way in which each local councilor exercised his vote, is recorded in a minute, signed by the president of the meeting and the secretary general of the administrative-territorial unit/subdivision".

[11] Article 140 „(1) After the meeting, the decisions of the local council are signed by the president of the meeting and countersigned, for legality, by the secretary general of the administrative-territorial unit/subdivision. (3) The secretary general of the administrative-territorial unit/subdivision does not countersign the decision if he considers it illegal. In this case, in the next meeting of the local council, he submits in writing and presents his reasoned opinion before it, which is recorded in the minutes of the meeting".

[12] This part regulates *specific rules regarding public and private property of the state and administrative-territorial units.*

a *declaration on one's own responsibility* that the secretary general of the administrative-territorial unit gives in the inventory procedure, regarding the immovable goods for which there are no proof of ownership and which are to be inventoried[13].

III. Duties of the secretary general of the administrative-territorial unit/subdivision.

The duties of the secretary general of the administrative-territorial unit are mainly listed in Article 243, which bears the very name we gave to the section. In paragraph (1) of Article 243 we find these attributions listed, specifying that the text does not exhaust their scope, providing, in letter p), *„other attributions provided by law or tasks given by administrative acts by the local council, the mayor, the county council or the president of the county council, as the case may be".*

We find these other *attributions*, as it follows from the content of the reference rule, in the law, it can be about the Administrative Code itself and other special *laws*, such as, for example, electoral laws, but they can also be represented by *tasks given by administrative acts* by the deliberative and executive authorities of the local administration within which they operate. It is important to specify that *the tasks* can be given through *administrative acts,* because **administrative acts implement the law.** It follows that **the administrative acts establishing tasks for the secretary general of the administrative-territorial unit must comply with the attributions that the law establishes for him and his status.** It follows that **it is not possible to require the secretary general to perform *tasks* that do not fall within the above-mentioned coordinates,** i.e. **attributions** and **status.** We believe that for **the clarity and predictability of the law**, which represents a requirement and a principle permanently imposed in the jurisprudence of the Constitutional Court, of European origin, **it would be desirable that the text that refers to the *tasks* that can be given by *administrative acts*, should be completed with the specification *established based on the attributions provided by law for the secretary general,*** a proposal that we make *de lege ferenda.* In this way, the risk of these assignments not having a support in law could be eliminated.

If we are to analyze the content of the duties listed in paragraph (1) of article 243, we believe that they can be classified into the following categories[14]: duties exercised in relation to the local/county council; duties exercised in relation to the mayor/president of the

[13] Article 289 (7) and (8) have the following content: „As an exception to the provisions of paragraph (6) a), in the event that there are no documents proving the right of ownership of real estate in the public ownership of the commune, the city, the municipality or the county, these goods can be registered in the public domain of the respective commune, city, municipality or county, the inventory attestation decision provided for in paragraph (5) being accompanied by a declaration on his own responsibility by the secretary general of the administrative-territorial unit, regarding the following: a) the property in question is not the subject of any litigation regarding its belonging to the public domain of the respective administrative-territorial unit at the date of signing the declaration; b) the property in question is not the subject of requests for the reconstitution of private property rights or for restitution submitted pursuant to the normative acts that regulate the legal regime of immovable property taken over abusively by the Romanian state between March 6, 1945 and December 22, 1989. (8) The self-responsibility declaration, provided for in paragraph (7), signed by the general secretary of the administrative-territorial unit, will be accompanied by a report on compliance with reality for the respective property, drawn up for the purpose of assuming what was declared, signed by the head of the relevant department in the specialized apparatus of the executive authority. The statement explicitly mentions the existence of the report and other supporting documents, as the case may be.

[14] Verginia Vedinaș, *The Annotated administrative code, 3rd Ed.*, Universul Juridic Publishing House, Bucharest 2021, pp. 262-266.

county council; duties exercised in relation to the prefect; duties exercised in relation to other legal subjects, such as courts, the Public Ministry etc. Here we will find, as we will analyze in the next section, also those that are directly related to the present study, namely the duties exercised in relations with the National Union of Notaries Public in Romania.

IV. The duties of the secretary general of the administrative-territorial unit/subdivision in matters of succession.

We use the noun in the plural, not in the singular, as it could be more rigorous, given the fact that, as we will show, it is about *a set of activities,* which are circumscribed to the attribution regulated in paragraph (3)-(7) of Article 243.

According to paragraph (3) of Article 243, „*The secretary general of the commune, the city, the municipality, respectively the administrative-territorial subdivision of the municipality communicates a notification for the opening of the succession procedure to the chamber of public notaries, as well as to the cadastre and real estate advertising office, in whose territorial constituency the deceased had his last residence: a) within 30 days from the date of death of a person, if the death occurred in the place of residence; b) on the date of taking cognizance, in the situation where the death occurred within the scope of another administrative-territorial unit; c) on the date of receipt of notification from the territorial office, within whose territorial jurisdiction are the buildings of the deceased registered in land registers established as a result of the completion of the systematic registration".*

We note that this article regulates the **attribution** of the secretary general of the commune, the city, the municipality, respectively the administrative-territorial subdivision of the municipality to submit an administrative document called **notification**, the objective of which is to **open the succession procedure**. This *notification* is forwarded to two public authorities, respectively to **the chamber of public notaries,** as well as to **the cadastre and real estate advertising office, in whose territorial constituency the deceased had his last domicile.**

Paragraph (4) regulates the **elements that must be included in the notification,** respectively: „a) the name, surname and personal numerical code of the deceased; b) date of death, in day, month, year format; c) date of birth, in day, month, year format; d) the last domicile of the deceased; e) the movable or immovable assets of the deceased registered in the tax records or, as the case may be, in the agricultural register; f) data on possible successors, in the format of name, surname and the address to which the citation is made".

We notice, among these, listed the **movable or immovable assets of the deceased** and, referring to the text in paragraph (3), regarding the **recipients of the notice**, we wonder **if it is mandatory that both recipients be seised of the notification, regardless of the nature of the assets that are found in the deceased's estate and are registered in the records of the local administration?**

We believe that **the notification is always mandatory to be submitted to the chamber of notaries public in whose territorial constituency the deceased had his last residence.**

Regarding the **cadastre office and real estate advertising**, we think **that it is to be notified when real estate is also found in the deceased's estate**. In the situation where **only movable goods are found, we appreciate that it is not required that the notification be also submitted to the OCPI.** From the content of the text, this does not expressly follow, and we believe that it would be useful for the legal provision from

paragraph (3) to be clarified, as follows: „*The secretary general of the commune, the city, the municipality, respectively of the administrative-territorial subdivision of the municipality communicates a notification for the opening of the succession procedure to the chamber of public notaries in whose territorial constituency the deceased had his last domicile: a) within 30 days from the date of a person's death, if the death occurred in the place of residence; b) on the date of notification, in the event that the death occurred within the scope of another administrative-territorial unit; c) on the date of receipt of notification from the territorial office, in whose territorial jurisdiction are the buildings of the deceased registered in land registers established as a result of the completion of the systematic registration.* ***When real estate is also found in the deceased's estate, the notification is also forwarded to the cadastre and real estate advertising office, in whose territorial constituency the deceased had his last residence".*** Practically, we removed from the first sentence of the text the reference to OCPI and introduced a new sentence, which provides for the situation in which the deceased had immovable property.

According to paragraph (5) it is provided that" *(5)The attribution provided for in paragraph (3) can be delegated to one or more persons who exercise delegated duties of a civil status officer, by the mayor's order on the proposal of the secretary general of the administrative-territorial unit/subdivision".* We find that the legislator expressly establishes the subject of law to whom this attribution can be delegated and it targets **the person or persons exercising civil status attributions. Depending on the organization chart of each institution, it may be an official from the civil status structure or the only official who exercises this attribution.**

The delegation is made **by order of the mayor, at the proposal of the secretary general.**

The significance of this attribution results from the corroboration of paragraphs (6) and (7) of Article 243. Thus, in paragraph (6) we find the provision according to which „*The mayor seeks the fulfillment of this attribution by the secretary general of the commune, the city, the municipality, respectively of the administrative-territorial subdivision of the municipality or, as the case may be, by the delegated civil status officer, under the conditions of paragraph (5)".* According to paragraph (7), *„Non-fulfillment of the attribution provided for in paragraph (3) attracts the disciplinary and contraventional sanctions of the responsible person".*

We find that the legislator attaches great importance to the way in which this attribution is exercised, which may attract the intervention of disciplinary or contravention liability of the one who actually exercises it.

We believe that the text still has **a deficiency**, in the sense that **it does not also provide for the secretary general 's attribution to supervise how this attribution is carried out when it has been delegated, at his proposal,** ***to one or more persons who exercise delegated attributions as an officer of civil status***. We believe that **such a supplement would be required**, given the fact that the secretary general is the *specialist* and the f*irst person responsible for fulfilling this attribution*. For these reasons, we believe that **the text of paragraph (6) should be supplemented with a new sentence**, which should have the following content: *„In the situation of delegating this attribution, the secretary general monitors the way it is exercised by the person or persons to whom it was delegated",* a proposal that we make *de lege ferenda.*

V. The legal nature of the referral made by the secretary general of the administrative-territorial unit/subdivision.

The question arises whether this notification is an **administrative act** or an **administrative operation.** These are the two possible solutions that we could identify in relation to the legal nature of the referral.

In order to be an **administrative act**, we should deal, in the spirit of Article 2 c) of Law no. 554/2004 of the administrative litigation[15], with an express and unilateral manifestation of legal will, expressed under the regime of public power, through which rights and obligations or legal relationships are born, modified or extinguished[16], that is, to produce a change in the existing reality.

We do not believe that the notification submitted by the secretary general of the administrative-territorial unit or the person delegated by him meets such a feature. It does not produce, by itself, legal effects. The effects are produced only after the succession procedure has been carried out and the heir certificate has been issued.

We appreciate that the *notification* submitted by the secretary general or the person delegated by the mayor's order is, by legal nature, **an administrative operation that produces effects in terms of civil or *succession* law.** We say this because we believe that **administrative operations, like administrative acts, can produce effects both in terms of administrative law and in terms of other branches of law, such as labor law, civil law, financial law etc**. În the doctrine[17] it is argued, with full reason, that, in terms of the extent of the legal effects they produce, „*administrative acts give rise to reports of administrative law, but also to other categories of reports"*[18].

Mutatis mutandis, we also appreciate that **administrative operations can produce effects for administrative law, but also for other branches of law,** in the present case **civil or *succession* law.**

VI. Conclusions.

The presented subject is of interest, given the fact that it concerns an important attribution of the secretary general of the administrative-territorial unit, which consistently loads his work agenda, which is already full of responsibilities. It is important due to the effects it produces, but also due to the fact that both the content and the forms in which it is carried out place it on the border between public and private law. I pointed out the attention given to it by the legislator and I was able to ascertain the involvement of the mayor who, as the head of the specialized apparatus, controls the manner of its exercise, as well as the fact that the defective way of fulfilling this attribution attracts the legal responsibility of the secretary general or the person exercising this attribution.

We want the criticisms that we have signaled and the proposals that we have formulated to be taken into account, in order to improve the normative content of the provisions that regulate it and to eliminate the risk of dysfunctions in its exercise.

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[15] Published in The Official Gazette of Romania no. 1154/7 December 2004.

[16] Anton Trăilescui, Alin. A Trăilescu, *Administrative litigation law. Comments and explanations., 4th Ed.*, C H Beck Publishing House, Bucharest, 2018, p. 32.

[17] Antonie Iorgovan, *Administrative law Treatise, op. cit.,* vol. I, 4th Ed., p. 261.

[18] Dana Apostol Tofan, *Administrative law,* vol. II, ed. 5, C.H. Beck Publishing House, Bucharest, 2020, p. 45.

SOME CONSIDERATIONS REGARDING THE SURVIVOR'S PENSION

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Abstract

The survivor's pension belongs the children and the surviving spouse, if the deceased supporter was retired or met the conditions for obtaining a pension. In this way, the fulfillment of the eligibility criteria by the beneficiaries of the right to a survivor's pension activates the obligation of the Romanian state, as a debtor, to pay a periodic benefit, in cash, in an amount subject to specific establishment rules according to a general calculation algorithm., pre-established by law.

The determination of the beneficiaries of the survivor's pension and the conditions for granting the survivor's pension is the exclusive competence of the legislator, exercised by regulating the conditions for granting social insurance rights taking into account both the protected social values and the available financial resources.

Keywords: *survivor's pension, deceased supporter, beneficiaries, conditions for granting*

1. Introductory remarks

The phrase „survivor's pension", distinct and main category [1], species of pension (as a genus), together with the other categories shown by art. 51 para. (1) of Law no. 263/2010 on the unitary public pension system, with subsequent amendments and completions, is so strongly rooted in the social mind that it seems that even the legislator is no longer bothered by the somewhat imperfect association of the two terms: pension and successor.

The imperfection is due to the specific premises underlying the granting of pensions. On the one hand, old-age pensions, early retirement pensions, partial early retirement pensions and invalidity pensions, require them to be granted to the holder, to the person entitled to whom the right to a pension has been opened, as long as he is alive and the survivor's pension is conditioned by the death of the holder, due to the descendants [2], i.e. those who, by law, acquire a vocation to receive it: children of the deceased, regarded as descendants, offspring of the family, successors of the family considered in relation to generations his predecessor, and the surviving spouse of the deceased. On the other hand, the beneficiaries of the survivor's pension, belonging to the category of persons against whom the deceased had, during his lifetime, the legal maintenance obligation and who are part of the category of legal heirs of the deceased, with a vocation to inherit it, are those who they receive the survivor's pension, without having contributed, in any way, to the acquisition of this right.

This study aims to address the issues related to the survivor's pension in relation to the notion and legal nature of the survivor's pension, the categories of survivor's pension, the specific features of the right to a survivor's pension, and the categories of survivor's pension beneficiaries.

2. The notion of survivor's pension. Legal nature

In doctrine, the pension was defined as „the replacement income granted for the total or partial loss of professional income due to old age or reaching the age, disability or death of the insured person [3]".

Survivor's pension means the monetary rights granted to the children and the surviving spouse, if the deceased supporter was retired or met the conditions for obtaining a pension, in order to ensure their social protection.

Understanding the legal nature of survivor's pension requires a complex analysis, with implications for both private law (family law and inheritance law), as well as public law (social security law). In other words, the premises of the legal regulation of this category of pensions are found in the positive obligation of the state of protection of the small family consisting of their spouse and children, by reference to the duties and legal obligations imposed on them during their life in close correlation with the quality of legal heirs recognized to these persons. In this sense, art. 258 para. (2) of The Civil Code stipulates that „The family has the right to protection from society and the state".

From the point of view of social security legislation, the claimant must have been retired or have met the conditions for obtaining a pension at the time of death. The claimant's own right to a pension, regardless of the category of pension he receives or could benefit from, is taken over and administered for the benefit of his descendants, under the conditions and within the limits of the law, through social insurance that assumes their role of supporter. In this way, „the wife and children succeed to the deceased person's right to pension, the granting of the survivor's pension being subject to the condition that the deceased had the quality of pensioner or to have fulfilled the conditions for obtaining a pension [4]". The survivor's pension due to the children and the surviving spouse is quantitatively dimensioned according to the author's own pension contribution and the number of descendants.

In the doctrine, it was judiciously held that „the survivor's pension specifically illustrates the legal transfer of the legal maintenance obligation from the predecessor to the state social insurance [5]" and that „the holder (beneficiary) of the survivor's pension is not only a creditor of a maintenance obligation, but also the legal successor of the deceased, in the degree of kinship or as a result of marriage relations, defined by a series of legal conditionalities of access and detailed descriptions of legal content [6] „.

It is therefore observed that the mechanism of descent which underlies the natural kinship is not sufficient, in itself, to make explicit the legal nature of the survivor's pension, as it neither covers the entire sphere of beneficiaries nor allows the understanding of the time limit within which the survivor's pension is granted to beneficiaries in certain cases.

Consequently, the legal basis of the survivor's pension is found in the cumulative conditions of the creditor of the legal maintenance obligation and, at the same time, of the legal heir of the deceased, necessary to be fulfilled by the beneficiary of the survivor's pension themselves. The specificity of the kinship relations, natural or civil, and of the marriage relations, existing between the spouses and their children, is transposed by the legislator in the content of the legal maintenance obligation regulated by art. 513 Civil Code, in correlation with the quality of legal heir of the deceased recognized to the surviving spouse and children of the deceased, pursuant to art. 963 para. (1) Civil Code, corresponding to the rules governing legal inheritance. Thus, not all persons provided by law between which the legal maintenance obligation is imperatively established and who

have the quality of legal heir of the deceased, can acquire the quality of beneficiary (holder) of the survivor's pension. We are talking here about the ascendants of the deceased, as well as his brothers and sisters.

The naturalness of the above solution on which the legislator stopped is legitimized in the social security legislation by the preference for the notion of family supporter (instead of the deceased one), this demonstrating that the legislator's concern focuses on the principle of supporting and helping the family. relatively similar material conditions for raising, caring for and educating minor children and maintaining a state of financial comfort, a standard of living as close as possible to the pre-death period for the deceased supporter's family members, corresponding to the available financial resources of the Romanian state.

In judicial practice [7] it was decided that „the survivor's pension must be used for the upbringing and education of the minor, therefore it is inferred that it is an included condition for the person to whom the pension is paid to take care of the minor". Thus, parental authority over children must be exercised by the guardian / guardian insofar as it requires the establishment and payment of the survivor's pension for minors, because „only in this case is the purpose of the legal norm giving the right to a child survivor's pension respected". Similarly, the person to whom the children have been entrusted must exercise parental authority over the children, because „they take care of the upbringing and education of minors".

The legal maintenance obligation of the deceased supporter is not transferred to the public social insurance system *mutatis mutandis*, but it is metamorphosed at the time of taking over in terms of conditions (the deceased supporter was retired or met the conditions for obtaining a pension); of the method of establishment (percentage of the average annual score earned by the claimant, related to the pension in payment or to which the claimant was entitled); of the manner of execution (since it is always executed in money); of the amount (it is established according to the number of entitled descendants); of the period of time during which she is active, in a differentiated manner (for the surviving spouse, corresponding to the period of widowhood, first or second degree disability, lifelong etc. or for children, until the acquisition of the studies, but not more than 26 years or for the entire period of disability). In this way, the state will be required to fulfill a new obligation to pay the survivor's pension, born through the novation of the legal maintenance obligation due by the deceased supporter during his lifetime. The purpose of the legal maintenance obligation, consisting in ensuring the financial resources necessary for the existence and needs of the creditor of the obligation in terms of family relations with the deceased, is assumed by the public pension system in the form of survivor's pension, at the date of death of the insured.

The taking over of the survivor's pension by the public social insurance system takes place under the law, *ope legis*, in the sense that it is not left to the legislator at the discretion and appreciation of the debtor's obligation to pay. Noting the fulfillment of the conditions for granting the survivor's pension, based on the documents shown in Annex no. 8 to the Methodological Norms for the application of Law no. 263/2010, the state is obliged to respond positively and immediately to the application for enrollment in the survivor's pension made by the beneficiary of the survivor's pension.

3. Categories of survivor's pensions

The survivor's pension can be considered as an survivor's *ordinary* pension, whose methods of establishment, payment, as well as those related to the modification, suspension,

resumption, termination and recovery of amounts unduly collected, jurisdiction are subject to the general rules of Law no. 263/2010, or as a special survivor's pension, the regulation of which is subject to the special laws that provide for it.

In other words, the grounds of Section 5 of Law no. 263/2010 legislates the survivor's pension in consideration of the common law (death of the author due to natural conditions, accident, common illness etc.), unlike the other normative acts that regulate particular conditions relative to the survivor's pension.

It has been noted in judicial practice [8] that „when the legislator wanted to grant the survivor's pension as a special pension, he did so explicitly. *Per a contrario*, when this is not regulated by the special law (...) the general rules regarding the survivor's pension remain applicable, as it cannot be calculated by reference to the amount of the special pension '.

By way of example, the special survivor's pension is due to the surviving spouse, minor children, older children until the end of their studies, but not more than 26 years, under the conditions provided by the legislation on the public pension system, calculated from the service pension in payment or to which the claimant was entitled at the date of death, updated, as appropriate, for the following categories of persons:

– the specialized personnel of the courts and of the prosecutor's offices attached to them, the specialized forensic personnel, the personnel holding auxiliary functions of forensic specialty and of the forensic technician within the prosecutor's offices, pursuant to art. 68^5 para. (9) of Law no. 567/2004 regarding the status of the specialized auxiliary personnel of the courts and of the prosecutor's offices attached to them and of the personnel functioning within the National Institute of Forensic Expertise, with the subsequent modifications and completions;

– the external public auditors within the Court of Accounts, based on art. 16^1 of Law no. 94/1992 on the organization and functioning of the Court of Accounts, with subsequent amendments and completions;

– judges or prosecutors, pursuant to art. 84 para. (1) and (2) of Law no. 303/2004, with subsequent amendments and completions;

– the professional navigating civil aeronautical personnel from the Romanian civil aviation, based on art. 42^7 of Law no. 223/2007 on the Status of professional civil aviation personnel in civil aviation in Romania, with subsequent amendments and completions;

– members of the Romanian Diplomatic and Consular Corps, pursuant to art. 2 of Law no. 216/2015 regarding the granting of the service pension to the members of the Romanian Diplomatic and Consular Corps, with the subsequent modifications and completions;

– the descendants of the medical staff who died as a result of the medical complications caused by the COVID-19 coronavirus infection, pursuant to art. 4 of Law no. 56/2020 for the recognition of the merits of the medical staff participating in medical actions against COVID-19, with subsequent amendments and completions etc.

As special pensions are an exception to the general law on the granting of pensions in the state public system, their granting taking place under a specific calculation algorithm, taking into account a special status of its beneficiaries, means that, by the will of the legislator, survivor pensions special derogations, in turn, from the principle of contributivity, and the beneficiaries of the special survivor's pension are successors to the special status of their beneficiaries.

In judicial practice [9] it was held that „the defendant was not bound by the possible notoriety of the circumstances in which the death of the author of the respondents-plaintiffs occurred, the survivor's pension rights must be established by reference to the application and the attached documents. It is true that, in the medical certificate confirming the death (tab 8 of the case file) it is mentioned in the Rubric „Causes of death", letter c – acute bilateral bronchopneumonia due to SARS COV 2 infection, but only this mention, without any express indication from the pensioner, cannot be able to conclude that the defendant was obliged to establish the rights according to the provisions of Law no. 56/2020".

4. Specific features of the right to a survivor's pension

The set of legal provisions regarding the survivor's pension allows the synthesis of the specific features of the right to which it gives rise:

a) is a *right of claim*, which arises directly in the patrimony of the beneficiaries qualified by law as descendants of the deceased supporter, at their simple request, on the date of death of their supporter.

The procedural provisions of art. 103 para. (1) and (2) of Law no. 263/2010 establishes only the categories of persons who can request the establishment and payment of the survivor's pension for the minor, who does not have the capacity to exercise, in order to request the recognition of the right. Consequently, the right to a survivor's pension was born, there are already, in the patrimony of the survivor, any of the entitled persons requesting only the recognition of this right.

b) is *a derived right* (as opposed to the insured's own rights), subject to the condition regarding the fulfillment by the deceased claimant of the quality of pensioner or of the conditions for obtaining a pension.

A distinction is thus made between the category of the insured's own rights and the category of derivative rights of the insured's descendants. The doctrine states that „the old-age pension falls within the contributory rights of the insured, more precisely his own rights, insofar as it is the counterpart of his submission, during his life, to one or more pension insurance schemes and payment of the related contributions [10]".

The characteristic of being a derived right also derives from the entire legal construction of the survivor's pension, the legislator speaking about the right of children and the surviving spouse to their own pension, which they deserve by fulfilling the conditions provided by law.

c) is socially based on the existence of the creditor's state of need, presumed *iure et de iuris*;

d) the fulfillment of the eligibility criteria by the beneficiaries activates the obligation of the social insurance system, as a debtor, to pay a benefit, in cash, in an amount subject to specific establishment rules, according to a general calculation algorithm, pre-established by law;

e) its exercise is *continuous* (the obligation to pay the survivor's pension must be fulfilled monthly) and *temporary* (corresponding to the duration of widowhood; age up to 16 years; date of completion of studies in a form of education organized by law, without to exceed the age of 26; the duration of the disability arising during the period of growth and professional training provided by law etc.).

5. Discussions regarding the categories of beneficiaries of the survivor's pension

According to art. 83 of Law no. 263/2010, the survivor's pension is due to the children and the surviving spouse, if the deceased supporter was retired or met the conditions for obtaining a pension.

a. The right to a survivor's pension for children

(i) The quality o being a child of the deceased supporter

The provisions of art. 83 and 84 of Law no. 263/2010 attributes the survivor's benefit to children of the deceased supporter simply on the basis of natural or civil kinship, regardless of whether the deceased spouse's own or adopted children from a previous marriage or children adopted or from the surviving spouse's marriage, thus respecting the principle of equal rights of children enshrined in art. 260 Civil Code.

(ii) Conditions for the award of survivor's pension to the children of the deceased supporter

According to art. 84 of Law no. 263/2010, the survivor's pension is due to the children of the deceased supporter taking into account the age of the children, the continuation of their studies and their state of disability, under the following conditions:

– „until reaching the age of 16", legal norm correlated with the provisions of art. 13 para. (1) Labor Code, according to which the natural person acquires the capacity to work at the age of 16. Therefore, even if the minor will be an employee from the age of 15, by concluding an individual employment contract, based on the capacity for early work, he will benefit from the survivor's pension until the age of 16. The text of art. 84 para. (1) of Law no. 263/2010 has an imperative character, and according to the rule of interpretation of the right „*ubi lex non distinguit, nec nos distinguere debemus*" enshrined in art. 1268 Civil Code, insofar as the legal norm is clear and unequivocal, so must its application be.

Once the right to a survivor's pension has been established in favor of the minor child, it naturally runs until the age of 16 or until the completion of studies, but not more than 26 years, provided that there is no case of suspension or termination of pension rights, in order to discuss a resumption of their payment, with all the procedure to be followed in this situation.

In court practice it was held that „the impossibility of paying the survivor's pension in favor of the plaintiff, following the death of the guardian / curator, between the date of the death and the date of appointment of the new guardian / curator of the plaintiff, during which measures were taken necessary for the appointment of a new legal representative of the applicant, given that the applicant was a minor, does not invalidate the applicant's right to a survivor's pension during that period [11]".

– „if he continues his studies in a form of education organized according to the law, until their completion, without exceeding the age of 26".

The reasons for granting the survivor's pension to a minor child up to 16 years of age are the same for the young person who continues his studies in a form of education organized according to the law, stating that the benefit of the survivor's pension ceases ex lege on the date of fulfillment. 26 years of age, even if the studies are not completed.

The following conclusions can be drawn:

a) after reaching the age of 16, the benefit of the survivor's pension flows naturally, if the minor continues his studies in a form of education organized according to the law. Currently, according to art. 25 para. (1) of Law no. 1/2011 of the national education, with the subsequent modifications and completions, the forms of organization of the pre-

university education are: full-time education and part-time education. And the forms of organization of higher education are: full-time education, part-time education and distance learning;

b) after the age of 16, the minor who interrupted their studies or abandoned them before reaching the age of 26 no longer benefits from a survivor's pension;

c) in the age range between 16 and 26 years, the person in question is entitled to a survivor's pension conditional on enrollment and maintenance in a form of education organized by law, for the entire period of studies, but not more than the date 26 years old.

It is noted that the legislator does not impose the condition of graduating the studies completed with a document certifying their completion. The condition of graduation is not necessary because the age of 26 has the legal nature of an extinctive term, at the end of which the legislator absolutely assumes that the young person has the necessary skills and abilities to ensure the means of subsistence.

– „for the duration of the disability of any degree", if it arose until the age of 16 or during the continuation of studies in a form of education organized according to the law, without exceeding the age of 26 years.

This time, the condition imposed for granting the survivor's pension to the children of the deceased supporter consists in the emergence of disability during the period of growth and formation of children's personality, regardless of their age, granting the survivor's pension illustrating the social dimension of the Romanian state. 1 para. (3) of the Constitution, and the obligation of the Romanian state to ensure the protection of persons with disabilities, provided by art. 50 of the Basic Law. The benefit of the survivor's pension is intended to be compensation for the inconvenience of the disability, during its duration, on the basis of total absence or at least half of the working capacity. The care of the legislator is transferred to the disability, regardless of its degree. Even if the person retains at least half of his / her ability to work, having the ability to perform a professional activity, the benefit of the survivor's pension will not be deducted as long as the disability arose until the age of 16 or during pursuing. a form of education organized according to the law, without exceeding the age of 26 years.

Fulfillment of the conditions provided by art. 68-82 of Law no. 263/2010 accords the right to the invalidity pension to any person, this being seen by the legislator as an own pension granted to the holder on the grounds of invalidity.

Given that pupils and apprentices who have lost all or at least half of their ability to work as a result of accidents at work or occupational diseases during and as a result of their professional practice are entitled to a disability pension under the conditions laid down in art. 68 para. (1) lit. a) and para. (3), in the competition between the legal norms regarding the invalidity pension and the survivor's pension, the holder's option for the most advantageous pension prevails, pursuant to art. 92 of Law no. 263/2010.

b. The right to a survivor's pension for the surviving spouse

(i) The quality of a surviving spouse

Regarding the quality of surviving spouse, undoubtedly, according to art. 83 of Law no. 263/2010, the right to a survivor's pension belongs to the surviving spouse of the death of the person with whom he was married on the date of death. The first condition for granting the survivor's pension to the surviving spouse is the intervention of the death of one of the spouses during the marriage, so prior to its termination by death or judicial declaration of the death of one of the spouses or its dissolution by divorce, according to law, according to

art. 259 para. (1) Civil Code. We must be in the presence of a marriage concluded in accordance with the rules of civil law between the deceased spouse, who must be insured at the time of death, and the surviving spouse, in connection with whom the insured status is not an essential condition.

(ii) Conditions for awarding survivor's pension to the surviving spouse

According to art. 85-88 of Law no. 263/2010, the survivor's pension is due to the surviving spouse for a lifetime or a period of time from the date of death, taking into account the duration of the marriage, the age of the surviving spouse, the first or second degree disability of the surviving spouse, the cause of death of the deceased spouse, monthly income and the type of activities from which they are carried out, the age of the dependent children, under the following conditions:

a. The benefit of the survivor's pension throughout the life of the surviving spouse, pursuant to art. 85 para. (1) and (2), respectively art. 86 paragraph (2) of Law no. 263/2010

The surviving spouse receives a lifetime survivor's pension if he or she is in one of the following situations:

- The duration of the marriage between the spouses must have been at least 15 years, in which case the right to a survivor's pension is activated when the surviving spouse reaches the standard retirement age.
- The duration of the marriage between the spouses was less than 15 years, but at least 10 years, in which case the right to a survivor's pension is activated when the surviving spouse reaches the standard retirement age, and the amount of the survivor's pension due to the surviving spouse is decreases by 0.5% for each month, respectively by 6.0% for each year of marriage minus. The surviving spouse whose marriage lasted less than 10 years does not receive a survivor's pension.
- Regardless of the age and duration of the marriage, if the death of the supporting spouse occurred as a result of an accident at work or an occupational disease and in correlation with the own material resources earned monthly by him, pursuant to art. 86 para. (2) of Law no. 263/2010.

In the present working hypothesis, the legislator wants to highlight the role of the deceased spouse in the family life, preferring the phrase of supporting husband. Beyond the measures of protection and social security imposed imperatively in the field of labor relations, whose non-compliance entails the legal liability of those involved, the legislator intervenes and takes over, in part, in the form of granting a material benefit, the inherent difficulties that arise in the family. of the death of one of the spouses caused by an accident at work or an occupational disease. The income of the deceased spouse, the age, the duration of the marriage or any other possible element of the person of the deceased spouse, regardless of the cause of death, is irrelevant. It is also irrelevant to establish the guilt of a certain person. As it is irrelevant, the accident at work is the fault of the deceased.

Basically, in the presence of death due to an accident at work or an occupational disease, the survivor's pension benefit is attributed to the surviving spouse if he or she is a spouse and, cumulatively, either does not earn a monthly income from dependent activities. in one of the situations provided in art. 6 para. (1) § I lit. a) and b) or point II, or these realized monthly incomes are less than 35% of the average gross salary used to substantiate the state social insurance budget.

It should be noted that the benefit of the survivor's pension attributed to the surviving spouse does not depend on the value of the estate or his or her own assets, which are wholly

owned by the surviving spouse. Just as the amount of income from independent activities and / or intellectual property rights or income assimilated to salaries for which a social security contribution is due, possibly to be made by the surviving spouse, is not legally relevant. Not even the status of unemployed person held by the surviving spouse entitles her to the survivor's pension, regardless of the amount of unemployment benefit paid from the unemployment insurance budget, in accordance with the law.

Although the intention of the legislator to provide, as compensation, in the event that the death of the supportive spouse as a result of an accident at work or an occupational disease and in conjunction with his own material resources made monthly by him, a material privilege with a role in supporting the standard of living of the surviving spouse, by law ferenda we consider it necessary to reconsider the legal text at least by covering all activities for which social security contributions are due, reaching a ceiling for a period of time being the determining criterion for not allocating survivor's pension to surviving spouse.

b. Benefit of survivor's pension for a period of 6 months from the date of death, attributed to the surviving spouse who is not in any of the situations listed above, if during this period he does not earn monthly income from dependent activities being in one of the situations provided in art. 6 para. (1) § I lit. a) and b) or point II, or if they are less than 35% of the average gross salary used to substantiate the state social insurance budget.

By Decision no. 699 of October 6, 2020 regarding the exception of unconstitutionality of the provisions of art. 83 and art. 85 of Law no. 263/2010 on the unitary system of public pensions, the Constitutional Court ruled that „the legislator has instituted the granting of temporary assistance for the surviving spouse who has the ability to work, has not reached the legal retirement age and does not earn income from dependent activities or income is appreciated as small. The same hypothesis includes the persons whose marriage lasted less than 10 years [12]".

c. The benefit of the survivor's pension for the period in which he is is invalid of degree I or II, regardless of the age of the surviving spouse, provided that the duration of the marriage has been at least one year, pursuant to art. 86 para. (1) of Law no. 263/2010. In this case, the surviving spouse's first or second degree disability must have occurred prior to the termination of the marriage by death, but not necessarily during the marriage, in which case the surviving spouse's right to survivor's pension operates exclusively during the state of invalidity. of grade I or II and regardless of the age of the surviving spouse.

The first or second degree invalid surviving spouse, whose marriage lasted less than one year, does not receive a survivor's pension. If the duration of the marriage has been longer than one year, he will receive a survivor's pension during the state of first or second degree of disability.

d. The survivor's pension benefit to the surviving spouse who is caring for one or more children up to the age of 7 at the time of the supporter's death receives a survivor's pension until the last child reaches the age of 7, in the periods when they do not realize monthly incomes from dependent activities being in one of the situations provided in art. 6 para. (1) § I lit. a) and b) or point II, or if they are less than 35% of the average gross salary used to substantiate the state social insurance budget.

(iii) Details relating to persons who do not fulfill the legal status of *surviving spouse*

The legal norm that makes direct and express reference to the surviving spouse provided by art. 83 of Law no. Regulation (EC) No 263/2010 is inapplicable in the following situations:

a. persons living in cohabitation

Cohabitation is not at all assimilated to family relations, neither in domestic law nor in the law of the Member States of the European Union, the situation of people living in cohabitation being different from that of people who have chosen to marry.

In this regard, the European Court of Human Rights has emphasized that „the legal effects of a marriage or a civil partnership by which two persons expressly and freely decide to marry distinguish this type of relationship from other forms of common living. Beyond the duration or the solidarity character of the relationship, the determining element is the existence of a public commitment, which is accompanied by a series of contractual rights and obligations. In the same way that an analogy cannot be made between married or civil partnerships, on the one hand, and heterosexual or homosexual couples in which members have chosen to live together without becoming spouses or civil partners, the absence of such A binding legal agreement between the plaintiffs makes the cohabitation relationship, despite its long duration, fundamentally different from that between spouses or civil partners. In conclusion, the Court held that there could be no question of a legitimate expectation of the spouse to receive a pension following the death of his partner [13]".

The Court of Justice of the European Union has held that „a common-law union, such as cohabitation, does not comply with these characteristics in so far as it is not in principle subject to a statutory status", mainly because it does not through a strict formalism and does not create reciprocal rights and obligations between spouses, of a high level, such as the obligations of assistance and solidarity [14]".

b. engaged persons

In the absence of the marriage, there are no spouses, because the engagement is only the mutual promise between a man and a woman to conclude the marriage, according to art. 266 para. (1) and (5) Civil Code, the fiancés not being bound by the reciprocal rights and obligations between spouses, provided in detail in the Civil Code. Regarding the rights and obligations of spouses provided in the Civil Code, the Constitutional Court stated that „they concern both the emotional dimension, respect and moral support that marriage entails, but also the choice of one of the matrimonial regimes established by law and assuming the legal effects of the establishment of the family home and the rights and obligations deriving therefrom, as well as the assumption of obligations regarding the expenses of the marriage [15]";

c. persons of the same sex united by marriage or persons of the opposite sex or of the same sex united by a civil partnership

Article 277 para. (1) Civil Code prohibits same-sex marriage. The Romanian legislator does not recognize same-sex marriages or civil partnerships between persons of the opposite sex or of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens.

However, according to the case law of the Court of Justice of the European Union, „a partner in a consensual union may claim the survivor's pension benefit following the death of his partner, the provisions of the statute relating to married persons being extended, under certain conditions, to persons – a registered consensual union [16]".

d. to the surviving spouse partly of a consensual union assimilated to marriage / engagement / cohabitation and partly to marriage, provided that the duration of the marriage is less than 10 years, but only together with the duration of the partnership exceeds the duration of marriage required by law. In other words, the period of engagement or cohabitation, in which they live and live together, followed by the conclusion of the marriage, is not taken into account for the minimum period of 10 years in order to open the right to a survivor's pension to the surviving spouse. The period before marriage cannot be assimilated with the period of marriage, so as to give rise to similar rights.

In this case, the Constitutional Court ruled that, „insofar as it would encourage the assimilation of cohabitation between spouses in order to establish the right to a survivor's pension, the legislator would relativize the importance of the requirement regarding the duration of marriage, weakening the protection granted to this institution. Thus, the surviving spouse could use the period in which she lived with her ex-spouse before marriage in order to reduce, in fact, the number of years of marriage required to obtain the survivor's pension, which became a derisory condition. Furthermore, if it were to accept that the number of years of marriage provided for by law in order to obtain the survivor's pension may be supplemented by the addition of the period spent together outside the marriage, the court of constitutional contention would be substituted for violating the principle of separation of powers, the legislator, who, as indicated above, has the exclusive power to regulate the conditions for granting social security rights taking into account both the protected social values and the available financial resources [17]".

e. to the surviving spouse (s) from the deceased's previous marriage (s), provided that they did not marry after the marriage was terminated by divorce

How, at the date of the death of one of the spouses, only the person who was married to him / her has the status of surviving spouse, means that, in the event that the deceased spouse was previously married, once or several times, the ex-spouse Survivors, unmarried and later, do not meet the requirement to have the status of surviving spouse because their previous marriage (s) ended in divorce.

Social security legislation provides arguments justifying the benefit of survivor's pension in favor of the surviving spouse of the death of the person with whom he was married on the date of death, such as: a) always uses the notion of surviving spouse in the singular; b) the term „deceased supporter" refers to the family of the deceased, in which he had the capacity of spouse and exercised the rights and obligations deriving from this capacity.

The above arguments are insufficient to justify direct discrimination between the deceased's ex-spouse, requiring the assimilation of the divorced spouse (s) but not remarried to the surviving spouse, so that the right to a survivor's pension is open to each divorced spouse. Moreover, we consider that, even in the event of remarriage of the former surviving spouses, it is necessary to recognize the right of each of them to the survivor's pension, in proportion to the period of time corresponding to each of their marriages.

In the sense of the above, retaining the solution of assimilating the divorced spouse (s) with the surviving spouse in order to obtain the survivor's pension, the doctrine states that „when the insured was married several times, the amount of the survivor's pension is divided to ex-spouses in proportion to the duration of each marriage. The death of one of the beneficiaries entails a new allocation of rights [18]".

6. Conclusions

The study concludes that obtaining a survivor's pension presupposes the fulfillment of the conditions provided by law regarding the deceased supporter, respectively of being a pensioner or of having fulfilled the conditions for obtaining a pension, and the quality of persons who can apply for this pension, retained by the legislator in the light of the relations they had with the deceased.

The survivor's pension „belongs" to the children and the surviving spouse, the legislator marking the lack of direct contribution of the holders to the attribution of this right, being sufficient to have the quality of child or surviving spouse, under the conditions and limits of the law of course, but by direct reference to the panacea for the contribution of the deceased supporter in correlation with the social dimension of the Romanian state and with its obligation to ensure the protection of children, young people and people with disabilities.

Bibliography

[1] S. Ghimpu, A. Ţiclea, C. Tufan, Social Security Law, All Beck Publishing House, Bucharest, 1988, p. 99

[2] The explanatory dictionary of the Romanian language, second edition, 1998, https://www.dictio.ro/dex/, accessed on 08.04.2022

[3] A. Țiclea, Social Security Law, University Course, Universul Juridic Publishing House, Bucharest, 2009. p. 149

[4] C. Tufan, Social Security Law, University Course, Global Lex Publishing House, Bucharest, 2000, p. 129

[5] A. Athanasiu, Social Security Law, Actami Publishing House, Bucharest, 1995, p. 141

[6] Al. Athanasiu, Reflections on the survivor's pension from the perspective of its legal nature, in Law no. 11/2020, https://idrept.ro/DocumentView.aspx?DocumentId=11024069, accessed on 08.04.2022

[7] Timișoara Court of Appeal, Decision no. 1092 dated 15-12-2017, https://www.ilegis.ro/practica-extinsa/index/act/id/10180089, accessed on 08.04.2022

[8] Cluj Court of Appeal, Civil Decision no. 1237 dated 16-10-2017, https://www.ilegis.ro/practica-extinsa/index/act/id/10100644, accessed on 08.04.2022

[9] Suceava Court of Appeal, Decision no. 1056 dated 02-11-2021, https://www.ilegis.ro/practica-extinsa/index/act/id/14518884, accessed on 08.04.2022

[10] J. J. Dupeyroux, X. Prétot, Social Security Law, 12th edition, Dalloz, 2008. pp. 122, pp. 130

[11] Suceava Court of Appeal, Decision no. 497 dated 21-06-2017, https://www.ilegis.ro/practica-extinsa/index/act/id/8935417, accessed on 08.04.2022

[12] Constitutional Court, Decision no. 699 of October 6, 2020 regarding the exception of unconstitutionality of the provisions of art. 83 and art. 85 of Law no. 263/2010 on the unitary public pension system [12], published in the Official Gazette no. 49 of January 15, 2021, paragraph 22

[13] European Court of Human Rights, Judgment of 10 February 2011 in Korosidou v. Greece, paragraph 70, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103431 %22]}, accessed on 08.04.2022

[14] Court of Justice of the European Union, Judgment of 19 December 2019 in Case C-460/18 P, paragraph 72 et seq., Https://curia.europa.eu/juris/document/docu

ment.jsf;jsessionid = A957956ECC5799D9F7636C695E982B12? Text = & docid = 221798 & pageIndex = 0 & doclang = ro & mode = lst & dir = & occ = first & part = 1 & cid = 1554407, accessed on 08.04.2022

[15] Constitutional Court, Decision no. 699 of October 6, 2020, idem, paragraph 25

[16] Court of Justice of the European Union, Judgment of 19 December 2019, ditto, in Case C-460/18 P, paragraph 72 et seq.

[17] Constitutional Court, Decision no. 389 of June 8, 2021 regarding the exception of unconstitutionality of the provisions of art. 85 of Law no. 263/2010 on the unitary public pension system, published in the Official Gazette no. 785 of 16 August 2021, paragraph 19

[18] J. J. Dupeyroux, X. Prétot, *op. cit.*, pp. 131

TRANSFER, BY WAY OF SUCCESSION, OF THE PATRIMONY OF AFFECTION AND GOODWILL

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Abstract

The present study aims to analyze some theoretical aspects with practical relevance of the issue of the transmission, by way of succession, of patrimony of affection but also of goodwill.

The challenges of such research were generated by the quasi-total lack in the specialized doctrine of dealing with the legal effects of the succession devolution when in the patrimony of the „de cuius" there is a special affectation of some goods, and, implicitly, rights and obligations for the exercise of commercial, liberal, handcrafting activities etc., in other words, an individual professional patrimony constituted on the basis of Article 33 of the Civil Code.

Moreover, the successive transfer of goodwill presents a real intensity from the perspective of the intangible elements that make it up, respectively: the company, the emblem, the good custom, the clientele etc.

In our opinion, from a notional point of view, patrimony of affection is not confused with goodwill even if in their structure there may be the same tangible elements (for example, the place where it operates). Patrimony of affection contains both rights and obligations as well as assets, while in the goodwill are usually present only assets, whether tangible or intangible.

Keywords: *Patrimony, of affection, goodwill, transfer, inheritance, inheritors, creditors*

The death of the professional-trader, a natural person who has established a patrimony of affection for the accomplishment of his (professional) activity has the effect of its transmission by succession to the legal heirs and / or legatees.

The affected assets are included in the trader's estate as a component of the trader's property as well as the assets not affected by his professional activity.

The legal issue that arises is the following: *Does the patrimony of affection survive the death of the professional-trader, as it does any professional?*

The challenges of such a study start from the legislative, doctrinal and case law realities; realities from which it results that the specialized doctrine and, at the same time, the Romanian judicial practice did not „bend" on this subject although we consider it important, especially from the perspective of the professional creditors who benefit from the general pledge on the assets within the patrimony of affection.

Research on succession transmission of **patrimony of affection**, including that of the **goodwill**, is also important from the perspective of some legal regulations specific to the professional-trader in the conditions in which **his liability for the debts resulting from the trade activity is unlimited** (*ultra vires hereditatis*).

Can the unlimited liability of the professional-trader also affect his heirs?

On the other hand, will the creditors of the professional-trader who have a general pledge of patrimony of affection benefit from this general guarantee even after the death of the trader?

1. Legislative landmarks

The existence of **patrimony of affection** but also of the **goodwill** within the estate of the deceased professional-trader – natural person undoubtedly creates the **problem of the conditions** in which they operate their transmission to the heirs of the trader, whether they are legal heirs or legatees.

Until now, since the adoption of the New Civil Code by Law no. 287/2009, there is no theoretical analysis with practical reverberations on this issue although **the two legal institutions – patrimony of affection and goodwill** – it is among the legal instruments particularly involved in the activity of professionals, in general, and of professionals-traders, in particular.

The legal texts on which we base this scientific approach are those of the Civil Code, respectively: **Article 31 (1)** which enshrines *the principle of the uniqueness of the assets of any natural or legal person;* **Article 31 (2**), in which the legislator provides for the possibility t*hat the patrimony, although unique, may be subject to division or affectation only in the cases and under the conditions provided by law;* **Article 31 (3)**, in which *patrimony of affection is defined as the fiduciary estates constituted according to the law (title IV of book III) those assigned to the exercise of an authorized profession as well as other patrimonies determined according to the law;* **Article 32 (1)** which governs *intra-patrimonial transfer in case of division and affection in such a way that the rights of creditors over each estate are not affected or prejudiced*; **Article 32 (2)** in which the legislator establishes that *the transfer of rights and obligations from one estate to another does not constitute an alienation* and of course, **Article 33** on the *the individual professional patrimony, the way of its constitution as well as the liquidation of the individual patrimony* to whom the provisions of **Article 1941-1948 will apply provided for** *for the liquidation of the simple company*. In addition to these provisions which constitute the **common law,** there are also **special provisions** that will apply as a matter of priority, according to the rule „*specialia generalibus derogant*" in question, the provisions of GEO no. 44/2008, modified, on the authorized natural person, the sole proprietorship and the family business where in Article 2 (f) the legislator defines patrimony of affection; Article 20, 26, 31 in conjunction with Article 2324 (3) of the Civil Code *„creditors whose claims arose in connection with a certain division of the patrimony, authorized by law, must first pursue the goods which are the object of the same estates. If these are not sufficient to satisfy the claims, the other assets of the debtor can be pursued*[1] *".*

Distinct from the legal framework of the concept „patrimony of affection" in the analysis we undertake we must follow the legal provisions, but especially the specialized doctrine on the concept of „goodwill"[2]; its relevance in the case of transfer, by way of succession, being all the more evident with regard to the intangible elements of goodwill.

The texts of the Civil Code devoted to de facto universality are applicable to goodwill, respectively **Article 541, Article 745** in which the legislator uses „*expressis verbis*" the term „goodwill" in terms of its usufruct; **Article 2368** with respect to the conventional mortgage; **Article 2393** transfer of the mortgage on the price obtained from the sale of a mortgaged

[1] See, R. Rizoiu, Garanția comună a creditorilor în noul Cod civil, in the „Revista română de drept privat" no. 1/2012.

[2] For details on the legal and conceptual framework of goodwill, S. Angheni, Drept comercial, Tratat, C.H. Beck Publishing House, 2019, p. 57-58; G. Ripert, R. Roblot, Traite de droit commercial, vol. I, 15th Ed., L.G. D.J. Paris, 1993, p. 467-468; Y. Reinhard, Droit commercial, 3rd Ed., Litec, 1993.

property etc.; as well as **Article 5 (4) 73)** of Law no. 85/2014, amended by GEO no. 88/2018, on insolvency prevention and insolvency proceedings.

2. Transmission, by way of succession, a patrimony of affection and goodwill

In the absence of general legal provisions (Civil Code) or special, GEO no. 44/2008, which expressly regulates the transmission of patrimony of affection by way of succession devolution, the research we carry out is configured from the perspective of the invoked texts.

Thus, as a result of the death of the professional-trader *patrimony of affection is terminated,* in such a way that all rights and obligations, tangible and intangible assets existing at the time of the death of the „*de cuius*" enters the estate by giving substance to the principle of '**uniqueness of the patrimony**', enshrined by the legislator in Article 31 (1) Civil Code. Moreover, the fact that in Article 32 (2) of the Civil Code provides that the transfer of property does not constitute an alienation is natural as the goods affected by the activity of the trader, including receivables and payables, to return to its patrimony goods that will benefit the heirs according to the share of each.

Regarding goodwill – as **de facto universality** – without including receivables and payables (debts), so to speak, rights and obligations, it becomes a component of the estate **but only those tangible and intangible elements** may be passed on to the heirs who continue the business that the „de cuius" carried out.

Although **in our legislation** there are no provisions according to which **the trade activity** of a natural person – trader (professional, in general) could be continued with his heirs, **we still consider that this could be done.** The only legal regulation exists in the case of partnerships and limited liability companies provided by the Companies Law no. 31/1990, republished, with the subsequent amendments and completions, if in the constitutive act there is a clause to continue the activity of the company with the heirs of the deceased.

Thus, the company, the emblem, the clientele, the good custom etc. it **could be passed on** in succession if **it is proved that the activity continues** with the heirs of the authorized natural person, the sole proprietorship and the family business, if the heir or heirs also meet the conditions of the special legislation in question.

This reasoning is based on the provisions of Law no. 26/1990, regarding the Trade Register, republished and amended, which requires that the trade register mention: the donation, sale, lease, establishment of real securities on the goodwill.

However, if the goodwill may be the subject of „*inter viros*" legal acts, we consider that it may be the subject of „*mortis causa*" legal acts, even of the transmission of the legal succession.

The patrimony of affection components but, in particular, of goodwill must be valued in order to determine, in terms of value, both the assets and liabilities of the estate.

The de jure problem is, however, **of the succession liability,** concretely, of the creditors whose claims were guaranteed with patrimony of affection, according to Article 2324 (3) Civil Code and GEO no. 44/2008 will be in competition with the personal creditors of the deceased **in the situation when the succession assets, respectively the assets from patrimony of affection and from the goodwill are sufficient to cover their claims.**

If the value of the claims of the creditors secured by patrimony of affection falls within its limit, obviously, they will be sufficient from the component goods of patrimony of affection.

On the other hand, in the event that the claims of these categories of creditors exceed the value of the patrimony of affection but also of the goodwill, according to the principle of „*ultra vires hereditatis*" liability of the professional-trader – natural person, his professional creditors will enter into competition with personal creditors.

So the natural question is: *patrimony of affection as well as goodwill survive in the event of the death of the professional-trader, there are two categories of assets: of affection and personal?*

Or the patrimony of affection as well as the goodwill **ceases** by **the death of the professional-trader** and all creditors will be satisfied with the patrimonial asset regardless of the guarantee (general pledge) that was given to them by the establishment of patrimony of affection.

„*De lege lata*", Civil Code, respectively Article 1155 Civil Code regarding the payment of the succession liability (settlement of debts); does not contain an express provision regarding the debts resulting from the patrimony affected by the exercise of the activity with the help of the individual professional patrimony, in other words, with patrimony of affection, according to Article 33 related to Article 31 of the Civil Code.

The only legal provision that could be discussed would be Article 791 (2) of the Civil Code on the effects of the termination of the contract of trust[3] text according to which „*The merging of the fiduciary estate into the patrimony of the beneficiary or of the constituent will take place only after the payment of the fiduciary debts",* provision which is in conjunction with that contained in Article 790 (3) according to which, „*The trust contract also terminates when the insolvency proceedings against the trustee have been opened or when, according to the law, the effects of the reorganization of the legal person occur.*." However, these provisions are special, specific, in the case of situations expressly provided by the legislator. *Could it also extend in the event of the death of the trustee or professional-trader – a natural person who has established a patrimony of affection?*

If the **answer is affirmative**, it means that **we accredit the idea of the satisfaction of these creditors from the fiduciary estate before merging with the personal patrimony of the fiduciary or of the constituent,** which means that the respective estate will not be a component of the succession patrimony.

On the contrary, if in the case of patrimony of affection constituted for the accomplishment of the trader's activity it is transmitted and enters the estate, it means that it operates a fusion of it with his patrimony „de cuius" – former trader, and there is no question of liquidating the patrimony of affection liability prior to the establishment of the estate.

In this situation, we return to the question that has become a „*lait motif*", namely: does patrimony of affection survive the death of the trader in order to cover the claims of creditors secured by the general pledge on the assets of patrimony of affection?

In our opinion, the reason for the establishment of patrimony of affection must also exist in the event of the death of the professional-trader, the creditors being satisfied with the assets affected by the activity for which the patrimony was established.

[3] See Gh. Buta, *Fiducia şi administrarea bunurilor altuia*, Hamangiu Publishing House, Bucharest, 2017.

3. Issues concerning the transfer of patrimony of affection and goodwill in French law

In French law, the law nº 2010-658 of June 15, 2010 regarding the individual entrepreneur with limited liability (EIRL) whether he is a trader, liberal, artisan, farmer etc. may affect the assets and rights of his professional activity in accordance with Article L 526 – 6 of the Commercial Code, distinguishing professional patrimony of affection from own property which is not affected by this activity and, consequently, **professional creditors have the right to pledge,** to cover the claims of the affected patrimony and, symmetrically, the personal creditors have the right of pledge on the personal patrimony that is not affected (Article L 526-12 C.com.). In this legislative framework, **the principle of the uniqueness** of the patrimony is used, which is the basis of the connection between the person and his patrimony, a particularly important connection in the case of the legal or testamentary successors who will inherit, both the assets and the liabilities of the estate[4].

By the reform of the law of succession and of the liberalities intervened by the Law of December 3, 2001 and, especially, by the Law of June 23, 2006, *the issue of patrimony of affection in the event of the death of the sole proprietor has not been specifically addressed.* Instead, the Law of 15 June 2010 highlights **two** different **hypotheses** referring to Article L 526-15 și L 526-16 of the Commercial Code, namely: i) is either that no heir wants to continue the activity that the deceased exercised; ii) or an heir declares that he wishes to continue the activity and that he takes over the patrimony of affection[5].

In **the first situation**, when the heirs declare that they do not want to continue the activity Article L 526-15 provides that „*...in case of death (of the entrepreneur) the declaration of constitution of the patrimony of affection ceases, reason for which also ceases its effects".*

However, in the event of death, the creditors referred to in para. 1^0 and 2^0 of Article L526-12 (professional and personal creditors) **keep** the general **pledge** that exists at the time of the contractor's death, with the obligation to mention in the advertising register the statement provided by law.

Therefore, through the death of the entrepreneur, the patrimony of affection ceases to be reunited with the succession patrimony and as an expression of the principle of the uniqueness of the patrimony of any person.

However, for the liquidation of the succession liability, each category of creditors who benefit from the general pledge (creditors for whom patrimony of affection and personal creditors have been established) will be satisfied from the assets of the respective estate.

This delimitation is valid only for creditors existing at the date of the opening of the succession and, in no way, for those who are subsequent to this moment.

Difficulty settling liabilities (payment of debts of each category of creditors) intervenes if the assets of patrimony of affection are not sufficient to cover the claims. This category of creditors cannot cover their claims from the deceased's personal assets because the liability of the contractor is limited in the case of EIRL.

The natural question would be: if the **personal patrimony is negative** and the one affected by the **professional activity is positive**, can the first category of creditors benefit

[4] For details, see Raymond le Guidec, Le patrimoine affecte de l EIRL et le droit des successions, ISSU de Defrénois 30/03/2011 – no 6 – p. 599, IDRD 201133039218.

[5] P. Danos, EIRL- întreprinzător individual cu răspundere limitată, Eyrolles Publishing House, Edition d'organisation, Paris, 2011, p. 119; Dossier pratique, Francis Lefevre, EIRL, 2011, p. 174-176.

from the professional patrimony? The logical answer **would be no**. However, **according to French law**, the solution depends on the **will of the heirs** depending on how they accept the pure and simple succession, in which case it is possible to cover the claims of creditors who benefit from the pledge of patrimony of affection, being in **the presence of a confusion** between the patrimony of the deceased and the heirs, or acceptance and an inventory benefit when this would no longer be possible[6].

In the **second case**, when the heirs declare that they **wish to continue** the professional activity of the deceased, they must **submit the declaration** provided by Article L 526-7 C.com. within 3 months from the date of death of the entrepreneur. Wishing to continue the activity, the respective heir or heirs will **take over the patrimony of affection with the obligation to evaluate it** as any personal patrimony, subsisting the distinction between the patrimony of affection and the personal one, or the heirs in question will pay to the others, as the case may be, a **sum** in case the assets attributed from patrimony of affection exceed the value of the inheritance quota that is due to them.

The idea expressed in French doctrine is as follows: *maintaining the separation of the pledge of creditors after the date of death of the individual contractor involves the liquidation of patrimony of affection, a procedure that is not incompatible with the principle of continuation of the deceased by the heirs, a principle expressed by forcing the heirs to pay debts of the patrimony of affection*[7].

The theoretical analysis undertaken by French theorists is important as long as the legislation provides for **the two forms of acceptance** of the succession: pure and simple and under the benefit of inventory.

Under Romanian law, through the current provisions of the Civil Code (Article 1100) the acceptance of the liability of an inheritance is made within the limits of the asset; except as provided in Article 1119 of the Civil Code, which governs the forced acceptance of inheritance as a sanction when the heir in question is liable for the debts of the „*ultra vires*" inheritance, including his own property.

According to Article 114 (2) of the Civil Code „*The legal heirs and the universal or general title legatees are liable for the debts and tasks of the inheritance only with the goods from the estate, proportional to the share of each one"*, theoretically, the possibility of an „*ultra vires hereditatis*" liability of the heirs being eliminated. Basically, the inventory of the assets from the succession table is only optional, the separation of patrimonies remaining a desideratum[8].

Although at present, the Civil Code no longer expressly provides for the possibility of confusing the inheritance estate with the personal property of the heirs except in exceptional situations as a sanction, however, having regard to Article 31 (2), the property of a person „*may be the subject of a division or assignment only in the cases and under the conditions laid down by law".* At the same time, the law does not provide for the establishment of such a division *„mortis causa"*[9] and the Civil Code did not take over the mechanism of separation of assets which was provided for in Article 781 of the Civil Code of 1864, the

[6] *Ibidem*.

[7] See, J-P. Sénéchal, Le décès de L'EIRL et l'obligation de l'héritier aux dettes de la succession, ISSU de Bulletin /Joly Entreprises en difficulté 01/07/2011 – no 03, p. 218; ID JBE-2011-0092.

[8] See D. Chirică, *Tratat de drept civil. Succesiunile și libertățile*, C.H. Beck Publishing House, 2014, p. 530.

[9] See J. Kocsis, P. vasilescu, *Drept civil. Succesiuni*, Hamagiu Publishing House.

purpose of which was to protect successor creditors against the personal creditors of the heirs[10]. In fact, the separation of assets establis>hed a privilege granted to successor creditors against the personal creditors of the heirs[11].

Conclusions

The issue of the succession of patrimony of affection and even of goodwill is a **challenge** for both the Romanian legislator and the theorists, but especially for practitioners. The **two ideas** are: **1) -**the **survival** or, on the contrary, the **cessation** of the existence of patrimony of affection in the event of the death of the professional-trader and its incorporation into the estate without any distinction as to the categories of creditors or **with the option** of keeping the pledge of each category of creditors for the patrimonial division and 2) **the possibility of continuing the activity** with the heirs of the deceased, in which case the patrimony of affection and the goodwill will be taken over by these heirs.

[10] *Idem*, p. 331.
[11] *Ibidem*.

CRIMINAL OFFENCES OF FORGERY COMMITTED IN THE NOTARIAL SUCCESSION PROCEDURE. CASE STUDY

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Abstract
With this study the author aims to present a classic case on criminal offences of forgery committed in the notarial succession procedure, case, which, however, has some notable features. The study will include, in addition to the case itself, the incidental legal texts as well as the author's assessments on how to solve the case.
Keywords: *misrepresentation; forgery; criminal offences in the notarial succession procedure; false civil actions*

I. Introductory aspects

In this study, a case having as object criminal offences of forgery committed in the notarial succession procedure will be presented and analyzed. Although in principle the case is a relatively classic one with which the courts are generally invested, some features of the civil action brought in question make the case interesting enough to be presented as a case study. The author is to present his opinion on the solution ordered by the judicial bodies regarding both the criminal and the civil action.

II. Incidental law texts

Law no. 286 of July 17, 2009 on the Criminal Code[2]
Article 52 Improper participation
[...]
(3) Enabling, facilitating or aiding in any way, intentionally, to commit an act provided by the criminal law, by a person who commits that act without guilt, is punished by the penalty provided by law for that offence.
[...]
Article 321 Forgery
(1) Forgery of an official document on the occasion of its preparation, by a civil servant in the performance of his duties, by attesting untrue facts or circumstances or by deliberate omission of some data or circumstances, is punished by imprisonment from one to five years.
(2) Attempt is punishable.
Article 326 Misrepresentation
(1) Improper statement of truth, made to a person included in art. 175 or to a unit in which he/she operates in order to produce a legal consequence, for itself or for another, when, according to the law or the circumstances, the statement made serves to produce that consequence, by imprisonment from 6 months to 2 years or with a penalty.
[…]

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[2] Published in the Official Gazette no. 510 of July 24, 2009.

Law no. 135 of July 1, 2010 on the Criminal Procedure Code[3]

Article 25 The judgment of the civil action in criminal proceedings

[...]

(3) The court, even if there is no civil party, rules on the total or partial annulment of a document or on the restoration of the situation prior to the commission of the crime.

[...]

III. Presentation of the issue. Case Study

By indictment no. 2484 / P / 2019 of the Prosecutor's Office at the Law Court of Constanţa, registered on docket of the Law Court of Constanța with no. 30596/212/2019, the defendant M.I. was sent to trial for committing crimes of misrepresentation, provided by art. 326 Criminal Code, in application of art. 35 paragraph 1 Criminal Code and improper participation to forgery, provided by art. 53 paragraph 3 referred to art. 321 Criminal Code, in application of art. 35 paragraph 1 Criminal Code, in application of art. 38 paragraph 2 Criminal Code.

In the court notification document the defendant M.I. was found guilty for having given untrue statements before the notary public G.A. on 09.08.2016 (dd.mm.yyyy) and on 23.03.2018 (dd.mm.yyyy), falsely testifying that he was the sole heir of the late M.D., in order to obtain a certificate of inheritance so as to provide him as his sole successor, and on 09.08.2016 and 23.03.2018, intentionally determined the so-called G.A., notary public, to testify without guilt in the certificate of inheritance no. 102/07.10.2016 (dd.mm.yyyy) and in the additional certificate of inheritance no. 32/16.04.2018 (dd.mm.yyyy), untrue circumstances, namely the fact that he is the sole heir of the late M.D..

At the hearing of 04.02.2020 (dd.mm.yyyy), the defendant admitted the commission of the crime requesting the trial of the case according to the simplified procedure.

Following the rule, the court[4], pursuant to art. 326 Criminal Code (C.C.) in application of art. 35 C.C. and of art. 396 paragraph 3 Criminal Procedure Code (C.P.C.), referred to art. 80 C.C. and to art. 396 paragraph 10 C.P.C. ordered the waiver of the sentence against the defendant M.I., for committing the crime of misrepresentation.

Also, pursuant to art. 53 paragraph 3 C.C. referred to art. 321 C.C. and to art. 35 C.C. and to art. 396 paragraph 3 C.P.C. referred to art. 80 C.C. and to art. 396 paragraph 10 C.P.C. ordered the waiver of the sentence against the defendant M.I. for committing the crime of improper participation in forgery.

Pursuant to art. 81 C.C. the court provided defendant M.I. with a warning which was to be given to him on the date of the sentence being final.

Also, pursuant to art. 19 and art. 397 paragraph 1 C.P.C. referred to art. 1349 paragraph 1 and 2, art. 1357, art. 1381 Civil Code, the court admitted the civil action brought by the civil party M. I. and obliged the defendant M. I. to pay to it, as material damages, in the amount of 6800 RON.

In the sentence considerations the court found as a fact that „On 03.04.2016 (dd.mm.yyyy), the death of the named M. D. intervened. He had three brothers, one predeceased, respectively the father of the defendant M.I. (the defendant would come to the inheritance by representation), the aggrieved person M.A. and witness B.I.

[3] Published in the Official Gazette no. 486 of July 15, 2010.

[4] s.p. no. 251 of 19.02.2020 (dd.mm.yyyy) of Constanța Law Court, unpublished.

On 30.09.2016, (dd.mm.yyyy), witness B.I. came before the notary public and stated that it renounced the succession of the late M.D..

Subsequently, defendant M.I. stated before the notary public G.A. that he is the sole heir of the deceased M.D., which does not correspond to the truth, as another successor of the deceased was M.A..

In this context, regarding the successors of deceased M.D., were heard in the notarial procedure, as witnesses, the named C.I., H.E. and C.G., who testified before the notary public that they know that M.I. would be the sole heir of the late M.D.[5]

Thus, the defendant M.I. requested and obtained a certificate of inheritance, attesting that he is the sole successor of the deceased M.D., declaring this aspect inconsistent with the truth before the witness G.A., notary public, by omitting to make clear that the aggrieved person M.A. is the brother of the named M.D.

Specifically, the defendant's activity took place in two stages, being registered at the Individual Notary Office G.A. on 09.08.2016 (dd.mm.yyyy), the request for opening the succession procedure regarding the real estate remaining from the deceased, within which M.I. declared at his own risk that he is the sole heir and on the basis of which the certificate of inheritance no. 102/07.10.2016 (dd.mm.yyyy) was issued and on 23.03.2018 (dd.mm.yyyy), the request for opening the succession procedure regarding the movable goods remaining from the deceased, within which M.I. declared at his own risk that he is the sole heir and on the basis of which the additional certificate of inheritance no. 32/16.04.2018 (dd.mm.yyyy) was issued.

On the occasion of being informed of the quality of suspect, M.I. stated before the criminal investigation bodies of the judicial police that he had the representation that the aggrieved person M.A. he has no hereditary vocation as he is the stepbrother with M.D..

On the occasion of being informed of the quality of defendant, M.I. maintained his statement as a suspect.

The defendant's defence cannot be accepted, since he was not called to assess who has a hereditary vocation, but it would have been necessary to declare before the notary public who are the living relatives of the deceased, as explained to him by witness G.A. on the occasion of completing the necessary forms in order to issue the certificate of inheritance. We will therefore note that the defendant M.I. failed to notify the notary public of the existence of another successor, in order to unjustly obtain the entire inheritance left by the late M.D.''

As for the civil side, the court found that the aggrieved party had become a civil party in the case and reached an agreement with the defendant on the amount of civil damages.

At the trial, the civil party's attorney requested the court during the court hearing to note that a mediation agreement had been reached between the parties and as such, the civil party intends to reduce the amount of the claim for civil damages to the amount of 6800 RON.

Previously, M.A. became a civil in the case stating in the motivation of the request that he is the brother of the deceased M.D., who died on 03.04.2016 (dd.mm.yyyy).

[5] The three witnesses in question were investigated for the crime of perjury provided by art. 273 paragraph (1) C.C., being ordered to be closed in accordance with the provisions art. 16 paragraph (1) letter b) thesis I Criminal procedure code since the deed is not provided by the criminal law. It was appreciated that following the end of the evidentiary matters a doubt arose as to their knowledge of the fact that the aggrieved party M.I. is the brother of the late M.D., doubt which had to be interpreted in favor of the suspects.

He stated that the deceased and his wife M.P. (predeceased), had no children, so that his brother would have had an inheritance vocation in his succession (civil party M.A), the nephew of the predeceased brother (the defendant in question – M.I.) and the sister witness B.I. (who chose the renouncement of inheritance).

The civil party mentioned that it had no knowledge of the fact that the defendant debated the succession in his absence, obtaining the certificate of inheritance no. 102/07.10.2016 (dd.mm.yyyy).

Regarding the civil claims, they reached the amount of 18,940 lei which was requested as material damages representing in fact the value of the lack of use of the goods which compose the remaining estate from my late M.D..

The estate in question consisted of the property right on the individual share of 6/8 of the apartment located in the municipality of C., 8 H. Alley, bldg. F, entry D, 4th floor, apt.77, county of C. and the property right on the land located in the commune of L., str. N., no. 103 B, county of C., in surface of 417 sqm..

Regarding the calculation method of the requested material damages, the civil party showed that the rental price on the market of an apartment like the one in question is 250 euro / month and was deprived of the use of this good for 39 months, period in which a rent in the amount of 9,750 euros could have been collected for the entire apartment, and in relation to its undivided share of 3/8, he would have deserved an amount of 3,656.25 euros representing uncollected rent in RON, so the amount of 17,439 RON.

In respect of the land located in the centre of Lumina commune, on a paved road, adjacent to the main street, with utilities, convenient for rent, the civil party assessed as reasonable the amount of 500 RON per year representing the lack of use according to the individual quota of ½ of this land, in total 1500 RON, for the three years.

In law, the constitution of a civil party was mentioned as being based on the certain and irreparable nature of the damage, both of patrimonial and non-patrimonial nature, based on all lost benefits resulting from lack of use.

As far as the extent of the damage is concerned, it was assessed by the civil party that it is obvious that it cannot be quantified according to mathematical or economic criteria, so that depending on the specific circumstances of the case, stated including in equity, it requested to be considered that the amount claimed is able to provide equitable satisfaction.

It was also mentioned that in this case all the elements of tort liability are met, which requires full reparation for the damage suffered, by the removal, in principle, of all harmful consequences, in order to restore the party as far as possible to the previous situation.

The civil party also stated that the civil action promoted seeks the granting of a compensatory indemnity, aiming at the offer of an equivalent which, par excellence, can be a sum of money, allowing the reparation, by certain advantages, of the unpleasant result of the illicit deed and therefore, what must be assessed and will be assessed, in reality, is the compensation which comes to compensate for the damage, and not the damage as such.

For this reason, it was mentioned that the requested amount of money comes not so much to put the aggrieved party in a situation similar to the one he had before, but to provide him moral satisfactions that could replace the values from which he was deprived.

In the end, the civil party requested the court to find the civil matter as grounded and given the material negative consequences, the importance of damaged moral values, the extent to which these values have been harmed, the intensity with which the consequences of the damages were perceived, to compel defendant M.I. to pay the sums claimed, sums of

money which constitute a reparation and at the same time a sufficient and equitable satisfaction and not an unjust enrichment.

Against the decision, within the legal term, the Prosecutor's Office at the Constanţa Law Court and the aggrieved party M.A. filed an appeal, requesting the removal of the waiver and conviction of the defendant with relation to the real and personal circumstances, respectively the annulment of the false documents.

The appeal of the Public Ministry criticized the decision of the court of first instance in terms of individualizing the sanction, in the sense that it was considered that in relation to the concrete circumstances of the commission of the deeds and the consequence produced, there is no justification for a solution of renouncing the application of the punishment. Proportional to the seriousness of the offences would have been a solution to the sentence of imprisonment, the execution of which should be suspended conditionally.

It was shown that the solution of the court of first instance also presents an element of illegality in the sense that although it was found the counterfeit character of the inheritance certificate no. 102 of October 7, 2016 and of the additional inheritance certificate no. 32 of April 16, 2018 ordering a conviction for the crime of forgery committed in the form of improper participation, the court failed to order the annulment of these false documents even though it would have been obliged even in the absence of a civil party in question.

In the sentence considerations[6] it was stated that „Examining the legality and validity of the sentence under appeal, in view of the criticisms made by the prosecutor and the appellant civil party, considering the conclusions of the defence and ex officio within the limits of art. 417 C.P.C., the Court finds the appeals grounded for the reasons set out below.

According to art. 396 C.P.C.., the court delivers the sentence of conviction when it finds, beyond any reasonable doubt, the existence of the deed, that it constitutes a crime and was committed by the defendant.

In terms of criminal proceedings, based on the evidence submitted only during the criminal investigation in view of the defendant's admission of guilt and trial of the case according to art. 396 paragraph(10) referred to art. 375 and art. 374 paragraph.(4) C.P.C., the statements of the aggrieved party M.I, the statements of witnesses G.A., B.I., C.I., C.G., H.E., documents, copies of the notary documents, statements, the defendant's statements, it turns out that on 09.08.2016 (dd.mm.yyyy) and 23.03.2018 (dd.mm.yyyy), the defendant M. I. stated that he was the sole heir of the late M.D. intentionally determining G.A., notary public, to certify without guilt in the inheritance certificate no. 102/07.10.2016 (dd.mm.yyyy), and in the additional certificate of inheritance no. 32/16.04.2018 (dd.mm.yyyy), untrue circumstances, namely the fact that he is the sole successor, facts that meet the constitutive elements of the crimes of false statements/misrepresentation, provided by art. 326 C.C., in application of art. 35 paragraph 1 C.C. and improper participation to forgery, provided by art. 53 paragraph 3 referred to art. 321 C.C., in application of art. 35 paragraph 1 C.C., in application of art. 38 paragraph 2 C.C., the court of first instance correctly establishing both the issue in fact and the legal classification of the act.

Taking into account the reduced social danger of the acts and the of the defendant, not knowing the inheritance vocation of the aggrieved person, in respect of the personal circumstances of the 60-year-old defendant, having no criminal record or other misconduct, insisting on removing the consequences of the acts, the order of the first instance of waiving

[6] d.p. no. 404/P of 11.06.2020 (dd.m.yyyy) of Constanța Court of Appeal, unpublished.

the sentence is justified pursuant to art. 80 Criminal Code in respect of the defendant M.I. for committing the 2 crimes with the application of the sanction of „warning" provided by art. 81 Criminal code.

As the prosecutor has not proved the existence of circumstances that would aggravate the danger of the facts or of the defendant, it is not necessary to modify the sanction.

However, the appeals made by the prosecutor and the aggrieved party are admissible because for the just solution of the case unable to maintain the false documents, pursuant to art. 404 paragraph (4) letter i) referred to art. 25 paragraph (3) C.P.C., the documents object of the criminal offences of misrepresentation and improper participation in forgery must be annulled.

As a consequence, pursuant to art. 421 point 2. letter a) C.P.C., criminal appeals will be admitted, the sentence under appeal will be annulled in part and the documents object of the criminal offences of misrepresentation and instigation to forgery will be annulled, pursuant to art. 25 paragraph (3) C.P.C., regarding the claim that „heir only M.I." from the request to open the succession procedure, respectively „point III.Heir" from the inheritance certificate (no. 102/07.10.2016) and additional inheritance certificate (no. 32/16.04.2018).

The other provisions of the sentence will be maintained insofar as they do not contradict this decision".

IV. Author's assessments. Conclusions

We find that this case is a classic case regarding criminal offences of forgery committed in the notarial succession procedure, although it has certain peculiarities that we will indicate later.

The notarial succession procedure is governed by the provisions of Law no. 36/1995, of the notaries public and the notarial activity. According to art. 108 paragraph (1) of law no. 36/1995 „The quality of successor and / or, as the case may be, the title of legatee, as well as their number are established by civil registry documents, by will and by witnesses. The assets that make up the estate are proved by documents or by any other means of proof admitted by law".

Also, art. 104 paragraph 1 of law no. 36/1995 stipulates that „In the request to open the succession procedure there will be mentioned the civil status data of the deceased, the name, surname and domicile of the presumed heirs, the assets of the deceased, mentioning their value, as well as the succession liability" and paragraph (3) of the same article states that „The request for the opening of the succession procedure may be made by any of the successors, by the creditors of the succession or successors, as well as by any other person who justifies a legitimate interest".

We notice, therefore, that any successor can open the notarial succession procedure, and among the information he/she is obliged to provide to the notary public is to the extent to which he /she knows of the existence of other successors, their number and identification data.

We therefore consider that the solution ordered by the court that found the existence of the constitutive elements of the criminal offences for which the defendant was sent to trial is correct, taking into account that the documents issued by the notary public are authentic documents, and the latter is a civil servant according to the criminal law, being a person exercising a service of public interest for which he/she was invested by the public authorities, according to art. 175 paragraph 2 C.C.

We find that the defendant did not give statements corresponding to the truth regarding the living relatives of the deceased person, determining the notary public to insert without guilt in the inheritance certificate facts that did not correspond to reality.

Also, considering the attitude of the defendant manifested during the criminal trial, his age, the lack of criminal record, the length of time elapsed from the moment of committing the criminal offence, we appreciate that the individualization of the criminal sanction was fair.

Regarding the civil action, given the provisions of art. 25 paragraph (3) C.P.C. we find that the court of first instance omitted the annulment of the documents in question, an obligation which it had, the appeal being grounded.

Instead, we have serious doubts as to whether the court would have allowed the civil action in question if there had been no mediation in question, the parties reaching an agreement, being most probably found the applicability of the provisions of art. 23 paragraph 1 C.P.C. which stipulates that „During the criminal proceedings, regarding the civil claims, the defendant, the civil party and the responsible party in the civil lawsuit may conclude a transaction or a mediation agreement, according to the law."

Even so, we believe that the dismissal of the civil action could have been ordered as inadmissible, given that the criminal offences for which the defendant was sent to trial are crimes of danger, not of result, the practice being almost unanimous in considering that a civil action cannot be settled by the criminal court for damages that are not direct consequences of the crime.

The crimes of danger do not cause material damage in themselves, the purpose of the incrimination being that of defending the social relations in terms of public trust granted to the authentic documents or under private signature and in order for a civil action to be admissible, it is also necessary to commit a crime of result, the classic example being that of the crime of fraud committed in conjunction with a crime of forgery.

We also find that art. 19 paragraph 1 C.P.C.. stipulates that „the civil action exercised in the criminal law process has as an object the tort liability prosecution of the persons responsible according to the civil law for the damage produced by committing the act that makes the object of the criminal action".

We note, therefore, that it is possible to introduce a civil action only for the damage caused by committing the act which makes the object of the criminal action, being therefore necessary that the act which caused the damage to be at the same time an offence.

In terms of the case presented above, the benefit which was not obtained from rental of property does not constitute damage resulting from an act which is an offence, being in our opinion a case of tort liability within the jurisdiction of civil courts.

In the end we consider that the certainty of the damage has not been demonstrated by the civil party either, existing a simple possibility to rent the assets, this being uncertain and unquestionable, since no evidence was presented that the goods were rented or could be rented there being concrete people who wanted to do this.

V. Bibliography

1. Sentence no. 251 of 19.02.2020 (dd.mm.yyyy) of the Law Court of Judecătoriei Constanța, unpublished.

2. Penal sentencing no. 404/P of 11.06.2020 (dd.m.yyyy) of Constanța Court of Appeal, unpublished.

3. Law no. 36/1995, of the notaries public and the notarial activity, published in the Official Gazette no. 237 of March 19, 2018.

4. Law no. 286 of July 17, 2009 on Criminal Code, published in the Official Gazette no. 510 of July 24, 2009.

5. Law no. 135 of July 1st, 2010 on Criminal Procedure Code, published in the Official Gazette no. 486 of July 15, 2010.

DEATH OF THE DEBTOR – ASPECTS OF MATERIAL LAW IN THE ENFORCEMENT PROCEDURE

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Abstract

This study aims to highlight the impact of the substantive legal rules that must be observed in enforcement proceedings initiated or continued after the death of the debtor. The theoretical and practical difficulties generated by the procedural-civil norms in the matter of the forced execution of the obligations after the death of the debtor have often overshadowed the imperative substantially civil norms that regulate the way of covering the succession liability. At the time of the debtor's death, the legal link between him and the creditor passes over his successors, and this link is suitable to be released by payment made voluntarily or by way of enforcement.

Keywords: *Heirs, enforcement against successors, successor acceptor, estate of the deceased, creditor, debtor, estate*

Motto:
The heir's tears behind the mask are smiles.
Publilius Syrus

1. The patrimony of the deceased: the end is not here

The patrimony of the deceased, a legal universality with a composite content consisting of rights and obligations assessable in money, unfractionated or divided into patrimonial masses, is obligatorily attached, in our law, to legal personality, not being accepted at this time the theory of patrimony without holder[1].

In the case of natural persons, the *inter vivos* transfer of the entire patrimony is not possible, this being one of the structural elements that form the legal personality [art. 31 para. (1) Civil Code]. The transfer of the patrimony in its entirety can take place exclusively *mortis causa* in which situation, the patrimonial rights and obligations that represent its content are transmitted *de iure* to the successors. When the legal personality ceases as a result of the death, the legal link between the patrimony and the original holder disappears, the patrimony being immediately attached, through a legal fiction, to another holder – the successor. In this sense, the provisions of art. 1.114 of the Civil Code expressly provides

[1] Art. 1,261 Civil Code Québec has the following content: „Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel"; „The fiduciary patrimony, made up of goods transferred to the fiduciary, constitutes an patrimony of affectation autonomous and distinct from that of the constitutor, of the fiduciary or of the beneficiary over which none of them has a real right" (t.n.). In the official commentary of the article offered by the Minister of Justice, the fiduciary patrimony is referred to as a patrimony without owner – patrimoine sans titulaire. Quebec's civil law has thus distanced itself from European doctrine and heritage. The connection between the fiduciary patrimony and the holder is no longer explained by means of a subjective right of the holder, exercised in his own interest but by means of the notion of power of administration exercised on behalf of the beneficiary. (pouvoirs d'administration exercés pour le compte des bénéficiaires) [1].

that the acceptance of the inheritance only consolidates its transmission made by right at the date of death. However, the successor (heir) remains unknown to the creditors until the completion of the succession procedure in which the rules of legal or testamentary return will be applied.

By acquiring the deceased's patrimony, the successor will not be the owner of two distinct patrimonies, but, through a legal fiction, the deceased's patrimony is integrated in the successor's own patrimony, being established within it as a distinct patrimonial mass, with a specific legal regime known under the specific name of „succesion's patrimonial mass".

When the succesion's patrimonial mass includes patrimonial obligations, through the forced execution procedure the succession asset is capitalized in order to cover the liability. The obligations, the object of the forced execution, are fulfilled by means that defeat the reluctance or ignorance of those called to answer for the succession liability.

2. Substantial rules governing enforcement proceedings in the event of the debtor's death

In the shadow of the problems of civil procedural law that today generate theoretical and practical difficulties in starting or continuing enforcement when the debtor of the obligation contained in an enforceable title dies, the rules of substantive law governing how to cover liabilities directly configure civil procedural framework of enforcement.

2.1.Substantive rules of law set out the subjective and objective procedural framework of the enforcement procedure

From the provisions of art. 1,114 para. (2) thesis I and art. 1,155 para. (1) Civil Code, we extract the rule according to which the creditors of the deceased debtor and the creditors of the inheritance tasks can follow only the persons called to be responsible for the succession liabilities and only the goods in the succession assets.

2.1.1. The sphere of the persons called to be responsible for the succession liability

The norms of substantial law regulate the liability for the succession liability of the legal heirs, of the legatees (universal or with universal title) and, by exception, that of the legatees with private title [art. 1,114 para. (2) – (3) Civil Code]. This inert finding does not seem to reveal any practical difficulties. The creditor who wishes to initiate or continue a foreclosure in the context in which the debtor of the enforceable title has died will initiate the foreclosure procedure in contradiction with one of these persons, the proof of passive procedural quality will be performed and verified in the procedure of approving foreclosure by reporting to the certificate of heir or to the court decision by which the succession was debated, as the case may be. However, the assembly of the substantial provisions within the civil procedural framework generated by the provisions of art. 687-689 Code of Civil Procedure seems to reveal a much more nuanced reality. In order to understand the sphere of persons acquiring passive procedural quality and the genesis of the issue of the sphere of persons acquiring passive procedural quality in an enforcement procedure, we will make a brief foray into the history of regulation. The rigid provisions of art. 397 of the Code of Civil Procedure of 1865, which imposed on the creditor the individual notification of each heir and the waiting for the fulfillment of a prohibitive term of 8 days, placed him, a period of time [1865-1900] in a difficult situation – the effective identification of the heirs the

deceased to initiate enforcement proceedings [2]. In 1900, a reform of the Code of Civil Procedure of 1865 took place, including in the matter of forced execution, aiming at its modernization. In this context, a new concept on forced execution in the event of the debtor's death takes shape, inspired by the Geneve system. The notification of the heirs now acquires a collective and generic character, the creditor being forced to carry out a collective notification at the domicile of the opening of the succession, in the name of the inheritance, without showing the name and quality of each heir. Thus, the forced executions were to take place until the effective finding of the heirs against the succession, without knowing to whom the patrimonial mass of the succession is attached [3]. With the entry into force of the New Code of Civil Procedure, the right of creditors to initiate or continue a forced execution was maintained before the succession debate (to avoid any reluctance in its debate by the persons called to inherit) but the idea of a forced execution carried out against generic persons was no longer accepted as it was in obvious contradiction with the general theory of civil action. The new procedural-civil institution of enforcement in the context of the debtor's death[2] used the civil procedural mechanism of the special trustee for execution and the substantial institution of the trustee of the succession to avoid a generic enforcement against the succession in the absence of a representative. By law, enforcement can be initiated and must be initiated against the following persons, and in the following order: (i) against the heirs (if the succession has been debated), (ii) if the succession has not been debated but it has been accepted, against the successor acceptors, (iii) if the inheritance has not been debated or accepted, it will be started generically, against the heirs of the deceased debtor through the curator of the succession if he was appointed by the notary public under the conditions of art. 1.136 Civil Code, (iv) if the inheritance has not been debated or accepted or a trustee of the succession has been appointed, it will be initiated generically, against the heirs of the deceased debtor by the special trustee appointed for execution, under the conditions of art. 58 Code of Civil Procedure.

In the procedural context analyzed, the liability for the succession liability of the legal heirs and legatees may be direct – as part of the enforcement procedure – or indirect, by bearing the diminution of the succession asset if the enforcement was completed before the succession debate when it was represented either by a curator of succession appointed by the notary public or by a special curator for execution.

2.1.2. A procedural digression

Although a contrary opinion has been expressed in the doctrine [6], we consider that it cannot be considered an obligation of the creditor to verify before submitting the enforcement application if the debtor is still alive and otherwise, what is the situation of the succession. The bailiff will be the one who will *ex officio* check the population records database and will subsequently check the status of the succession. In reality, the most

[2] We note that the title of the section itself may lead to confusion regarding the scope of the persons called to answer for the succession liability in the forced execution phase, this being „Forced execution against the heirs". This is not the only escape of the legislator. The notion of „accepting heir" provided in art. 688 Code of Civil Procedure, is clearly pleonastic and tautological. By heir, within the meaning of the provisions above, we must understand the person who acquired (definitively – n.n.) *in pars* or in integrum the patrimony of the deceased i.e., the person to whom the quality of acquirer of the deceased's patrimony and the related share thereof have been established by a certificate of heir, of quality of heir or by a court decision. We appreciate that *de lege ferenda* it must be replaced by the notion of successor acceptor. We find this notion used singularly in art. 1,133 para. (1) Civil Code.

difficult issue that enforcement practice faces in the event of the debtor's death is related to the observance of the conditions for exercising the civil action at the beginning of the execution.

In all cases, the lack of information held by the creditor regarding the debtor's death will lead to a request for enforcement against a person who has no procedural capacity for use. From the provisions of art. 56 para. (3) the second thesis corroborated with the provisions of art. 176 point 1 of the Code of Civil Procedure, the sanction that affects the request for forced execution in this case is the absolute, unconditional nullity. Compared to the previous clarifications regarding the moment of the beginning of the forced execution, we consider that the conditions of the civil action are met if the debtor dies after receiving the request by the enforcement body but before issuing the conclusion of registration of the forced execution.

In this context, it is necessary to establish in a practical vision what is the procedural conduct that the participants in the enforcement must follow in order to avoid such nullity and for the enforcement to start legally.

Pursuant to the protocol concluded on 01.08.2019 with the Directorate for the Registration of Persons and Database Administration, registered at the U.N.E.J., under no. 1965, having as object the supply by D.E.P.A.B.D. Based on the legal provisions of personal data in the National Register of Persons, the bailiff may obtain information on the debtor's current name and surname, his personal numerical code, current and previous domiciles, current residence and previous residences, including the date of their beginning and end and the date of death, if any. Verification by the bailiff of the database before the conclusion of the registration of the enforcement application and the opening of the enforcement file may allow him to refuse to open the enforcement proceedings in it, motivated by the death of the debtor and the prohibition of initiating proceedings against a deceased debtor provided in art. 687 Code of Civil Procedure [7].

Although the bailiff refuses to open the procedure, he must fulfill his obligation expressly provided by art. 687 para. (2) Code of Civil Procedure. According to art. 687 para. (2) Code of Civil Procedure, when he becomes aware, in any way, of the debtor's death, the bailiff has the obligation to address the Chamber of Notaries Public in whose district the debtor had his last domicile for issuing a certificate stating whether the inheritance was or not discussed again, if so, (a) who are the heirs, and (b) whether or not a successor trustee has been appointed until the acceptance of the inheritance by at least one of the successors. The reason why the bailiff can carry out these interrogations even though the enforcement procedure has not been opened lies in their semi-public nature which allows their interrogation by any interested person. The interrogation carried out by the bailiff is not directly based on the provisions of art. 660 para. (2) Code of Civil Procedure, not being interrogations that would be necessary to carry out the forced execution but the provisions of art. 687 para. (2) Code of Civil Procedure which establishes an obligation thereof as well as the legal provisions governing the operation of notarial registers. Also, such an approach would be extremely difficult for the creditor because the request addressed to the Chamber of Notaries Public must be attached to the proof of death of the debtor who, in few cases, is held or can be obtained by the creditor by his own means.

However, we consider that the bailiff notified with a request for enforcement against a previously deceased debtor will not be able to request that the statement regarding the commencement of enforcement in the R.N.N.E.C. because it cannot be started until the

heirs, the successors are clarified or until the appointment of a curator of the succession or a special curator for execution.

Depending on the response of the Chamber of Notaries Public, the creditor may know whether the new application for enforcement will be directed against successors, whether it will be directed against the succession by its trustee appointed by the notary public or if he will have to request the appointment of a special trustee.

2.1.3. The sphere of goods that can be traced

The patrimonial mass of succession has a partially hermetic character (unlike the patrimonial mass assigned to the exercise of a profession) [art. 2,324 para. (4) Civil Code]. The creditors of the deceased debtor and the creditors of the tasks of the inheritance cannot follow in principle things that are the object of the rights from other patrimonial masses existing in the patrimony of the successors. Thus, the responsibility of the successor is usually realized *intra vires hereditatis*, *i.e.,* within the limits of the succession asset, compared to the old regulation that allowed creditors to pursue the own assets of the heirs, if they did not accept the inheritance for the benefit of inventory – *ultra vires hereditatis.*

The creditors of the deceased debtor and the creditors of the inheritance tasks may trace both the assets contained in a certificate of heir or the court decision by which the succession was debated and the other assets that are identified in the enforcement procedure as belonging to the deceased debtor. The only condition imposed by law in this case for the forced pursuit is that of belonging to the rights pursued in the patrimony transmitted by the deceased debtor. This avoids the fact that, by not declaring some rights from the succession table at the time of debating the succession, the interests of the creditors of the succession are defrauded.

Enforcement practice has identified a sometimes insurmountable difficulty in enforcing obligations after the operation of universal subrogation. At the level of the patrimonial masses, the real subrogation works with universal title. Therefore, both the private or relative rights that existed at the date of the opening of the succession and the private or relative rights that replaced them along the way must be included in the estate. In this sense, the provisions of art. 1,114 para. (4) The Civil Code provides that, in case of alienation of the assets of the inheritance after its opening, the assets entered in the succession patrimony by the effect of subrogation may be affected by the settlement of debts and tasks of the inheritance.

The practical problem we notice on this occasion refers to the impossibility, sometimes absolute, of identifying the elements that replaced the asset that came out of the estate. For example, in case the heir certificate attests a succession asset of 100,000 lei in the X account opened at bank Y, in the forced execution phase, the bailiff, in application of the rule provided in art. 1,114 para. (2) Civil Code, shall order the establishment of the attachment on the previously identified bank account. If the answer of the seized third party banking institution mentions that the credit balance is non-existent or that it has been liquidated and closed, the bailiff, in application of the norm provided by art. 1,114 of the Civil Code must identify the patrimonial elements that replaced the successor asset, respectively the amount of 100,000 lei. The issue may also be extended if the replacement of an asset in the estate was carried out with an asset affected by insensitivity (legal – e.g.: with an asset provided for in Article 727 of the Code of Civil Procedure or, even conventionally, made opposable to third parties) or if the acquired good was of a perishable nature (food etc.). If there are no

documents proving the purchase of goods with the amounts from the estate, the need arises to know whether: (i) it is possible to set up the seizure on the salary income of the heir or (ii) on his personal accounts.

In our opinion, *de lege lata,* the impossibility to determine the succession asset resulting from the subrogation attracts the applicability of the provisions of art. 703 para. (1) point 2 of the Code of Civil Procedure, respectively the cessation of the forced execution due to the lack of traceable goods or due to the impossibility of their capitalization. *De lege ferenda,* we appreciate that substantive law can establish liability *extra vires hereditatis* if the successor asset has been alienated and the debtor does not prove the asset that replaced the transferred asset or it no longer exists.

Also, the sale of some successor goods that do not require an advertising of the translating legal act may generate the impossibility of determining the value that replaced the transferred asset or even the impossibility of determining the date on which the transfer took place.

However, it is not impossible to imagine a situation in which real subrogation in particular can be used to give efficiency to the pursuit of assets that have replaced the successor assets. For example, if the contract for the sale of real estate mentions the source of the funds to purchase the real estate as the amounts obtained as a result of an inheritance to prove the quality of the property's own property (if the acquirer is married under the legal community of the assets), the creditors of the succession may pursue, the real estate within the limit of the value of the succession asset used for its acquisition.

The hermetic character of the succession patrimonial mass represents one of the cases that creates the hypothesis of the forced pursuit of the real estate even when the value of the claim does not exceed 10,000 lei [art. 813 Code of Civil Procedure].

2.2. *Substantive rules of law set the limits of liability for succession liabilities in the case of a plurality of heirs*

According to the general rule on obligations, when the obligation is divisible between debtors, they are bound to the creditor in equal parts, unless otherwise provided by contract or by law. Such an exception provided by law and which represents the rule regarding the payment of the succession liability, is found in art. 1,114 para. (2) Thesis II of the Civil Code and within art. 1,155 para. (1) Civil Code, which establishes the liability of the heirs in proportion to the share acquired in the succession asset[3].

The exceptions from the rule of bearing the liability proportional to the share acquired from the assets are provided in art. 1,155 para. (3) Civil Code which provides for the inapplicability of the legal division of the succession liability if (i) the obligation is indivisible, (ii) the obligation concerns an individual property determined indivisible by its nature or a performance determined on such property, (iii) where the obligation is secured by a mortgage or other security interest in which case the heirs who acquire such property

[3] Apparently, the same rule is established in two distinct articles within the same normative act, an aspect that contradicts the norms of legislative technique provided by art. 16 of Law 24/2000 which require the avoidance of parallels. However, we must note that the general rule expressed in art. 1,114 para. (1) The Civil Code aims to establish the general framework for limiting the liability of private legatees for the debts and tasks of the inheritance provided by art. 1,114 para. (3) Civil Code and the provisions of art. 1,155 para. (1) The Civil Code prepares the exceptions to the rule of legal division of the succession liability by reference to the share acquired by the heir from the succession asset. Therefore, although both provisions have a similar content, they are intended to support the provisions of the subsequent paragraphs which, otherwise, would seem out of context.

will be held for the entire secured claim, within the value limit of the property with the effect of a corresponding reduction in participation in the rest of the liability, (iv) one of the heirs is assigned, by title, to perform the obligation himself. In the latter case, if the title is the will, the exemption of the other heirs constitutes a liberality, subject to reduction if necessary[4].

The rule is important in the forced execution phase when it is started against the heirs *i.e*., after the debate of the succession. We appreciate in the application of the general rule, the bailiff will divide the creditor's claim and will establish the enforcement costs that each heir must bear in relation to the share acquired by each of the successor assets. If the asset capitalized in the forced execution phase does not cover the entire claim, the debt owed by each debtor will be reduced according to the share it held in it.

If there is an exception to the rule of division of liabilities, the bailiff will not carry out the operation of division of the claim and will not establish separately the costs of enforcement.

If one of the heirs has paid the debt of the succession in a higher installment than the one in which he was held, he has a right of recourse against the other heirs, provided that the regression will be made against each heir within the limits responds without the effect of subrogation being able to exceed the share of bearing the liability by the other heirs [art. 1.157 Civil Code]. If the heir has paid more than was required in a foreclosure procedure and is subrogated to the rights of the creditor [art. 1,596 lit. d) Civil Code], will be able to request the bailiff to continue the enforcement at his request (being in our opinion in one of the cases of transmission of active procedural capacity) for the realization of the part of the debt paid beyond the limit at which it was held but respecting the limits of their liability.

2.3.Substantive rules of law confer a right of preference to creditors of inheritance and tasks of inheritance

The privilege is the preference given by law to a creditor in consideration of his claim [art. 2,333 para. (1) Civil Code]. According to the provisions of art. 1,156 para. (5) Civil Code, a cause of preference is established, respectively a privilege [5] of the claim of the creditors of the inheritance over the claims of the personal creditors of the heir. This privilege allows the creditors of the estate to prioritize their claims over the personal creditors of the heir. Therefore, in the situation where, in the forced execution phase, a good that belonged to the deceased is capitalized, in the distribution project of the amounts resulted from the forced execution the creditor of the succession creditor towards the successor's creditors will have the rank provided in art. 867 Code of Civil Procedure. In this case, the claim of the creditor of the succession will be paid after the payment of the claims provided in art. 865 para. (1) lit. a) and b) Code of Civil Procedure.

However, when the creditor of the succession has not registered his privilege in the land book and the successor has constituted a mortgage right over a building, the mortgagee will be preferred to the distribution of the amounts resulting from the foreclosure under the provisions of art. 2,342 para. (2) final thesis Civil Code.

[4] The provisions of art. 1,155 para. (3) lit. a) Civil Code, represents a reiteration of the general rule in the matter of obligations provided in art. 1,425 para. (1) Civil Code, an article which provides that the indivisible obligation is not divided between debtors, creditors or their heirs. Unlike the indivisible obligations, the solidary obligations are transmitted divided to the heirs of the debtor according to the provisions of art. 1,460 Civil Code.

When several creditors of the succession participate in the distribution of the amounts resulting from the forced execution, the order of satisfaction of their claims will be established according to the provisions of art. 865 and 867 Code of Civil Procedure.

2.4.*Substantive rules of law give the creditors of the deceased debtor the right to pursue the assets of the successor without initiating a partition procedure.*

Unlike the personal creditors of an heir who are held, (if there are several heirs) to make the division of the estate in order to be able to follow his share of the assets of the inheritance, the creditors of the succession can pursue the rights of the estate, without being held by this temporary prohibition. The benefit of tracing the undivided assets before the partition of the inheritance is recognized to the creditors of the succession for the speedy realization of the claims born before the death of the debtor or those made with the preservation or administration of the assets of the estate.

Although, the provisions of art. 1,156 para. (2) Civil Code prohibits the personal creditors of the heir to pursue the assets of the inheritance before the division, we believe that this substantial provision does not prevent the commencement of enforcement because otherwise the right to free access to justice would be infringed. After the registration of the heir's property right in the land book – in order to respect the principle of relativity of the entries, the personal creditor of the heir will be able to ask the bailiff to mark the forced pursuit in the land book and find a legal suspension of the forced pursuit until the date of division, similar to the procedure of forced pursuit of common goods in disrepair, according to the provisions of art. 818 of the Code of Civil Procedure, in order to benefit from the effects that the provisions of art. 827-828 Code of Civil Procedure I recognize them for noting the forced pursuit. In the absence of this notation, the co-owner debtor may freely dispose of the successor property and the creditor will have to file a Pauline action.

Regarding the rule of the impossibility of following the successor's assets by the successor's creditors until the division, we appreciate that they will not be able to participate in the distribution of the amounts resulting from a forced pursuit initiated by the successors' creditors until the succession division is made, if there are several heirs. However, if undistributed amounts remain in the capitalization of a successor creditor and there is only one heir, his personal creditor will be able to participate in the distribution of the remaining amount.

Therefore, the procedure for intervening in proceedings instituted by a creditor of the succession should not be evaded from the personal creditors of an heir unless there are other heirs. The procedure for the intervention of a personal creditor of a heir can create difficulties when there are several heirs.

The release of the remaining amounts after the capitalization of an asset by the creditors of the succession can be made only to the heirs *i.e.* only after the submission of the certificate of heir by the persons concerned. The certificate of quality of heir is not sufficient for the release of the amounts to the heirs because it does not contain any assets and does not confer any real right over the assets of the succession.

References

[1] Yaëll Emerich, La fiducie civiliste: modalité de la propriété ou intermède à la propriété?, în McGill Law Journal, Vol. 58, nr. 4/2013, pp. 837-846.

[2] Referring to the provisions of art. 397 of the Code of Civil Procedure from 1865, the famous prof. Demetru Negulescu wrote „This article, however, gave rise to the greatest difficulties, because in order to continue the execution against the heirs, you had to know the heirs who remained after the deceased. There were successions in which the creditor thought he knew the heirs, began the execution against several, and just when he thought he had finished the execution, another heir was discovered, which made the creditor resume the pursuit." Demetru Negulescu, Execuțiunea silită. Principii generale, Vol. I, Ed. Tipografia „Gutemberg", Joseph Göbl, București, 1910, pp. 43-44. „We see that the old article 398 tells us that an execution against the heirs cannot be started until the titles or decisions that are being executed have been notified to each one. We have already shown, when it came to the first case, in what a difficult situation the creditors found themselves, who at one point saw that their debtor had died and did not know who the heirs of that debtor were. The old legislator put creditors in a situation of impossibility. They needed to know the names and addresses of all the heirs". *Ibidem*, p. 49.

[3] Prof. Demetru Negulescu states about this new vision „This article (art. 398 C. proc. Civ. 1865 after the modification from 1900 – n.n.) expresses the idea of personification of the successor goods that form the succession; it is to some extent the idea of personification in Roman law *hereditas personam defuncti sustinet*". Demetru Negulescu, *op cit.,* Vol. I., p. 27. The idea of personification of the rectius succession assets of the patrimony appeared in the context in which the forced execution could, in the new conception, begin or continue without knowing the person or persons in charge. Law 134/2010 mitigated this „personification" by establishing the possibility and at the same time the obligation to appoint a curator of succession or a special curator for execution.

[4] See in this regard the Timiș Tribunal, Civil Section I, Decision no. 512/2021 also available online on www.sintact.ro.

[5] For a study on the right of pre-emption of creditors of inheritance in the previous and current regulations, see Lucreția Albertina Postelnicu, Preference right of creditors of inheritance in the current and future regulation of the Civil Code. Aspects of comparative law, in Revista Forumul Judecătorilor no. 2/2011, pp. 173-186.

[6] See Mihaela Ionaș, Aspecte privind executarea silită împotriva moștenitorilor, in Revista Română de Executare Silită nr. 1/2018, p. 40.

[7] See: Iași District Court, decision no. 2207/2021 of March 3, 2021: „(...), it is illegal to start enforcement against a person who died on the date of its commencement and, therefore, lacking capacity to use, and subsequently the continuation of enforcement acts on behalf of the heirs, as was done in the enforcement file no. (...)".

DES CONSIDÉRATIONS CONCERNANT LE DROIT DE SUCCESSION DES HIÉRARQUES ET DES MOINES, COMME CONFIGURÉ DANS LE STATUT D'ORGANISATION ET DE FONCTIONNEMENT DE L'ÉGLISE ORTHODOXE ROUMAINE

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Abstract
Le statut d'hiérarque comme celui de moine représentent, dans l'Église, des formes spécifiques par lesquelles les personnes douées de certaines qualités et qui manifestent une certaine vocation servent à Dieu et aux gens. En assumant ce statut, ces personnes-là doivent respecter aussi certaines obligations comme la chasteté, la pauvreté et l'obéissance inconditionnelle. Par conséquent, dans les deux cas, il s'agit d'un régime strict, car il y a des incidents et des privations juridiques, qui se fondent sur la loi ecclésiale. Une telle privation est imposée aussi dans le domaine du droit de succession, l'Église Orthodoxe Roumaine, choisissant dans le cas des hiérarques et des moines, un régime dérogatoire par rapport au droit commun. La modalité de configuration et les aspects problématiques concernant cela sont compris dans la présente étude, l'approche étant interdisciplinaire.
Keywords: *hiérarques, moines succession, statut, BOR*

I L'acquisition du statut d'hiérarque et de moine dans l'Église Orthodoxe Roumaine et les dispositions canoniques concernant la succession

Dans l'Église Orthodoxe Roumaine l'acquisition du statut d'hiérarque se réalise-en suivant la procédure [1] établie dans le Chapitre II, l'IIème Section, du Statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine [2] étant un *choix*, sur base de *vote secret,* [art. 126 alin. (1)], *l'ordination* [3] et *l'intronisation* [art. 133], d'un des candidates éligibles [4] qui a obtenu le plus grand numéro de votes de la part des membres du Saint Synode. Le nom du nouveau hiérarque est communiqué, *post factum*, au Président de la Roumanie, au premier ministre et à l'institution de l'administration publique centrale de ressort [art. 133 alin. (1)], en précisant que, du point de vue des attributions constitutionnelles, le Président de la Roumanie, n'est pas habilité à émettre de décrets de reconnaissance des hiérarques BOR [5]. D'autre part, le Secrétariat d'État pour les Cultes [6]: „*prend acte du choix […] du personnel ecclésial, […] des cultes reconnues par la loi […] en vue de l'allocation du support financier du budget d'Etat pour la paie du personnel des cultes,* conformément à la loi, [art. 4 alin. (1) pct. 14 din H.G (ordonnance d'urgence) nr. 44/2013] [7]. Une fois élu, ordonné hiérarque et intronisé, celui-ci [8] reçoit de la part de l'Église [9] le droit de réaliser la triple œuvre d'*enseignement, sanctification et coordination* du clergé et des fidèles qui lui sont attribués [10], devenant ainsi *l'âme de la vie ecclésiale*, *au niveau de son diocèse* [11]. L'hiérarque est celui qui doit animer de manière visible, la

vie ecclésiale de son diocèse et pour cela il doit bénéficier de prérogatives accrues et d'un respect spécial car il ne pourrait pas réaliser cette triple œuvre [12] dans un monde marqué par la désobéissance, sans ces bénéfices-là.

Mais ils ont le rôle de consolider l'autorité de l'hiérarque strictement dans la réalisation de l'objectif mentionné ci-avant, c'est pour cela que l'hiérarque est vu comme étant un facteur coagulant de l'Église [13]. D'autre part, en corrélation avec les prérogatives accrues et le respect accordé, le statut d'hiérarque implique aussi certaines privations d'ordre mondain, ceux qui occupent une telle fonction étant obligés à une pureté morale extraordinaire. Une des privations serait *l'impossibilité d'accéder au mariage* [14], mais l'essence de l'interdiction ne vise pas la capacité du mariage d'empiéter en quelque manière le statut d'hiérarque, mais le fait que par *le vote du célibat, l'hiérarque peut se dédier de manière exclusive aux devoirs ecclésiaux.* En matière de la succession, le canon 40 apostolique, *imposait une séparation des biens qui sont dans la propriété de l'hiérarque de ceux de l'Église*, reconnaissant en même temps *le droit de l'hiérarque de disposer de la première catégorie de biens* [15]. À l'occasion du commentaire de ce canon, le père archidiacre Ioan Floca dit « ce n'est que très tard, dans le XIII-XIVème siècle, qu'on a donné à ce canon l'interprétation que […] *les évêques sont obligés à devenir moines* [16]. Ainsi que, si à partir de cette période les hiérarques ont été choisis parmi les moines, il est évident que le vote de la pauvreté [*penias pauperitatis*/ στηνοζορίας] *exclut l'idée de disposition successorale,* l'hiérarque étant moine à la base.

D'autre part, si le statut d'hiérarque implique, notamment l'exercice d'une autorité, lorsqu'on fait référence au statut de moine [17], il faut prendre en considération la *simplicité, la retraite, la prière, l'ascèse, le travail et la philanthropie*, comme éléments définitoires de celui-ci. Le statut de moine réclame, donc, un mort par rapport au monde et l'appropriation d'un mode de vie qui est difficile à comprendre pour ceux qui vivent dans le monde. Dans la littérature de spécialité, on a précisé que „Un troisième état dans lequel peuvent se trouver les membres de l'Église est le monachisme, plus connue sous le terme de *călugărie (un autre terme roumain)*. Dans le droit canonique catholique les moines sont nommés aussi *membres des instituts de vie consacrée* […] Les moines peuvent être soit des clercs, soit des laïques, [suite à l'introduction du rituel de la tonsure du clergé laïque aussi (tonsure/ αποκάρσις)]"[18].Pour que la personne puisse obtenir le statut de moine, il est nécessaire qu'elle parcoure *la période de noviciat* [19], période dans laquelle on vérifie s'il accomplit les conditions requises par le monachisme. Si on constate que la personne répond aux conditions, sur base du consentement écrit du père spirituel et avec la recommandation du Conseil Spirituel et du supérieur du monastère, l'Hiérarque approuve la *tonsure monacale* [*cf*. art. 23 du Règlement pour l'organisation de la vie monastique et le fonctionnement administratif et disciplinaire des monastères] cérémonie qui suppose la profession *des votes monastiques* [21]. Une fois obtenu le statut de moine, on ne peut pas y renoncer, mais il peut être perdu par exclusion, suite à la violation de la discipline monastique. Enfin, il est relevant de point de vue de la succession le fait que dans le canon 6 du Synode de Constantinople de 861 [22] établit *l'obligation du candidat de disposer de sa richesse d'avant le statut de moine, toute disposition ultérieure étant sans validité*, le monastère ayant droit sur tout ce qu'il a gagné suite à l'appropriation du statut respectif [23].

II. Le droit de succession des hiérarques et des moines conformément aux dispositions du Statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine

En ce qui concerne les hiérarques, l'art. 195 du Statut mentionne « les diocèses ont vocation sur tous les biens successoraux de leurs hiérarques ». À titre préliminaire, on doit considérer le terme d'hiérarque non adéquat, parce que dans la catégorie de la hiérarchie, on inclut aussi les prêtres et les diacres [24] et comme il est évident qu'ils ont des successeurs, ceux-ci *auront vocation sur les biens respectifs.* En réalité, la norme vise les évêques, ils sont à la base des moines, et leurs liaisons de famille étant rares ou même inexistantes, du à leur statut qu'ils ont assumé. Aussi, il aurait était plus adéquat d'utiliser le dernier terme. L'analyse de la norme statutaire, qui règlemente le droit de succession [25] détermine certaines précisons:

1. Les diocèses [26], comme formes d'organisation ecclésiastique, peuvent avoir vocation héréditaire par rapport aux hiérarques défunts, *en vertu de la possession de la personnalité juridique.* La législation de l'état statue en ce sens: „il y a des personnes juridiques les parties composantes des cultes aussi, telles que mentionnées dans *les statuts* [27] *ou dans les codes canoniques* [28] propres, *si elles accomplissent les conditions prévues dans ceux-ci»* [art. 8 alin. (1) de la Loi no. 489/2006][29];

2. La vocation [30] des diocèses sur tous les biens successoraux des hiérarques défunts doit résulter du testament, de manière indépendante de la disposition statutaire. Parce que le terme atteint le point essentiel et en même temps névralgique de cette présente étude, j'argumenterai aussi mon opinion à ce sujet dans les sections qui suivent:

3. Les biens successoraux qui font l'objet de la vocation doivent être compris dans la lumière des dispositions de l'art. 535-550 C. civ;

4. Le Statut ou la qualité d'hiérarque [évêque] n'exclut pas, d'emblée, l'hypothèse de *l'existence de la vocation effective des parents sur les biens successoraux apparentent aux hiérarques défunts*, qui sont des héritiers légaux, testamentaires ou les deux qualités [31].

Concernant les moines, l'art. 196 du Statut BOR établit les suivantes: « les biens des moines et des moniales, apportés ou donnés au monastère lors de l'entrée en monachisme, comme *les biens acquis dans toutes les manières pendant leur vie en monastère*, restent totalement en possession du monastère dont ils appartient et *ne peuvent pas faire l'objet des revendications ultérieurs.* Au titre préliminaire, il faut préciser que le titre de la section D qui inclut aussi l'art. 196 s'intitule « Dispositions concernant le droit de succession des hiérarques et des moines » étant évident que les trois hypothèses mentionnées seront incidentes *au moment de l'ouverture de la succession*, suite au *décès du moine ou de la moniale* [*cf*. art. 954 alin. (1) C. civ.] [32].

Au fond, le texte normatif génère certains problèmes d'ordre juridique et, afin de donner une réponse très proche de la vérité, on doit observer les aspects de détail, l'article mentionnant, comme nous avons précisé, *trois hypothèses différentes*:

1. *Le don de ses biens au monastère.* Dans cette première hypothèse on vise l'entrée dans la communauté monastique [33] d'une personne qui a acquis le statut de moine *dans son monastère initiale (n.t: en roumain, mănăstire de metanie, c'est-à-dire l'endroit de la tonsure, impossible à traduire mot à mot en français* [34], il s'agit dans ce cas d'un transfert [35]. Bien évidemment, le statut de moine implique, comme nous avons montré dans la IIème section de notre présente étude, un renoncement aux biens personnels, les canons [36] obligent «à ne pas avoir des biens à soi » [37]. Mais aussi radicale que c'est le renoncement aux biens personnels, il est exclus que le moine ou la moniale n'apporte aucun bien avec soi au monastère. Et exceptant la situation où les biens apportés sont d'une valeur patrimoniale réduite, les choses se compliquent lorsque ces biens ont une valeur patrimoniale élevée et quand le moine ou la moniale qui les a apporté les possède en tant que *détenteur précaire* [*cf*. art. 918 alin. (1) lit. a) – d) C. civ] en vertu d*'un titre qui respecte les rigueurs de la loi.* D'autre part, si les biens apportés au monastère résultent d'un acte prévu par la loi pénale [*cf*. art. 112 alin. (1) lit. a) C. pen.], *ont été destinés ou utilisés pour commettre cette action*, [*cf*. art. 112 alin. (1) lit. b) C. pen.], *pour assurer la salvation* [*cf*. art. 112 alin. (1) lit. c) C. pen.], *pour déterminer le fait ou pour récompenser le coupable* [*cf*. art. 112 alin. (1) lit. d) C. pen.], ils peuvent faire l'objet de la mesure de *confiscation spéciale, malgré l'invocation du monastère du droit de succession concernant ces biens*.

2. *La donation des biens personnels lors de l'entrée en monastère.* Il s'agit de la plus viable solution d'ordre juridique pour que les intérêts du monastère et des éventuelles personnes qui pourraient réclamer un droit pour que les biens soit protégés, tout en respectant *la forme de l'acte de donation.*

3. *L'acquisition des biens personnels, sous toute forme, pendant la vie dans le monastère.* Cette dernière hypothèse vise aussi la capacité civile; les règles de l'Église établissant que suite au statut de moine on parle de mort civile [38], le moine ou la moniale étant *incapables d'établir par testament le destin de ces biens après la mort.* Par conséquent, indépendamment de l'acquisition des biens par un héritage ou par vente, on ne pourra pas disposer de ceux-ci par testament. La législation civile qualifie comme *incapables de disposer par testament* [39]: *le mineur qui n'a pas l'âge de 14 ans* [art. 43 alin. (1) C. civ.], *celui qui a entre 14 et 18 ans,* [art. 988 alin. (1) C. civ.], *la personne qui n'a pas de discernement et celle qui a disposé en faveur de l'ancien protecteur représentant légal, avant de recevoir de l'instance de tutelle la décharge* [art. 988 alin. (2) C. civ.]. D'autre part, anticipant cette fois aussi le résultat de l'analyse, vu que par la décision CCR no 601/2020[40] on a admis l'exception de non-constitutionalité de la disposition de l'art. 164 alin. (1) C. civ., concernant l'interdiction [41], résulte que l'architecture constitutionnelle sur le droit fondamental à l'héritage ne permet pas l'application d'une régime dérogatoire sans garanties avec un niveau élevé de protection de celui-ci [42];

4. *Les biens ne peuvent pas faire l'objet des revendications ultérieures.* La disposition est *très* problématique, règlementant en essence *une véritable limitation de l'accès à la justice* pour les personnes qui, par exemple, souhaiterait initier une *action en revendication* [art. 563 C. pen.][43] pour récupérer les biens qui se trouvent dans la prétendue possession du monastère, justement à base de la norme statutaire.

Voici donc que les deux articles statutaires, qui règlementent la succession des hiérarques et des moines d'une manière dérogatoire du droit commun, entre dans une certaine contradiction avec les règlementations du code civile, motif pour lequel il convient d'analyser globalement les réglementations de la législation étatique applicable à ce domaine. De plus, la démarche est nécessaire aussi pour identifier dans la loi les éventuels fondements des dispositions statutaires évoquées, ainsi que les limites incidents. La contradiction est générée, évidemment par l'incapacité de l'État de comprendre le spécifique du travail des hiérarques et des moines, car la doctrine de l'Église établit qu'une des conditions essentielles pour la réalisation d'une telle mission est le renoncement aux biens matériaux, qui s'étend aussi sur les droits successoraux. La configuration de la législation étatique de telle manière que la règle soit *la plénitude de l'exercice des droits et des libertés fondamentaux*, et que l'exception soit représentée par la *restreinte, sans porter atteinte à la substance du droit ou de la liberté*, exclut l'idée de mort civile et de renoncement aux biens matériels. L'Église et l'État ont une vocation propre, éminemment différente l'une par rapport à l'autre et le fait que la première est dépourvue de plus en plus de ces instruments nécessaires pour la réalisation de la mission spirituelle, n'est autre chose que la réponse d'une société dans un changement permanent, société qui consacre des nouvelles valeurs et supprimes les anciennes.

III Dispositions de la législation étatique par rapport au droit de succession et leur rapport avec les dispositions de l'Église

Si dans la section précédente nous avons indiqué et analysé les principaux textes normatifs à caractère dérogatoire du droit commun par rapport à la succession dans le cas des hiérarques et des moines, dans le cadre de la présente section, il faut évoquer et analyser les dispositions étatiques en rapport avec les premières.

La constitution de la Roumanie [44] dispose comme règle dans l'article 46 que: « le droit à l'héritage est garanti ». Le contenu de ce droit est concrétisé dans « la possibilité d'une personne [physique ou morale] d'obtenir, par voie successorale, dans les conditions de la loi, tout bien » [45], art. 73 alin. (3) lit. m) statuant l'obligation de la règlementation du régime juridique général de l'héritage par la *loi organique.* Au niveau infra-constitutionnel « les conditions de l'exercice du droit à l'héritage sont règlementés concrètement, dans le Code Civil » [46], avec la mention que, même si dans la Constitution on utilise le terme d'*héritage* [47], le législateur utilise aussi le terme de *succession* [*e.g.* la représentation successorale (art. 1086 C. civ.) etc.] La doctrine a apprécié le premier terme comme étant „beaucoup plus adéquat concernant la *transmission mortis causa,* par rapport au terme de « succession » susceptible d'avoir plusieurs sens." [48].

Comme exception, le droit à l'héritage peut être restreint, en respectant de manière cumulative, *les conditions* évoquées dans l'art. 53 alin. (1) și (2), comme suit:

1. La restreinte doit se réaliser par la *loi.* L'énoncé constitutionnel incident est un peu ambigu, disant que: « l'exercice de certains droits ou des certaines libertés peut être restreint seulement par la loi » mais vu que le droit à l'héritage est fondamental, étant inclus dans le Chapitre II du IIème Titre de la Constitution, intitulé „Les droits et les libertés

fondamentaux" résulte que l'article 53 alin. (1) statue l'obligation de l'utilisation de la loi, comme formel du Parlement, dans le cas des droits ou libertés qui sont fondamentales.

2. La restreinte doit être circonscrite à un des objectifs limitativement et strictement prévus par l'art. 53 alin. (1), respectivement: *la défense de la sécurité nationale, de l'ordre, de la santé ou de la morale publique, des droits et des libertés des citoyens, le déroulement de l'instruction pénale, la prévention des conséquences d'une calamité naturelle, d'un désastre ou d'un sinistre très grave.*

3. La restreinte doit être *nécessaire à la réalisation de l'objectif* et doit avoir *caractère démocratique*, non pas totalitaire.

4. La mesure de restreinte ne doit pas porter atteinte à l'existence du droit d'héritage. Cette condition relève le caractère temporaire de la mesure restrictive, le caractère non-temporaire déduit même si implicitement des dispositions de la loi ou de l'ordonnance [51] représentant une atteinte portée à la substance du droit à l'héritage [52]. Par conséquent, l'accent est mis sur la *possibilité de l'exercice restreint du droit à l'héritage, même dans les situations exceptionnelles, excluant les dispositions normatives qui ont comme effet une limitation totale.*

La loi no. *489/2006* doit être analysée prioritairement, elle contient des réglementations avec une incidence sur le domaine successoral. L'art. 27 alin. (1) prévoit la « possibilité pour les Cultes reconnues et leurs unités de culte d'avoir et d'obtenir, dans leur propriété ou dans leur administration, des biens mobiles et immobiles, dont ils peuvent disposer en conformité avec les statuts propres ». *Ab initio*, on doit qualifier comme *erronée la possibilité de l'exercice du droit de disposition dans le cas de l'administration*, celle-ci supposant l'exercice seulement de la *possession et de l'utilisation, le droit de de disposition restant au propriétaire*. [53]. En plus, même si *la loi ne distingue pas,* les cultes religieux et les unités subséquentes *ne pourront pas être titulaires d'un droit d'administration sur un bien qui est propriété publique*, seules les régies autonomes ou les institutions publiques pourront être titulaires dans ce cas. [cf. art. 136 alin. (4) de la Constitution]. Les cultes religieux n'ont pas le statut d'institutions publiques, elles étant *des personnes morales de droit privé et d'utilité publique* [54]. D'autre part, seuls *les cultes religieux qui ont le statut d'utilité publique peuvent recevoir gratuitement pour utiliser des biens qui sont propriété publique* [*cf.* art. 136 alin. (4) la thèse finale de la Constitution]. Enfin, la reconnaissance légale du droit des cultes religieux et des unités subséquentes de disposer de biens qui sont dans leur propriété ou dans leur administration, en conformité avec les statuts propres, ne doit pas générer l'opinion que les statuts respectifs peuvent contenir par exemple des dispositions d'ordre successoral, contraires à la loi, art. 17 alin. (2), précisant que: „la reconnaissance des statuts et des dispositions des codes canoniques s'accordent dans la mesure où ceux-ci ne portent pas atteinte par leur contenu […] aux droits et aux libertés fondamanetales de l'homme [55].De la meme manière on doit interpreter l'art. alin. (1) qui dispose que: « Les biens qui font l'objet des apports résultant *des successions,* ainsi que tous autre biens entrés légalement dans le patrimoine d'un culte *ne peuvent pas faire l'objet des revendications ultérieurs* », tenant compte dans ce cas de la règle de la légalité. Mais, si les dispositions de la loi sur la succession ont été violées, l'article 31 alin. (1) ne peut pas constituer *per se* un argument de rejet d'une *action en revendication,* initiée de manière

exceptionnelle. Comme conclusion sur les textes de la loi des cultes cités plus haut et relevant pour le domaine successoral, on peut observer que ceux-ci *n'établissent aucun régime dérogatoire du droit commun et qui soit applicable dans le cas des hiérarques et des moines.*

Le Code civile à son tour, consacre deux formes d'héritage, celle légale, à laquelle a vocation, en ordre et selon les règles établies, *l'époux survivant et les parents du défunt*, à savoir *les descendants, les ascendants et les collatéraux* [cf. art. 963 alin. (1) C. civ.], et celle *testamentaire*, où a vocation le légataire, qui est ou non parent avec le testateur [v. disp. art. 1034 et le suivant C. civ.]. Analysant les dispositions du code civil, on peut déduire *l'inexistence de la vocation du diocèse ou du monastère par rapport à l'héritage légal*, elle pouvant pourtant avoir vocation à l'héritage testamentaire à base de la personnalité juridique possédée.

Le statut BOR, comme on montre dans la section II de notre étude, contient certaines dispositions en matière successorale qui établissent à la fois la vocation du diocèse sur *les biens des hiérarques défunts* et *la vocation du monastère sur les biens des moines et moniales défunts.* Mais, afin de pouvoir apprécier la validité de ces dispositions, il faut faire une courte analyse de l'acte juridique de consécration. Ainsi, de point de vue formel, le Statut BOR a été reconnu par la H.G no. 53 de 16 janvier 2008 et parce que celui-ci est inclus dans l'annexe qui fait partie de l'ordonnance [*cf*. art. 1], il résulte que *le Statut produit les mêmes effets que celle-ci*, par assimilation. Au fond, dans la mesure où la disp. art. 195 et196 du Statut ne seront pas interprétés en accord avec les dispositions constitutionnelles et légales présentées, mais seront interprétées seulement de la perspective de *l'autonomie des cultes religieux* [56], même si celle-ci est circonscrite par la loi, comme l'organisation statutaire, elles seront considérées par les instances de jugement comme de *véritables limitations du droit de l'héritage*. Et donc, on ne pourra pas exclure une éventuelle *action en annulation, sur la voie du contentieux administratif, tenant compte de l'interdiction des statuts des cultes religieux de léser, par leur propre contenu, les droits et les libertés fondamentales de l'homme* [art. 17 alin. (2) la loi des cultes] et le fait que *les ordonnances du gouvernement peuvent être attaquées en justice* [art. 22 alin. (2)]. Par conséquent, pour que les dispositions statutaires sur la succession dans le cas des hiérarques et les moines peuvent être considérés valables, il faut les interpréter strictement de point de vue des dispositions constitutionnelles et de la législation civile.

IV Conclusions

Arrivant à la fin de l'étude, je veux exprimer les idées essentielles suivantes:

1. Tenant compte que la mission d'hiérarque ou de moine suppose l'engagement dans une œuvre surtout spirituelle et très peu matérielle, le renoncement aux biens matériaux doit être vue comme une forte preuve de fidélité par rapport à la foi et à la mission assumée, dans une société marquée presque de manière génétique par le matérialisme et l'avarice;
2. L'Église Orthodoxe Roumaine a choisi de règlementer, par l'intermède de normes statutaires, la succession dans le cas des hiérarques et des moines, pour que la tradition et sa mission spécifique soient les plus évidentes possibles;
3. Le Statut, parce qu'il doit protéger un ensemble de valeurs, a configuré un système normatif qui ne permet pas la limitation du droit à l'héritage;

4. La loi des cultes ne réglemente d'aucune manière, de manière dérogatoire du droit commun, le domaine successoral dans le cas des hiérarques et de moines;

5. Les dispositions statutaires dérogatoires doivent être interprétées strictement dans l'optique des dispositions constitutionnelles et les lois applicables, afin de pouvoir être considérées valables.

Références

[1] Pentru unele aspecte a se consulta: arhid. G. GRIGORIȚĂ, *Procedura statutară a alegerii de ierarhi în Biserica Ortodoxă Română*, Bucureşti, Editura Institutului Biblic şi de Misiune Ortodoxă, București, 2015;

[2] Statutul pentru organizarea și funcționarea Bisericii Ortodoxe Române a fost republicat în temeiul art. 2 din Ordinul secretarului de stat al Secretariatului de Stat pentru Culte, nr. 116 din 19 decembrie 2019 privind modificarea și completarea Statutului pentru organizarea și funcționarea Bisericii Ortodoxe Române, ordinul fiind publicat în Monitorul Oficial al României, Partea I, nr. 13 din 10 ianuarie 2020; Statutul pentru organizarea și funcționarea Bisericii Ortodoxe Române a fost recunoscut prin Hotărârea Guvernului României, nr. 53 din 16 ianuarie 2008, fiind publicat în Monitorul Oficial al României, Partea I, nr. 50 din 22 ianuarie 2008 și rectificat în Monitorul Oficial al României, Partea I, nr. 132 din 20 februarie 2008;

[3] „Επισκοπος χειροτονείσθωὑπὸ ἐπισκόπον δύο ἢ τπιῶν.". Γ. Α. ΎΡΑΛΛΗ και Μ. ΠΟΤΛΗ, *ΣΙΝΤΑΓΜΑ ΤΩΝ ΘΕΙΩΝ ΚΑΙ ΙΕΡΩ ΚΑΝΟΝΩΝ ΤΩΝ ΤΕ ΑΓΙΩΝ ΚΑΙ ΠΑΝΕΥΦΗΜΩΝ ΑΠΟΣΤΟΛΩΝ ΚΑΙ ΤΩΝ ΙΕΡΩ ΟΙΚΟΥΜΕΝΙΚΩΝ ΚΑΙ ΤΟΠΙΚΩΝ*, t. δ, ΕΚ ΤΗΣ ΤΥΠΟΓΡΑΦΙΑΣ Γ. ΗΑΡΤΟΦΙΛΑΚΟΣ, ΑΘΗΝΗΣΙΝ, 1852, p. 1;

[4] Eligibilitatea candidatului este evaluată în acord cu prevederile statutare incidente treptei ierarhice sau arhierești pentru care se candidează, existând și unele condiții specifie, după cum treapta arhierească este mai mică sau mai mare;

[5] Referitor la practica de emitere a unor asemenea decrete, deși Constituția din 1965 nu a prevăzut pentru șeful statului o atare atribuție, acesta le emitea, temeiul legal constituindu-l art. 21 din Decretul nr. 177 din 4 august 1948 pentru regimul general al cultelor religioase, publicat în Monitorul Oficial al României, Partea I, nr. 178 din 4 august 1948, astfel cum a fost modificat prin Decretul nr. 150 din 19 iunie 1974, publicat în Buletinul Oficial al României, Partea I, nr. 83 din 19 iunie 1974. Potrivit articolului modificat: „Şefii cultelor, precum şi mitropolitii, arhiepiscopii, episcopii, superintendentii, administratorii-apostolici, vicarii administrativi şi alţii, având funcţii asemănătoare, aleşi sau numiţi în conformitate cu statutele de organizare ale cultelor respective, nu vor fi recunoscuţi în funcţie decât în baza aprobării date prin decret prezidential, la propunerea Consiliului de Miniştri, în urma recomandarii Departamentului Cultelor". Exercitarea acestei atribuții de către șeful statului, în perioada regimului comunist, a reprezentat o formă de control manifestă asupra Bisericii Ortodoxe Române. Relativ cu acest aspect a se consulta: G. ENACHE, *Amestecul puterii politice în alegerea ierarhilor Bisericii Ortodoxe Române*, comunicare prezentată în cadrul Conferinței internaționale « Aspecte ale totalitarismului în România. I. N. S. T. – 10 ani de activitate (1993-2003) », Bucureşti, 6-7 octombrie 2003 și G. ENACHE, *Statul şi Biserica Ortodoxă Română în anii democraţiei populare*, în rev. « Dosarele istoriei », an VIII, nr. 9 [85], București, 2003, pp. 11-21. Nici Constituția din 1991 nu a statuat în sarcina președintelui atribuția recunoașterii ierarhilor BOR prin decret și, cu toate acestea, cei carea au ocupat funcția au continuat să emită

decrete de recunoaștere, până la momentul abogării Decretului nr. 177 din 4 august 1948, prin intrarea în vigoare a Legii nr. 489 din 28 decembrie 2006. Din punctul meu de vedere, de vreme ce Constituția din 1965 a fost în întregime abrogată, prin intrarea în vigoare a Constituției din 1991 [cf. art. 149 din noua Constituție, publicată în Monitorul Oficial al României, Partea I, nr. 233 din 21 noiembrie 1991 și care a intrat în vigoare în urma aprobării ei prin referendumul național din 8 decembrie 1991] aplicarea dispozițiilor art. 21 din Decretul nr. 177/1948 de către președinții României, după această dată, s-a realizat fără temei;

[6] Secretariatul de Stat pentru Culte este un „organ de specialitate al administrației publice centrale, cu personalitate juridică, în subordinea Guvernului și în coordonarea prim-ministrului, prin Cancelaria Primului-Ministru, finanțat integral de la bugetul de stat, prin bugetul Secretariatului General al Guvernului";

[7] Hotărârea nr. 44 din 13 februarie 2013 privind organizarea și funcționarea Secretariatului de Stat pentru Culte, publicată în Monitorul Oficial al României, Partea I, nr. 95 din 15 februarie 2013;

[8] Fie el: episcop, arhiepiscop, mitropolit, patriarh, patriarh ecumenic, papă sau catolicos;

[9] Termenul Biserică vine din grecescul *Εκκλησία*, fiind tradus, ad literam, *Casa Împăratului*. Gh. IOANIDŬ, *Dikționarŭ Elino – Românesku tradusŭ dupe a luĭ Skarlatŭ D. Bizantie*, Ed. Tipografia Statuluĭ, Bukureștĭ, 1864, p. 709. Biserica se manifestă și vizibil sau instituțional, conferind drepturi și stabilind obligații, nefiind o realitate eminamente spirituală. În acest sens, în literatura de specialitate s-a arătat: „Manifesting itself in society, the Church is required to wear a worldly institutional robe. The institutional character of the Church is a necessary instrument in the world, but it must not become a goal. The church wears the institution's robe, but it is necessary that trugh this robe to be reflected the light of grace. Christ assumed the human nature as His own image. The Church also assumes the institutional character as an aspect of it, but it must not distort the eschatological identity, but to facilitate communication and help the Church to become understood by this world dominated by the institutional mentality". Pr. P. VLAICU, *Biserca. Realitate eshatologică și prezență instituțională*, in rev. « Tabor », an 2007, nr. 2, Cluj Napoca, p. 46; „The Church [...] has a double dimension, divine and human, seen and unseen". Pr. I. BRIA, *Dicționar de Teologie Ortodoxă*, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, Bucureşti, 1990, p. 56; „la Chiesa è visibile perchè visibili i riti, la dottrina, la predicazione, il culto, i mezzi, il capo". G. DIBLASI, *Compendio di Dritto Canonico*, vol. unico, a spese del l'editore, Napoli, 1852, p. 6. În considerarea celor de mai sus, putem spune, de asemenea, că: „la Chiesa e una società d'uomini". Fr. MERCANTI, *Compendio di Dritto Canonico con Illustrazioni*, edizione treza, tom. I, parte I, Ranieri Guasti [eds.], Prato, 1843, p. 6;

[10] Pr. L. STAN, *Har și jurisdicție*, în rev. « Studii Teologice », seria a II-a, an XXII, nr. 1-2, ian.-feb., București, p. 9;

[11] „L'Evêque doit être l'âme de la vie ecclésiastique de son éparchie, en sorte que par la dignité épiscopale qu'il détienne, il puisse représenter la perfection en ce qui concerne le suivi de la vérité divine et le témoignage de la foi orthodoxe. Par la perte de la foi, les évêques deviennent cause de tourment pour tout le troupeau". Arhim. G. ȘERBAN, *Legislation canonique*, *œcumenique*, *du V-e siecle*, în rev. « Codrul Cosminului », an 2009, nr. 15, Iași, p. 202;

[12] Într-o viziune ușor diferită din punct de vedere formal, Hristu Andrutsos precizează că „Lucrările ierarhiei sunt: slujirea cuvântului, săvârșirea sfintelor taine și puterea și autoritatea de a dezlega păcatele oamenilor…”. Hr. ANDRUTSOS, *Simbolica*, trad. de † Iustin Moisescu, Editura Centrului Mitropolitan al Olteniei, Craiova, 1955, pp. 73-74;

[13] „Episcopul este în Biserică și Biserica în episcop. Cine nu e cu episcopul, acela nu e în Biserica.”. † S. CÆCILI CYPRIANI, *Libri de catholicæ ecclesiæ unitate*, *de lapsis et habitum virginum*, recognovit et adnotatione critica instruxit J. O. G. Krabinger, Libraria Henrici Laupp, Tubingæ, MDCCCLIII [1853]. La rândul său, Jean-Claude Larchet spune că: „Funcția episcopului de cap al Bisericii este incontestabil confirmată și de organizarea sinodală a Bisericii.” J.-C. LARCHET, *Biserica – Trupul lui Hristos*, vol. I, *Natura și structura Bisericii*, trad. de Marinela Bojin, Ed. Sophia, București, 2013, p. 127; † SILVESTRU DE CANEV, *Teologia Dogmatică Ortodoxă – cu expunere istorică a dogmelor*, trad. de arhim. Gherasim Miron, t. IV, Tipografia Cărților Bisericești, București, 1903, pp. 304-333;

[14] „Sinodul de la Niceea [325] a arătat că nu este nici o contradicție între preoție și căsătorie, de aceea a admis Hirotonia celor căsătoriți. În schimb, Biserica Ortodoxă impune candidaților la episcopat [ierarhie – s.n.] votul monahal. De asemenea, Biserica nu permite căsătoria după Hirotonie, nici recăsătorirea preoților. Din secolul XII [Conciliul de la Lateran, 1139], Biserica Romano-Catolică impune celibatul preoților, cu înțelegerea că celibatul ar aparține naturii sacerdoțiului și ar însemna disponibilitate în serviciul Bisericii. Luther a combătut vehement celibatul preoților catolici. Pastorii, ca și laicii, sunt liberi să se căsătorească sau nu. Papa Ioan Paul al II-lea, în scrisoarea *Mulieris Dignitatem [Demnitatea femeii]*, din septembrie 1988, respinge hirotonia femeilor. Argumentul: Iisus a fost bărbat. Apostolii au fost bărbați, Biserica n-a hirotonit femei. Ortodocșii folosesc aceleași argumente contra hirotoniei femeilor în treapta de preot și de episcop, dar nu în cea de diaconiță. Protestanții acceptă femeile la ministeriu.”. Pr. I. BRIA, *Tratat de teologie dogmatică și ecumenică*, Atelierele Tipografice Metropol, București, 1999, p. 182. Părintele Gheoghe Soare, în acord cu tradiția Bisericii, indică și hirotonia ca impediment la căsătorie: „Hirotonia. Biserica, potrivit dispoziţiunilor canonice, interzice căsătoria, după primirea hirotoniei în treptele ierarhice de: diacon, preot şi arhiereu. Canoanele, care opresc acest lucru, sunt de autoritate ecumenică, şi Biserica nu poate trece cu niciun chip peste acest impediment.”. Pr. Gh. SOARE, *Impedimentele la căsătorie*, în rev. « Biserica Ortodoxă Română », an LXI, nr. 4-6, luna aprilie – iunie, București, p. 237. Vezi și: Γ. Α. Ῥαλλη και Μ. Ποτλη, *op. cit.*, p. 33;

[15] „Să fie arătate [cunoscute în mod lămurit] bunurile [lucrurile] proprii ale episcopului [în cazul că ar avea şi bunuri proprii] şi să fie arătate [cunoscute în mod lămurit] şi cele domneşti [bunurile Domnului, ale Bisericii], ca episcopul să aibă putere când s-ar săvârşi din viaţă să lase ale sale cui vrea şi cum vrea şi să nu se piardă cele ale episcopului sub cuvânt că ar fi bunuri bisericeşti, atunci când el ar avea soţie şi copii sau rude sau casnici. Căci este drept înaintea lui Dumnezeu şi a oamenilor ca nici Biserica să nu sufere vreo pagubă din pricina necunoaşterii bunurilor episcopului şi ca nici episcopul sau rudele lui să-şi risipească [bunurile] din pricina Bisericii, sau să cadă şi la certuri [procese] ai săi, şi moartea lui să se acopere de ocări.”. Arhid. I. N. FLOCA, *Canoanele Bisericii Ortodoxe. Note și comentarii*, Ed. Andreiană, Sibiu, 2005, p. 32; Γ. Α. Ῥαλλη και Μ. Ποτλη, *op. cit.*, p. 54;

[16] Arhid. I.N. FLOCA, *op. cit.*, p. 33;

[17] „Μοναχὸς, ἡ, ὸν – singur, singuratic”. Gh. IOANIDŬ, *op. cit.*, p. 1446;

[18] L. M. HAROSA, *Drept canonic*. *Curs universitar*, Ed. Universul Juridic, București, 2013, pp. 93-94;

[19] Potrivit prevederilor Regulamentului pentru organizarea vieții monahale și functionarea administrativă și disciplinară a mănăstirilor, această perioadă mai este denumită și ispitire canonică, ea fiind împărțită în trei sub-perioade;

[20] L. M. HAROSA, *op. cit.*, p. 95;

[21] Este vorba de votul sărăciei [*penias pauperitatis*/ στηνοζορίας], votul fecioriei [*castitatis*/ παρθενας] și votul ascultării [*obidientiae*/ ζυποταγης];

[22] „Monahii sunt obligaţi să nu aibă nimic al lor propriu, ci toate ale lor să le atribuie mănăstirii. Căci fericitul Luca zice despre cei ce cred în Hristos şi închipuiesc vieţuirea monahilor că « nici unul nu zicea că din a sa avere este ceva al său, ci totul Ie era de obşte » (F. Ap. 4, 32). Pentru aceea celor ce voiesc să fie monahi li se dă voie, în privinţa averilor lor, să ia dispoziţii mai înainte şi să transmită averile lor oricăror persoane ar voi care, firește, nu sunt oprite prin lege. Căci după ce se vor face monahi, mănăstirea are stăpânire peste toate ce le aparţin lor şi nu li se îngăduie lor ca să poarte grijă şi să facă dispoziţii asupra bunurilor lor. Iar de se va vădi că vreunul îşi va însuşi oarecare avere care nu s-a atribuit mănăstirii şi se va robi patimei iubirii de câştig, aceea să se ia de la dânsul de către egumen sau de către episcop, şi vânzându-se în prezenţa multora, să se împartă celor săraci şi lipsiţi. Iar cel ce a căutat să răpească o astfel de avere ca oarecând Annnia, Sfântul Sinod a hotărât să se înţelepţească cu certare potrivita. Şi este lămurit că cele canonisite de Sfântul Sinod pentru monahii bărbaţi, a hotărât să aibă vigoare şi pentru monahiile femei.”. Arhid. I. N. FLOCA, *op. cit.*, pp. 340-341;

[23] În tâlcuirea canonului, Mitropolitul Andrei Șaguna precizează că una din cerințele accederii la monahism este „dispunerea după propia voință cu privire la propria avere privată, mai înainte de intrarea sa la mănăstire, căci intrând cineva odată la mănăstire, și făcându-se noviț, nu mai poate dispune cu averea sa, ci aceea are să treacă în posesiunea mănăstirei, afară dacă el va fi silit a părăsi mănăstirea din vina egumenului, căci numai atunci are a i-se da îndărăt averea și el o duce cu sine la altă mănăstire; iar dacă novițul, sau călugărul, sau călugărița ar aveà pe ascuns vre-o avere, și aceasta s’ar dovedi, atuncea acea avere ascunsă se confișcă, și se împarte între săraci prin egumenul sau episcopal eparhial.”. † ANDREIU BARON DE ȘAGUNA, *Compendiu de Drept Canonic al unei Sântei Sobornicești și Apostolești Biserici*, ediținea a III-a, Editura și Tiparul Tipografiei Arhidiecezane, Sibiu, 1913, pp. 159-160. A se vedea și: pr. C. PANȚURU, *Regimul canonic*, *statutar şi regulamentar privind averea monahilor*, în vol. « Pastoraţie şi misiune în Biserica Ortodoxă », Ed. Episcopiei Dunării de Jos, Galaţi, 2001, pp. 77-78;

[24] „Ierarhie – [gr. hiera + arhi = conducere sau autoritate sacră]: cuprinde slujirile confirmate prin hirotonie, care au autoritatea de a conduce în Biserică. [...] Cele trei trepte ierarhice nu sunt altceva decât cele trei grade de sfințenie de pe scara desăvârșirii: episcopul este simbolul perfecțiunii; prezbiterul al iluminării, iar diaconul al purificării.”. Pr. I. BRIA, *Dicționar de Teologie Ortodoxă*, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1991, p. 206; S. IZVORANU, *Ierarhia bisericească după scrierile bărbaților apostolici*, în rev. « Mitropolia Moldovei », an XXXIII [1957], nob. – dec., nr. 8 – 9, Iași, p. 112; „The hierarchy, which is of divine institution by reason of the sacred orders, consists of bishops, priests and ministers.”. Rev. P. TRUDEL S.S., *A dictionary of Canon Law*, B. Herder Book Co., London, 1920, p. 103;

[25] „În cadrul dreptului civil, noțiunea de succesiune se întrebuințează și într-un sens mai larg, desemnând orice transmisiune de drepturi, între vii sau pentru cauză de moarte, transmisiune care poate fi universală, cu titlu universal sau cu titlu particular. În acest sens, de exemplu, cumpărătorul este succesorul cu titlu particular al vânzătorului [iar vânzătorul este autorul cumpărătorului]. Prin urmare, noțiunea de succesiune [și succesor] numai în sens restrâns al cuvântului – transmisiune pentru cauză de moarte – este echivalent al noțiunii de moștenire [moștenitor]. Astfel fiind considerăm că este mai indicată folosirea noțiunii de moștenire, această tendință putând fi observată și în domeniul legislativ. De exemplu, art. 45 din Constituția României [revizuită în anul 2003] prevede că « Dreptul de moștenire este garantat. ».”. F. DEAK și R. POPESCU, *Tratat de drept succesoral*, ediția a III-a actualizată și completată, vol. I, *Moștenirea legală*, Ed. Universul Juridic, București, 2013, p. 22;

[26] „*Eparhia* [gr. ἐπαρχία], din punct de vedere administrativ, reprezintă unitatea administrativ-bisericească ce se află sub autoritatea unui episcop şi care este compusă din parohiile şi mănăstirile ce se găsesc pe acel teritoriu. Termenul a fost împrumutat din limbajul juridic roman. Împăratul Constantin cel Mare [306-337] – urmând exemplul predecesorului său, împăratul Diocleţian [285-305] – a împărţit Imperiul în 4 prefecturi, ce se subdivideau în dioceze. Diocezele erau alcătuite din mai multe provincii, care, în limba greacă, erau identificate prin termenul de eparhii [gr. ἐπαρχίαι]. De aici, termenul de eparhie a trecut ulterior în limbajul bisericesc, la început cu înţelesul de provincie, mitropolie, iar mai apoi cu cel actual de episcopie”. Explicația este oferită într-o notă de subsol, de pr. George Grigoriță, în contextul elaborării Regulamentului Autorităților Canonice.

[27] Pentru unii autori, statutul reprezintă „modalitatea de concretizare a organizării cultului religios”. M. CONSTANTINESCU, A. IORGOVAN, I. MURARU şi E. S. TĂNĂSESCU, *Constituţia României revizuită*. *Comentarii şi explicaţii*, Ed. All Beck, Bucureşti, 2004, p. 58;

[28] „... deşi în Constituţie se foloseşte doar termenul statut, în Legea nr. 489/2006 se foloseşte, alături de acesta, şi sintagma coduri canonice [art. 8 alin. (3), va rămâne în sarcina CCR-ului să se pronunţe, pe viitor, în sens restrictiv sau extensiv, asupraconstituţionalităţii sau nu a sintagmei”. R. ZIDARU, *Considerații juridice referitoare la restrângerea exercițiului libertății religioase în contextul prăznuirii Sfintei Cuvioase Parascheva de la Iași*, în rev. «Universul Juridic», an 2020, oct, nr. 10, București, pp. 92-93. Din punct de vedere istoric, expresia cod canonic ia naştere abia la începutul sec. al XIX-lea, când Biserica Catolică promulga primul său *Codex Iuris Canonici* [*cf. Codex Iuris Canonici Pio X Pontificis Maximi iussu digestu Benedicti Papae XV auctoritate promulgatus (Praefatione*, fontium *annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasparri auctus)*, *Romae*, *1917*]. Arhid. G. GRIGORIŢĂ, *Legea nr. 489/2006 şi Biserica Ortodoxă Română*, în rev. « Studii Teologice », seria a III-a, anul III, nr. 2, Bucureşti, 2007, p. 198;

[29] Legea nr. 489 din 28 decembrie 2006 privind libertatea religioasă și regimul general al cultelor a fost republicată în temeiul art. 248 din Legea nr. 187/2012 pentru punerea în aplicare a Legii nr. 286/2009 privind Codul penal, publicată în Monitorul Oficial al României, Partea I, nr. 757 din 12 noiembrie 2012, cu modificările ulterioare, dându-se textelor o nouă numerotare, fiind publicată inițial în Monitorul Oficial al României, Partea I, nr. 11 din 8 ianuarie 2007 și a fost modificată prin Legea nr. 76/2012 pentru punerea în aplicare a Legii nr. 134/2010 privind Codul de procedură civilă, publicată în Monitorul

Oficial al României, Partea I, nr. 365 din 30 mai 2012, cu modificările ulterioare. Prezenta reglementare reprezintă o aplicare a dispozițiilor legislației civile, potrivit cu care „Persoana juridică se înființează: […] în orice alt mod prevăzut de lege." [cf. art. 194 alin. (1) lit. c) C. civ., adică Legea nr. 287 din 17 iunie 2009, Republicată în temeiul art. 218 din Legea nr. 71/2011 pentru punerea în aplicare a Legii nr. 287/2009 privind Codul civil, publicată în Monitorul Oficial al României, Partea I, nr. 409 din 10 iunie 2011, fiind publicată inițial în Monitorul Oficial al României, Partea I, nr. 511 din 24 iulie 2009, a fost modificată prin Legea nr. 71/2011 şi rectificată în Monitorul Oficial al României, Partea I, nr. 427 din 17 iunie 2011 şi în Monitorul Oficial al României, Partea I, nr. 489 din 8 iulie 2011.]. A se vedea și: P TRUȘCĂ și A. M. TRUȘCĂ, *Drept civil*. *Persoanele*, ediția a II-a revizuită și adăugită, Universul Juridic, București, 2015, pp. 238-239; E. CHELARU, *Drept civil*. *Persoanele*, ediția a IV-a revizuită și adăugită, Ed. Ch. Beck, București, 2016, pp. 200-201. În fine, trebuie arătat și că din perspectiva legislației statale, eparhiile nu sunt supuse procedurii de înmatriculare, înregistrare sau înscriere, de care să fie legată însăși dobândirea personalității juridice. E. CHELARU, *op. cit.*, p. 201;

[30] Legislația civilă definește vocația la moștenire în felul următor: „Pentru a putea moşteni, o persoană trebuie să aibă calitatea cerută de lege sau să fi fost desemnată de către defunct prin testament." [art. 962 C. civ.]. Doctrina precizează că există o „vocație generală, ce desemnează vocația potențială (eventuală) a unei personae de a culege moștenirea lăsată de o altă persoană" și o „vocație efectivă (utilă), determinată prin devoluțiunea succesorală, cu ajutorul căreia se selectează, dintre persoanele cu vocație succesorală generală acele personae care vor culege efectiv moștenirea lăsată de defunct.". F. DEAK și R. POPESCU, *op. cit.*, p. 94;

[31] În ceea ce privește posibilitatea coexistenței calității de moștenitor legal cu cea de moștenitor testamentar, doctrina s-a pronunțat pozitiv, dându-se ca exemplu situația în care: „de cuius-ul are doi frați și unul dintre ei este beneficiarul unui legat cu titlu particular având ca obiect o casă, fratele gratificat va primi casa în calitate de moștenitor testamentar, iar ½ din restul moștenirii în calitate de moștenitor legal, în vreme ce celălalt frate va primi ½ din restul moștenirii în calitate de moștenitor legal.". F. DEAK și R. POPESCU, *op. cit.*, p. 26; v. și D. NEGRILĂ, *Moștenirea în noul cod civil*. *Studii teoretice și practice*, ediția a II-a revăzută și adăugită, Ed. Universul Juridic, București, 2015, pp. 38-40;

[32] În legătură cu acest apect, reputați specialiști în domeniu au semnalat că: „Deschiderea moștenirii (și data ei) nu trebuie confundată cu deschiderea procedurii succesorale notariale. Este impardonabil ca de prea multe ori, atât în sălile de judecată, cât și în unele hotărâri judecătorești să se folosească expresia « nu s-a deschis moștenirea » sau « nu am deschis moștenirea (succesiunea) » ori « nimeni nu a deschis moștenirea (succesiunea) », în condițiile în care decesul a intervenit de multă vreme și cu acel prilej moștenirea (succesiunea) s-a deschis în mod automat, fără a fi nevoie de vreo manifestare de voință din partea moștenitorilor (succesibililor)." F. DEAK și R. POPESCU, *Tratat de drept succesoral*, ediția a III-a actualizată și completată, vol. I, *Moștenirea legală*, Ed. Universul Juridic, București, 2019, p. 58. Autorii mai arată în nota de subsol numărul 1, că: „În speța soluționată prin dec. civ. nr. 411/1979 a Trib. J. Ilfov, notariatul de stat competent a comunicat instanței că « succesiunea defunctei decedată la 08.02.1977 nu a fost deschisă » [a se vedea « Revista Română de Drept », nr. 10/1979, p. 65]. Este evident că în cauză moștenirea a fost deschisă pentru că ea nu depinde de actele ce se efectuează ulterior la

notarul competent. Ceea ce nu a fost declanşat este procedura succesorală notarială, care produce alte efecte juridice".

[33] *Închinovierea* reprezintă, pe de o parte, primirea în mănăstire a celui ce dorește să aleagă viața monahală [cf. art. 77 alin. (1) din Statut], iar pe de altă parte, primirea unui monah de la o alta, în urma transferului aprobat.

[34] *Mănăstirea de metanie* este cea în care persoana a primit statutul de monah, în urma săvârșirii slujbei de tundere în monahism. Pentru mai multe informații, a se consulta: sine auct., Molitfelnic, Editura Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române, București, 2010;

[35] *Cf.* can. 4 sin. IV ecum;

[36] Termenul *canon* a fost explicat astfel: „Le mot Κανών onvient du grec et signifie règle; on s'en est servi dans l'Église pour les décisions qui règlent la foi et la conduite des fidèles.". Cf. cu: Mgr ANDRÉ et de L'Abbé CONDIS, *Dictionnaire de Droit Canonique et de Sciences en conexion avec le Droit Canon*, reviz. de J. Wagner, ediția a III-a, t. I, Hipolyte Walzer Libraire – Éditeur, Paris, 1901, p. 280; tot pentru sensul de regulă al cuvântului canon, vezi și: C. ALEXANDRE, *op. cit.*, p. 459, precum și R. NAZ, *Dictionnaire de droit canonique*, t. II, Paris, 1937, p. 1283; de asemenea, a se avea în vedere și următoarele definiții, expuse în diferite dicționare cu caracter general: „CANON [du grec kanôn, règle] – en Théologie et en Liturgie, ce mot a plusieurs acceptions fort différentes. Les Canons de l'Église sont les lois et les règles de la discipline ecclésiastique.". Vezi: M. N. BOULLIET, *Dictionnaire Universel des sciences, des Lettres et des Arts*, 4éme edition revisé, Librairie de L. Hachette et Cle, Paris, 1859, p. 253; „CANON LAW – the term « canon » is a Greek word that comes from He-brew and means a « reed or straight rod », used for measuring a « yardstick ». In early Christianity it was used to connote a rule or norm of behavior, truth, or faith [acc. to Galatens VI, 16].". A se vedea: M. PROKURAT, A. GOLITZIN și M. D. PETERSON, *op. cit.*, p. 73; „CANON – (3) the rules of a religious order.". Vezi: S. MATHEWS & G. B. SMITH, *op. cit.*, p. 66; „CANON – esta palabra, que viene de un término griego que designa una regla de medir, se aplica en la Iglesia en general.". Cf. cu: L. BOUIER, *Dictionario de Teología*, Ed. Herder, Barcelona, 1973, p. 131; „CANON – signifie règle, loi [...] IV. CANONS DES CONCILES – se dit des lois, des décrets ou décisions prescrits par les conciles sur la foi, la discipline ou les moeurs.". Vezi în acest sens: L'Abbe J. B. GLAIRE, *Dictionnaire universel des sciences ecclésiastiques*, t. I, Ed. Libraire Poussielgue Frères, Paris, 1868, p. 386; „CANON – a law or ordinance of the Church, enacted by a council or other ecclesiatical body. In this sense the term is now commonly used.". Cf. cu: rev. W. STAUNTON, *op. cit.*, p. 129; trebuie avută în vedere și sintagma: „CANON LAW – in a broad sense, is the totality of legal regulations concerning church life. In its narrow [formal] sense, it is the totality ofthe rules that derive from church authorities.". A. P. KAZHDAN, *The Oxford Dictionary of Byzantium*, Oxford University Press, New York, 1991, p. 372; „CANON – adică normă și regulă privind etica creștină, cultul, disciplina clerului, monahismul, organizarea și jurisdicția bisericească, promulgată de sinoade ecumenice sau locale, ori recomandată de Părinții Bisericii. În general, canoanele reprezintă legislația bisericească, ce formează obiectul dreptului bisericesc". Conform cu: pr. I. BRIA, *op. cit.*, p. 78;

[37] Cf. can. 6 sin. C-nopol;

[38] Relativ cu acest aspect, părintele arhidiacon Ioan Floca precizează că: „efectele juridice ale tunderii în monahism au fost identice în Biserica veche și în epoca bizantină mai

ales, cu efectele decesului, în sensul că cel intrat în monahism își pierdea toate drepturile civile și politice, nemairămânând decât cu minime drepturi necesare pentru conviețuire în cadrul obștei monahale. În rest, el își pierdea până și calitatea de cetățean, dar fiind scutit în același timp și de îndatoririle corespunzătoare. Aceste efecte juridice sunt de fapt consecințe ale celor trei voturi pe care le depune cel ce primește tunderea în monahism". arhid. I. N. FLOCA, *Drept canonic ortodox. Legislație și administrație bisericească*, vol. II, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 1990, p. 134; „Cei ce se dedicau vieții monahale, prin faptul că se lepădau de toate bogățiile lumești, erau socotiți ca morți pentru lume; în consecință, ei erau tratați ca atare și din punct de vedere juridic; își pierdeau viața civilă". O. SACHELARIE, *Moșenirea monahilor în vechile noastre orânduiri juridice*, în rev. « Glasul Bisericii », an XXVIII [1969], nr 1-2, București, p. 103;

[39] Dar, legislația civilă conține și reglementări referitoare la incapacități de a primi legate, în această categorie intrând și preoții care au acordat asistență religioasă persoanei, pe timpul boli care este cauza decesului [cf. art. 990 alin. (3) C. civ.]. În doctrină s-a explicat această prevedere în felul următor: „trebuie să se stabilească dacă legatarul ce are calitatea de preot a acordat în mod constant asistență religioasă dispunătorului în cursul boli care i-a cauzat decesul și dacă liberalitatea a fost întocmită în favoarea preotului în considerarea actelor de asistență religioasă. După cum s-a decis în mod corect în jurisprudență, nu intervine sancțiunea nulității atunci când din ansamblul materialului probator administrat a rezultat că asistența religioasă acordată de către preot testatoarei, în cursul bolii din cauza căreia a survenit decesul, a avut caracter sporadic, aceasta fiind o persoană credincioasă, care mergea frecvent la mănăstiri și la alte biserici pentru a asista la slujbe, pentru a se spovedi și împărtăși. În plus, s-a reținut că factorul determinant în încheierea testamentului în favoarea preotului și a soției sale l-a constituit ajutorul financiar și moral pe care aceștia l-au acordat testatoarei, în lipsa sprijinului din partea rudelor, iar nu asistența religioasă, care nu a fost repetată, continuă, pentru a influența ea singură voința dispunătoarei.". F. DEAK și R. POPESCU, *op. cit.*, p. 44; v. și Decizia nr. 404 din 8 mai 2008 a Secției Civile a Curții de Apel Craiova;

[40] Decizia Curții Constituționale a României, nr. 601 din 16 iulie 2020 referitoare la excepţia de neconstituţionalitate a dispozițiilor art. 164 alin. (1) din Codul civil, publicată în Monitorul Oficial al României, Partea I, nr. 88 din 27.01.2021.

[41] „Persoana care nu are discernământul necesar pentru a se îngriji de interesele sale, din cauza alienaţiei ori debilităţii mintale, va fi pusă sub interdicţie judecătorească".

[42] „Curtea reține că măsura punerii sub interdicție judecătorească reglementată de art. 164 alin. (1) din Codul civil nu este însoțită de suficiente garanții care să asigure respectarea drepturilor și a libertăţilor fundamentale ale omului. Aceasta nu are în vedere faptul faptul că pot exista diferite grade de incapacitate și nici de diversitatea intereselor unei persoane, nu se dispune pentru o perioadă determinată de timp și nu este supusă unei revizuiri periodice. Orice măsură de ocrotire trebuie să fie proporțională cu gradul de capacitate, să fie adaptată la viața persoanei, să se aplice pentru cea mai scurtă perioadă de timp, să fie revizuită periodic și să țină cont de voința și preferințele persoanelor cu dizabilități. De asemenea, la reglementarea unei măsuri de ocrotire, legiuitorul trebuie să țină cont de faptul că pot exista diferite grade de incapacitate, iar deficiența mintală poate varia în timp. Lipsa capacității psihice sau a discernământului poate lua diferite forme, spre exemplu, totală/ parțială sau reversibilă/ ireversibilă, situație care reclamă instituirea unor măsuri de ocrotire

adecvate realității și care, însă, nu se regăsesc în reglementarea măsurii interdicției judecătorești. Prin urmare, diferitelor grade de dizabilitate trebuie să le fie atașate grade de ocrotire corespunzătoare, legiuitorul în reglementarea măsurilor juridice trebuind să identifice soluții proporționale. O incapacitate nu trebuie să conducă la pierderea exercițiului tuturor drepturilor civile, ci trebuie analizată în fiecare caz în parte. Prin urmare, Curtea reține că în lipsa instituirii garanțiilor care să însoțească măsura de ocrotire a punerii sub interdicție judecătorească se aduc atingeri prevederilor constituționale ale art. 1 alin. (3), ale art. 16 alin. (1) și ale art. 50, astfel cum se interpretează potrivit art. 20 alin. (1), și prin prisma art. 12 din Convenția privind drepturile persoanelor cu dizabilități.". *v*. par. 46 și 47 din *dec*. *Precit*;

[43] „(1) Proprietarul unui bun are dreptul de a-l revendica de la posesor sau de la o altă persoană care îl deţine fără drept. El are, de asemenea, dreptul la despăgubiri, dacă este cazul; (2) Dreptul la acţiunea în revendicare este imprescriptibil, cu excepţia cazurilor în care prin lege se dispune altfel; (3) Dreptul de proprietate dobândit cu bună-credinţă, în condiţiile legii, este pe deplin recunoscut; (4) Hotărârea judecătorească prin care s-a admis acţiunea în revendicare este opozabilă şi poate fi executată şi împotriva terţului dobânditor, în condiţiile Codului de procedură civilă.";

[44] Modificată şi completată prin Legea de revizuire a Constituţiei României nr. 429/2003, publicată în Monitorul Oficial al României, Partea I, nr. 758 din 29 octombrie 2003, republicată de Consiliul Legislativ, în temeiul art. 152 din Constituţie, cu reactualizarea denumirilor şi dându-se textelor o nouă numerotare [art. 152 a devenit, în forma republicată, art. 156]. Legea de revizuire a Constituţiei României nr. 429/2003 a fost aprobată prin referendumul naţional din 18-19 octombrie 2003 şi a intrat în vigoare la data de 29 octombrie 2003, data publicării în Monitorul Oficial al României, Partea I, nr. 758 din 29 octombrie 2003 a Hotărârii Curţii Constituţionale a României nr. 3 din 22 octombrie 2003 pentru confirmarea rezultatului referendumului naţional din 18-19 octombrie 2003 privind Legea de revizuire a Constituţiei României;

[45] I. MURARU și E. S. TĂNĂSESCU, *Drept constituțional și instituții politice*, vol. I, ediția a XV-a, Ed. Ch. Beck, București, 2016, p. 176; M. ANDREESCU și A. PURAN, *Drept constituțional și instituții politice*. *Teoria generală și instituții constituționale*. *Jurisprudență constituțională*, ediția a IV-a, Ed. Ch. Beck, București, 2020, p. 322;

[46] M. ANDREESCU și A. PURAN, *op. cit.*, p. 322;

[47] „Terminologic vorbind, chiar și Constituția României, în art. 46, utilizează tot termenul de « moștenire », atunci când spune că « Dreptul la moştenire este garantat. », probabil din aceleași considerente de claritate juridică.". D. NEGRILĂ, *op. cit.*, p. 18; M. ELIESCU, *Moștenirea și devoluțiunea ei în dreptul Republicii Socialiste România*, Ed. Academiei Republicii Socialiste România, București, 1966, p. 19.

[48] D. NEGRILĂ, *op. cit.*, p. 17; F. DEAK și R. POPESCU, *op. cit.*, p. 19; M. M. SOREAȚĂ, *Noutăți legislative în materia succesiunilor introduce prin noul Cod civil*, Ed. Hamangiu, București, 2013, p. 4;

[49] „Textul art. 53 din Constituție stabilește condițiile și limitele restrângerii exercițiului unor drepturi sau al unor libertăți. El are în vedere, însă, drepturile și libertățile fundamentale înscrise în Capitolul II al Titlului II din Constituția României, nu și alte drepturi.". Decizia Curții Constituționale a României nr. 503 din 16 noiembrie 2004, publicată în Monitorul Oficial al României, Partea I, nr. 53 din 17 ianuarie 2005.

[50] M. ANDREESCU și A. PURAN, *op. cit.*, p. 298; M. ANDREESCU, *Proporționalitatea ca principiu de drept constituțional*, în rev. « Universul Juridic », an 2016, aprilie, nr. 4, București, p. 38;

[51] Potrivit art. 115 alin. (6) din Constituție: „Ordonanţele de urgenţă nu pot […] afecta regimul instituţiilor fundamentale ale statului, drepturile, libertăţile şi îndatoririle prevăzute de Constituţie". Este adevărat că, interdicția de afectare se referă strict la ordonanțele de urgență adoptate de executiv, dar ea este valabilă și în cazul legilor, în sensul că nici acestea nu trebuie să le afecteze, prin lipsă de predictibilitate, cum este cazul de față, unde fiind o situație excepțională și norma din lege nu este competă, să se ajungă ca ea să fie completată de acte inferioare [e.g. hotărâri de guvern, ordine de ministru etc.]. Termenul a afecta a fost explicat chiar de Curtea constituțională într-o decizie relativ recentă, în ea precizându-se că: „Ordonanţele de urgenţă nu pot fi adoptate dacă « afectează », dacă au consecinţe negative, dar, în schimb, pot fi adoptate dacă, prin reglementările pe care le conţin, au consecinţe pozitive în domeniile în care intervin. Curtea a arătat că verbul « a afecta » este susceptibil de interpretări diferite, aşa cum rezultă din unele dicţionare. Din punctul de vedere al Curţii, aceasta urmează să reţină numai sensul juridic al noţiunii, sub diferite nuanţe, cum ar fi: « a suprima », « a aduce atingere », « a prejudicia », « a vătăma », « a leza », « a antrena consecinţe negative »„. A se vedea: Decizia Curții Constituționale a României nr. 906 din 16 decembrie 2020, referitoare la excepţia de neconstituţionalitate a dispoziţiilor art. 1 pct. 1, 2 și 4 din Ordonanța de urgență a Guvernului nr. 60/2017 pentru modificarea şi completarea Legii nr. 448/2006 privind protecţia şi promovarea drepturilor persoanelor cu handicap, publicată în Monitorul Oficial al României, Partea I, nr. 79 din 25.01.2021 și Decizia Curții Constituționale a României nr. 1189 din 6 noiembrie 2008, publicată în Monitorul Oficial al României, Partea I, nr. 787 din 25 noiembrie 2008;

[52] Într-o decizie de speță, Curtea Constituțională a precizat că: „atât art. 53 cât și documentele internaționale în materia drepturilor omului, de exemplu, Convenția europeană a drepturilor omului, Pactul internațional relativ la drepturile civile și politice, admit posibilitatea diminuării rezonabile a gradului de protecție oferită unor drepturi fundamentale, în anumite momente sau situații, cu respectarea unor condiții, câtă vreme prin acestea nu este atinsă chiar substanța drepturilor.". Decizia Curții Constituționale a României nr. 1414 din 4 noiembrie 2009, publicată în Monitorul Oficial al României, Partea I, nr. 796 din 23 noiembrie 2009.

[53] În dreptul administrativ, dreptul de administrare are o natură diferită de dreptul de administrare regăsit în dreptul civil, reputați specialiști din domeniu afirmând că: „Dreptul de administrare are o natură administrativă, neconfundându-se cu drepturile reale derivate din dreptul de proprietate civilă." V. VEDINAȘ, *Drept administrativ*, ediția a X-a revăzută și actualizată, Ed. Universul Juridic, București, 2017, p. 514 și E. BĂLAN, *Introducere în studiul domenialității*, Ed. All Beck, București, 2004, p. 60. Doamna profesor universitar doctor Verginia Vedinaș nu este de acord asupra compatibilității dreptului de dispoziție cu dreptul de administrare, ea precizând, în mod just, următoarele: „Nu împărtășim soluția recunoașterii dreptului de a dispunde de bun, deoarece ea duce la o identificare a statutului proprietarului cu cel al titularului dreptului de administrare, ceea ce înseamnă, în ultimă instanță, o înstrăinare deghizată.". *Ibidem*;

[54] „Potrivit art. 8 alin. (1) din Legea nr. 489/2006 cultele recunoscute sunt persoane juridice, același statut avându-l și părţile componente ale acestora [art. 8 alin. (2)]. Cu toate că legiuitorul român nu a alăturat la sintagma folosită și expresia de drept privat, este exclus

ca pentru cultele religioase să se reţină aplicabilitatea regimului de drept public, deoarece ele nu iau parte la organizarea Statului și nu sunt instituţii publice. Prin urmare, ele sunt persoane juridice de drept privat și de utilitate publică. Biserica Ortodoxă Română, neparticipând la organizarea Statului în sensul exercitării vreuneia din prerogativele celor cele trei puteri, are statutul de persoană juridică de drept privat și de utilitate publică. Această personalitate este afirmată expresis verbis în art. 41 alin. (1) – raportat la art. 6 alin. (1) – din Statutul pentru organizarea și funcţionarea Bisericii Ortodoxe Române. La rândul lor, eparhiile și parohiile din jurisdicţiile lor, ca și componente ale BOR, posedă aceeași personalitate [art. 41 alin. (1)]. Mai mult, pentru a argumenta în plus că dreptul aplicabil Bisericii Ortodoxe Române este cel privat, evoc și principiul autonomiei cultelor, consacrat de art. 29 alin. (5) din Constituţie, potrivit cu care acestea sunt autonome faţă de stat. Și, deoarece în virtutea acestuia Biserica Ortodoxă Română are dreptul de a-și stabili unilateral normele doctrinare, clericale și judiciare [...] și de a se autoguverna prin acestea, în mod independent faţă de Stat, este evident că Statul nu-i poate stabili acesteia, ca și regim aplicabil, dreptul public, o atare ipoteză însemnând subordonarea Bisericii Ortodoxe Române Statului și o deviere de la principiul autonomiei.". R. ZIDARU, *Raziile forţelor de ordine în bisericile sucevene și în Biserica Sfânta Ecaterina din Constanța – exemple că libertatea religioasă poate fi pusă între paranteze*..., în rev. « Studia Theologica Orthodoxa Doctoralia Napocensia », vol. III, an II [2020], nr. 2, Ed. Reîntregirea, Cluj-Napoca, pp. 174-176; Sintagma utilitate publică a generat în rândul unora confuzia cum că Biserica Ortodoxă Română ar fi o instituţie publică, ei demarând chiar unele acţiuni înaintea instanţelor de judecată ale Statului, ca actele emise de autorităţile ecleziastice ale Bisericii Ortodoxe Române, ca de exemplu acelea de caterisire, să fie anulate pe calea contenciosului administrativ. De asemenea, în doctrină exista părerea că: „actele diferitelor structuri bisericești, inclusiv hătărâri ale Sfântului Sinod al Bisericii Ortodoxe Române sau cele ale Adunării Naţionale Bisericești pot fi atacate în contencios administrativ și, eventual suspendate, în condiţiile art. 14 și art. 15 din Legea nr. 554/2004, modificată, cu trimitere la art. 2 alin. (1) lit. ș) teza a II-a din această lege, texte care vizează perturbarea previzibilă gravă a funcţionării unui seriviciu public, și anume serviciul religios". A. IORGOVAN, L. VITAN, A. S. CIOBANU și D. I. PASĂRE, *Legea contenciosului administrativ. Comentariu și jurisprudenţă*, Ed. Universul Juridic, București, 2008, pp. 97-98;

[55] „Este de observat caracterul diriguitor al legii. Ea trasează condiţiile în care cultele religioase se pot organiza şi prevederile statutare nu pot contraveni legii, deoarece respectarea legii reprezintă o obligaţie de rang constituţional [art. 1 alin. (5)]. Aşadar, vorbim de o limitare a cultelor religioase în a se organiza intern, limitare care este prevăzută de Constituţie, in abstracto şi care devine in concreto, atunci când legea o prevede expres.". R. ZIDARU, *Restrângerea exerciţiului libertăţii religioase în preajma sărbătorilor pascale – o analiză critică*, în rev. « Universul Juridic », an 2020, nr. 6, iunie, București, pp. 111-112. Pentru opinie întru-câtva asemănătoare, a se vedea şi I. MURARU şi E. S. TĂNĂSESCU, *op. cit.*, p. 179. Unii specialişti, pun un semn de egalitate între ipoteza de limitare şi cea de restrângere, arătând, totodată, că: „în temeiul art. 53 alin. (1) din Constituţie, orice restrângere a exerciţiului oricărui drept şi sub orice aspect nu poate fi presupusă, ci trebuie prevăzută expres de lege". T. BODOAŞCĂ, *Utilizarea operei de către terţe persoane fără consimţământul titularului dreptului de autor*, în rev. « Universul Juridic », an 2019, nr. 6, iunie, Bucureşti, p. 24.

[56] Potrivit art. 29 alin. (5) din Constituție: „« Cultele religioase sunt autonome faţă de stat. ». În literatura de specialitate autonomia cultelor religioase a fost definită astfel: « capacitatea cultelor de a legifera şi de a se conduce potrivit propriilor statute »; « dreptul Bisericii de a stabili unilateral normele doctrinare, clericale şi judiciare specifice naturii sale şi de a se autoguverna prin acestea, în mod independent faţă de stat » sau: « libertatea fiecărui cult în a-şi organiza forma de ritual, învăţământul, relaţiile cu adepţii cultului, relaţiile cu statul ». În jurisprudenţa sa Curtea a arătat că: « principiul autonomiei cultului nu ar mai fi respectat dacă insanţele de drept comun ar exercita controlul asupra hotărârilor luate de instanţele disciplinare şi de judecată bisericească în probleme doctrinare, morale, canonice şi disciplinare ». Deci, vorbim de o consistenţă constituţională a acestui preincipiu, în sensul că dispoziţiile din lege, care interferează cu unele prevederi din statutele de organizare şi funcţionare ale cultelor religioase, nu trebuie să îl înfrângă, deoarece, la rândul său, este de rang constituţional. Se observă, deci, necesitatea existenţei unui echilibru între principiul respectării legii [art. 1 alin. (5)] şi cel al autonomiei cultelor religioase [art. 29 alin. (4)], echilibru pe care tot Curtea va trebui să îl menţină, prin intermediul jurisprudenţei.”. R. ZIDARU, *Restrângerea exerciţiului libertăţii religioase în preajma sărbătorilor pascale – o analiză critică*, în rev. « Universul Juridic », an 2020, nr. 6, iunie, București, pp. 112-113. În literatură, autonomia cultelor mai este denumită şi: „libertate instituţională”. B. G. SCHARFFS, *The Autonomy of Church and State*, in « BYU Law Review », year 2004, no. 4, *sine loco*, p. 1226. Vezi și: M. SAFTA, *Drept constituţional şi instituţii politice*. *Teoria generală a dreptului constituţional*. *Drepturi şi libertăţi*, vol. I, Ed. Hamangiu, Bucureşti, 2008, p. 232; Pr. I.-G. CORDUNEANU, *Biserica şi Statul: două studii*, Ed. Evloghia, Târguşorul Vechi, 2006, pp. 52-82; M. ANDREESCU, *Libertatea conştiinţei*. *Implicaţii juridice şi religioase*, în rev. « Management Intercultural », vol. XVII, an 2015, nr. 2 [34], Pitești, p. 308 și Decizia CCR nr. 448/2011 referitoare la excepţia de neconstituţionalitate a disp. art. 26 din Legea nr. 489/2006 privind libertatea religioasă şi regimul general al cultelor, publicată în Monitorul Oficial al României, Partea I, nr. 424 din 17 iunie 2011.

THE SURVIVING SPOUSE, THE TRUE PRIVILEGED LEGAL HEIR?

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Abstract

From the repudiated heir, to the „favorite" of legal devolution...

This is briefly the evolution of the rights of the surviving spouse starting from the Civil Code 1864 and reaching the current Romanian Civil Code (NCC).

By introducing, together with the right to collect a share of the legal inheritance in competition with any of the four classes of legal heirs or even the entire inheritance, if they do not want or cannot inherit, a special right of inheritance having as subject furniture and household objects assigned to the common use (only when competing with classes II-IV of legal heirs), as well as a special right of habitation over a building in the estate, right of the surviving spouse who does not own another real right of his own on a house corresponding to his needs, as well as by taking over in our legal system the regulation of the precipitous clause, the surviving spouse acquires a status we could say „privileged" compared to the rest of the legal heirs.

French law also provides, in addition to the general right of inheritance in competition with the other classes of heirs, special rights of habitation over the building in which he lived, for use on the furniture of the house, rights that outline a privileged status of the surviving spouse as legal heir.

The analysis will be made concretely for each case, in order to see if in the successions with foreign element it is opportune to choose to make the choice of the national law as lex successionis, rather than to let the succession devolution operate according to the law of the last habitual residence.

Keywords*: succession, surviving spouse, precipitous, succession reserve, special right of abode, furniture and household objects, lex successionis*

Introduction

„Getting married means halving your rights and doubling your responsibilities", said Arthur Schopenhauer.

Honoré de Balzac also has a pragmatic philosophical approach in „Eugénie Grandet": „Do we not live from the dead? What then are inheritances?"

Many times, after the departure of our loved ones, we try to make up for their absence by keeping some things in common, some habits, some objects that belonged to them, in the hope that this way the transition to a new stage will be smoother.

From another point of view, perhaps in order to compensate for certain concessions made by the very fact of marriage, the legislator (probably made up mostly of married people, given the minimum age to be elected in the legislature) understood to offer the surviving spouse (slightly cynical adjective from a certain perspective, as if marriage was a struggle for survival from which the strongest emerged victorious) certain patrimonial advantages, which may be seen by the other heirs, to whom the deceased was related by blood kinship, as true „privileges".

From immemorial time, the legislator created the notion of „privileged ascendants" or „privileged collaterals", but are they really „privileged" or is it just an expression that shows a degree of kinship closer to the deceased than the „ordinary" and thus bigger advantages compared to the „ordinary" ones?

Is the surviving spouse „more privileged" than the privileged? If so, where is it „more privileged", in our country or in France?

Notion. The evolution of regulation. Importance

In a broad sense, the general right of inheritance and the special rights form the right of inheritance of the surviving spouse, which we will briefly analyze, and then turn to the rules of French law, for a brief comparative look and to be useful to the undecided, in a possible case with elements of foreignness: Romanian citizen, married, with habitual residence in France, who may or may not choose Romanian law as the law applicable to his succession (lex successionis) or French citizen, married, with habitual residence in Romania, who may choose, as lex successionis, the law of his nationality, the French law, in the absence of an option being applicable the law determined according to the point of connection „last habitual residence".

The Civil Code of 1864 was totally „hostile" to the surviving spouse, who became heir only if there were no successive relatives or natural children, according to art. 679.

This provision is taken from the French Civil Code of 1804 (Napoleon's Code), according to which the legal devolution succession is in principle based on the presumed emotional ties of de cujus, but especially on the blood relationship up to the twelfth degree. The surviving spouse and illegitimate children are excluded from the succession. [1]

By the Law on Progressive Inheritance Tax of 1921 (Titulescu Law), the situation of the right to inheritance of the Romanian surviving spouse is improved, in the sense that the surviving spouse is recognized this right of succession after the last fourth degree collateral of the deceased.

In the Romanian Civil Code, a series of burdensome actions were imposed on the surviving spouse: the sealing of the seals, the succession inventory, the solvent bail that was returned to him after three years if no heirs of the deceased appeared, even damages due to the heirs, if he did not fulfill the formalities to which he was obliged.

As a concession made to the poor „relative" (bloodless relative, in fact and hence the treatment of Cinderella of the heirs), the Civil Code 1864 enshrined the right of the poor widow, deprived of wealth, to acquire a right of usufruct over a share of the inheritance if she bequeathed in competition with the deceased's descendants and a right of inheritance in full ownership over a share of a quarter if she bequeathed together with ascendants or collaterals. This provision was taken from the Caragea Code. [2]

The Civil Code spoke expressly about „widow", not about „widower". Roman misogyny had been forgotten. The woman was positively discriminated against.

The new European end-of-war current spread to our lands, so that on June 10, 1944, Law no. 319/1944 on the right of inheritance of the surviving spouse was published in the Official Gazette, which repairs the injustices of the Napoleonic-inspired Civil Code and confers on the survivor spouse a right of legal inheritance not in usufruct, but in full ownership, over a share of the inheritance, depending on the class of heirs with whom he comes in competition. Also, special inheritance rights are enshrined, on the furniture and objects belonging to the household and on the wedding gifts, but also a temporary right of

habitation on the common residence of the spouses during the marriage. The surviving spouse becomes a reserved and sessional heir.

A radical transformation of the applicable legal regime, probably justified by the not at all peaceful context and the existence of many war widows, who became the main supporters of the families, after the tragic disappearance of their husbands in the war.

The provisions of the Romanian law in force

The new Civil Code (NCC), in force since October 1, 2011, preserved the rights of the surviving spouse and even increased them, giving him or her real privileges.

Suggestively, the very chapter in the NCC on legal heirs begins with „The Surviving Spouse" – Section I.

Article 963 NCC lists the legal heirs, the surviving spouse being placed as a topic in the sentence (accidentally or maybe not !?), before the blood relatives: descendants, ascendants and collaterals.

Therefore, compared to the rules of the previous succession transmission, which involved the corroboration of the provisions of the Civil Code of 1864 with Law no. 319/1944, this time we are facing a single source of law, the legal provisions being coordinated and integrated into a single logic, thought to be at the same time, not 80 years apart (1864 vs. 1944).

The seat of the subject is art. 970 and seq. from the NCC, but we also find provisions on matrimonial regimes, with reverberations in the succession procedure, which produce their post-liquidation effects matrimonial regime between the surviving spouse and the heirs of the deceased spouse.

In addition to the general right of inheritance, that of collecting a share of the deceased's estate in competition with any of the four classes of legal heirs (descendants, unlimited in rank; privileged ascendants and privileged collaterals, separately or coexisting; ordinary ascendants, ordinary collaterals) or even the whole inheritance if the heirs of the four classes do not want (give up the inheritance) or cannot (being unworthy) or simply do not exist, the surviving spouse also has been established special rights: the surviving spouse's inheritance on furniture and household items when not in competition with the descendants.

Art. 333 of the NCC provides for the regulation of the precipitous clause, which may be inserted in a matrimonial agreement by which the spouses choose the matrimonial regime of the conventional community of goods.

The special right of abode of the surviving spouse is a real right of own residence, a real sui-generis right, free, inalienable and inseparable, conditioned by pre-existing or subsequent premise situations:

– the surviving spouse does not have any real right to use another house that suits his or her needs;

– the object of the right is the house in which he lived until the date of opening the succession;

– subject to the acceptance of the other heirs who may request either the restriction of the right to live to the concrete needs of the surviving spouse, if the house is not necessary for him completely, exceeding his own housing needs, or the change of the object of the dwelling, if they provide another meet legal requirements house.

As this right appears to be a real social protection measure in order to enable the surviving spouse to build an alternative housing, he must not have another right of residence of his own, or not have a right of ownership or use over another dwelling.

We consider in this situation that the surviving spouse is the one who will request the granting of the exclusive legal housing benefit, his right will be recorded in the final succession and taken over, obviously, in the heir certificate, based on his own statement, even handwritten, inserted in the final succession conclusion, that he does not have another real right to use another house (property right or its dismemberment – usufruct, use, dwelling), corresponding to his needs. If another heir claims otherwise, the burden of proof will fall on him. In case of disagreement, if the succession is debated by notary, the notary public will suspend the notarial procedure and will direct the parties to address the court.

The court competent to resolve the dispute is provided by art. 973 para. 5 of the Civil Code, being „the court competent to judge the division of the inheritance, which will decide urgently, in the council chamber".

The surviving spouse must have lived in that building until the date of the opening of the succession. The law does not condition the granting of the right to housing for a minimum period of residence. It can also be a short period of time in which the heir spouse lived there.

Contrary to the opinion expressed in the doctrine that he must have resided in that dwelling [3], we appreciate that, just as the law links the determination of the law applicable to the succession of the deceased to his last habitual residence, in the successions with foreign element, we can also appreciate in this situation that the surviving spouse must have had the last habitual residence in that dwelling, even if that was not a family dwelling or was not recorded as a residence in the identity document and regardless of whether or not the surviving spouse's domicile was in that building. We say this because the domicile is proved by the identity document and it is possible that it (the identity document) does not always reflect the real situation, in fact, and the proof of the habitual residence is made by any means of proof.

The law speaks of the need for the rightful spouse to „live" until the date of the opening of the succession, and not having his or her domicile there, so that „Ubi lex non distinguit, nec nos distinguere debemus".

Also, as Professor Mihail Eliescu previously appreciated, we are of the opinion that the deceased spouse must not have lived with the deceased in that house [4]. All the more so nowadays, when the free movement of capital and labor is booming, many families may have to have second houses, for example due to the employment of one spouse.

Another premise is that the property is part of the assets of the inheritance, so the deceased had an exclusive property right over the property or a share of the property right together with third parties or even the surviving spouse. The estate will include the share belonging to the deceased spouse, resulting from the liquidation of the matrimonial regime between the surviving spouse and the other heirs, by determining the share of the common property of each spouse, based on their contribution to the acquisition of common property and fulfillment common obligations.

As stated in the doctrine [5], the right to housing exists only if the surviving spouse does not inherit the sole ownership of the property.

The premise of its birth is the existence of the state of indivisibility, its existence being conditioned by the existence of this state, hence its temporary character (ceases at the

termination of the state of indivisibility of the heirs of the deceased [6] by division, but still not earlier than one year from the date of opening of the succession).

Precisely because it is seen as a sign of homage and post-mortem protection, in memory of the deceased and his strong relationship with the surviving spouse, the law limits the existence of the right in case the surviving spouse remarries, even before the expiry of the period of one year from the date of the opening of the succession, in which case it is considered that the surviving spouse has tacitly renounced this benefit.

The special right to housing is meant to ensure the proper living needs of the surviving spouse, a matter which will be concretely assessed in relation to the factual situation and the normal daily life of the surviving spouse.

Art. 974 of the Civil Code enshrines another special right of inheritance of the surviving spouse, respectively over the furniture and household objects that have been affected by the common use of the spouses. It operates only when the surviving spouse is in competition for inheritance with classes II-IV or testamentary heirs, but not with class I of the descendants.

As in the case of the right to housing regulated art. 973, the surviving spouse benefits from this right in addition to his usual share of the inheritance and will not be a reservist regarding these rights.

Therefore, de cujus could dispose of these goods freely if these goods were his own or dispose of his share of these goods, if they were common goods. In this case, they may no longer be subject to the special right of inheritance if they have been transmitted by inter vivos or mortis causa deeds.

However, as stated in the doctrine, if the deceased disposed only in part, the surviving spouse will collect the rest of the property in that category, if the other conditions are met. [7]

Regarding the goods that are the object of this right, art. 974 excluded from its scope the wedding gifts, compared to the previous regulation of the Romanian law, perhaps taking into account the fact that In the contemporary conditions of increasing the standard of living, wedding gifts have considerable values and they must be part of the estate.

By expressly classifying the surviving spouse's right to furniture and household items and his or her right to housing as special inheritance rights, the NCC implicitly provides an answer to the question of whether the surviving spouse may choose different rights over the rest of the inheritance.

Given the indivisible nature of the right of succession option, the surviving spouse will have only one right of option regarding the legal inheritance.

However, regardless of his right of succession, the surviving spouse may be the beneficiary of a precipitous clause stipulated in a matrimonial agreement by which the spouses have agreed to choose a different matrimonial regime than that of the legal community of property ope legis.

Although art. 367 of the Civil Code expressly provides for the possibility of stipulating a precipitous clause in a matrimonial agreement by which the spouses choose the regime of the conventional community, given that art. 333 of the Civil Code refers both to goods in the case of property held in disrepair and in the case of property held in co-ownership, we agree that a precipitous clause may be provided for in a matrimonial agreement on the separation of property regime. [8]

In essence, the precipitous clause allows the surviving spouse (which may be stipulated in respect of both spouses or only one of them) to take over free of charge, before the division of the inheritance, one or more of the common property, held in inheritance or co-ownership. It is not subject to the donation report, but is subject to reduction, is without prejudice to the right of creditors to pursue the property covered by the clause, becomes obsolete if the community ceases during the life of the spouses, if the gratuity spouse dies before the disposer or the goods are sold at the request of the common creditors. The execution of the clause is done in kind or by equivalent. (art. 333 NCC).

The provisions of French law in force

Initially, in the Civil Code of 1804, the surviving spouse was not among the heirs, not being a blood relative of the deceased. In 1881, the usufruct was attributed to the share of a quarter of the succession. Gradually, by changing the law, the status of the surviving spouse gains weight. In 1957 it became a priority over ordinary collaterals. In 1963 the donation between the spouses was created, and in 1966 took place the reform of the matrimonial regimes. Finally, in 2002, by assigning rights to the family home, the surviving spouse becomes a heir with full rights.

With regard to inheritance shares, the rights of the surviving spouse differ according to the class of heirs with whom he inherits.

If the surviving spouse enters the competition only with children resulting from the common marriage with the deceased, he has the possibility to choose between the usufruct on all the assets of the deceased or a share of a quarter in full ownership. At the request of either of the heirs, the spouse must opt in writing within three months. If the option is not expressed in time or in the case of death prior to the expression of the option, the spouse is considered to have opted for the usufruct. By the agreement of the surviving spouse with the heirs, the usufruct right can be converted into a life annuity (art. 759 French Civil Code).

If the surviving spouse comes into competition with descendants from different marriages, he will inherit a quarter of the inheritance.

When the surviving spouse enters the competition with the deceased's parents, he or she will collect half of the inheritance, and if only one of the parents comes to the inheritance, he or she will acquire a quarter of the inheritance, and the surviving spouse the remaining three quarters.

If the deceased has no descendants or parents, the surviving spouse will inherit the entire inheritance. If there are assets acquired by the deceased through liberalities (donations or wills) made by parents or grandparents, a share of half of these assets will revert to the brothers, sisters of the deceased, grandchildren or great-grandchildren of siblings (art. 757-3 French Civil Code).

These rules apply if the deceased did not dispose by will or donation between spouses.

However, in the absence of descendants, the surviving spouse enjoys a legal reserve of one-quarter of the inheritance.

The surviving spouse has a free right of residence over his or her main house, if it is common property with the deceased or his or her own property, and a right of free use over the furniture in that house, temporary rights, valid for one year from the date of death.

If the spouse is the tenant or the deceased had only an undivided share of the dwelling, the surviving spouse may still be the tenant or may still reside in the building and the

surviving spouse shall be entitled to a refund of the rent or occupancy allowance, as he pays them, being considered tasks of succession.

The surviving spouse may enjoy for the rest of his life a right of housing over the dwelling and a right of use over the furniture in the dwelling, if the dwelling and the furniture were the exclusive property of the deceased or his joint property with the deceased (art. 764 French Civil Code).

Unlike the above temporary and free rights, the lifetime right is not free. It will be imputed to the surviving spouse's inheritance rights. If the value of this right is less than its share of the succession, it has the right to supplement. If these rights exceed the value of his share, he will retain the benefits and will not owe anything to the other heirs.

By mutual agreement, the heirs may decide to convert this life right into a life annuity or capital. In order to benefit from these rights, the surviving spouse must express his or her choice within one year of the death.

Temporary rights cannot be removed by the will of the deceased, while the right to life can be removed by a will drafted by a notary in the presence of two witnesses or two notaries.

When he inherits a share of the right of ownership, in the division of the estate, the surviving spouse has the right to the preferential assignment of the property or the right of lease of his dwelling (the one occupied at the time of death) and the furniture in the dwelling. If he owes the sult to the other heirs, he will be able to benefit from payment terms for a part of the sult (art. 832-4 French Civil Code).

If necessary, in principle in the year of death, the surviving spouse can benefit from a pension granted by the other heirs.

As in Romanian law, in French law there is the possibility to provide in a marriage agreement a precipitous clause (art. 1515-1519 French Civil Code), which can be stipulated generically for the benefit of the surviving spouse or in favor of one of the spouses, if he survives, giving him the right to withdraw before sharing, free of charge, a sum of money or certain goods that are part of the community. In the event of termination of the community during the lifetime, the clause will still be enforced at the time of death. It can survive even in the event of a divorce, if it has not been revoked. If the surviving spouse enters the competition with the children of the deceased from another marriage or out of wedlock, the matrimonial advantage which exceeds the special available quota between the spouses will be subject to reduction, so as not to deprive the children of the precipice clause to disinherit the children of the deceased who are not common with the surviving spouse.

Conclusion

We cannot judge sharply on the advantages or disadvantages of choosing one or the other of the laws as the law of succession. The situation will have to be considered at concretely by each spouse, comparing the legal provisions and if necessary one or the other chosen, also depending on the concrete situation, the nationality and the last usual residence.

It is certain, however, for both legal systems, that the surviving spouse, as the legal heir, currently enjoys patrimonial advantages superior to those granted by law to the other categories of legal heirs.

Reference

[1] Becqué, P. (2013). „Evoluția noțiunii de familie și consecințele acesteia în materie succesorală în dreptul francez", în Bob, M-D., „Evoluția noțiunii de familie și influența acesteia asupra ordinii succesorale legale", Monitorul Oficial R.A., pag. 154

[2] Hamangiu C. (1925), „Codul Civil adnotat", Editura Librariei „Universala" Alcalay & Co., vol II, pag. 49

[3] Deak, F; Popescu, R. (2013). „Tratat de drept succesoral. Vol.I – Moștenirea legală", Editura Universul Juridic, pag. 270

[4] Eliescu, M. (1966). „Moștenirea și devoluțiunea ei in dreptul RSR", Editura Academiei, pag. 142

[5] Deak, F; Popescu, R. (2013), *op. cit.*, pag. 271

[6] Macovei, C; Dobrilă, M.C. în Baias, Fl. A.; Chelaru, E.; Constantinovici, R.; Macovei, I., coord.; (2012). „Noul Cod Civil. Comentariu pe articole", pag. 1026

[7] Deak, F; Popescu, R. (2013), *op. cit.*, pag. 262

[8] Nicolescu, C. în Baias, Fl. A.; Chelaru, E.; Constantinovici, R.; Macovei, I., coord.; (2012). „Noul Cod Civil. Comentariu pe articole", pag. 353

[9] Codul Civil francez

COULD IT BE REACHED THE UTOPIA OF EVERLASTING YOUTH, THROUGHOUT LEGAL AND CONVENTIONAL REPRESENTATION ABILITIES ?

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Abstract

*Briefing, advising, assistance or **representation of old persons** represents a social protection requirement, but also it represents a professional deed in a process met by an old person- such events are sometimes bound to his or her right to have access to services offered by Law no. 17/2000 regarding social assistance of old people and it goes further to his or her counseling and oversight, both to special but non-exclusive protection measure which cand alternatively be used in other institutions such as **representation of old persons with legal capacity** that is using the mandate institution regulated by the Civil Code or representation by a lawyer through the legal assistance agreement concluded based upon law 51 or **trusteeship institution** that brings no damage to the represented person's capacity, keeping in mind that all these protection measures do not replace or not prove the fulfilment of substantive or procedural conditions for the valid conclusion of the legal relationship – these items remain to be checked according to the Civil Code for any and each legal document regardless of its parties: old or young person.*

Keywords: *old person, legal capacity, Law no. 17/2000, trusteeship, representation*

The idea of this paperwork came as a consequence of a **lecture** and a **saying**

Lecture – was a study proving that after the age of 50 we are entering in **later life** that starts with a repulsive and too early perspective: **an early aging** (50-60), it goes on with a middle aging (61-70) and for those of us who are the luckiest ones is falling to a late one (71+).

It seems that this classification is only for psychological training that we must administrate to ourselves in order to get used to the idea but mostly to the perspective and hope of taking advantage of the 70 years old people and 80 years old people, because I am refusing to believe that it is deeper than this because I would very much worry to think to natural physiological changes of the body felt with aging or social shortages brought by the late aging.

My biggest fear preventing me to think to the late old age is not a personal fear only but it is coming from an overpowering way received from all directions about public perception of eldness, which happily it is not a disease but mostly treated as a disease.

I am looking to the news: al old man has falled …, an old lady was hit by…, an old man has been cheated and I have always disliked this approach… but if I move my focus from social to legal world and I only have a quick look to judicial practice… oh he is 70 years old, we cannot assist him without a previous legal medicine expertise- are told by city halls representatives or oh, did he/she signed the Sale-Purchase agreement without a legal

medicine expertise? The document is null or he signed his last will and died after a week- for sure there is something wrong and such aberrations are going on and if it was not about our future and the present of our kind but just a movie, it would be funny.

The legal approach of the subject… consistency of an unwritten and definite assumption about the old person incapacity, ignoring his/her civil rights and blocking him or her or in the happiest case limiting his/her rights has determined me to approach this subject or maybe I am not so altruist but I am fear for our own future and I would like to remind you that the rule for the civil capacity (art. 28 Civil Code) teaches us that „*Civil capacity is recognized to all persons*", reason for which „*no one can be limited in whole or in part in his/her legal capacity but only in cases and conditions expressly stated by law".*

Eldness is a physiological stage of a person, a WISHED one in the life of a human being, a hope of an inevitable stage in the life of each human being, privileged ones who reach it.

I was telling at the beginning of this paperwork that this study has been determined also by a Romanian classic saying „*as you sow, so you shall reap*" („*cum iti asterni, asa dormi*") and inevitable in theory, we all will be in this stage of …eldness and maybe it is not a bad idea or we owe that now, while we are in the power of profession, position, activity that we represent to consider and maybe to change the (social and legal) mentality about what will be in the future and why not, maybe we will be able together to change, adjust the unhappy approaches over the subject and find savior solutions for the preservation of legal rights recognized for old people.

Coming back to the main subject we have to keep in mind that with every year we add a year to our functional aging, but the decline of our abilities that we face does not represent an invalidity but just a feature of eldness, which is not a disease and neither a loss of civil rights recognized to a natural persons.

Aging can bring a change in playing social roles throughout taking into consideration of biological age, visible in the level of the employment market, in demographic assessment of people, in children becoming in their turn adults or in physiological medical evolutions such as menopause.

How can these physiological changes in the life of a human being which influence productive and even legal area of society be translated into normative regulations? Without intention to rise polemics I am thinking that the answer is clear and simple from legal point of view because it can be translated through at most protective measures and only when the case, while from social point of view it can be translated through a positive approach of aging, initiated by Laslett theory (1987) and which is focused on the active aging, over the diminishing *of effects of the social activities over the wealth of old people,* but above all, over the learning procedure in the third age etc.

From institutional point of view, old age seems to be watched and sometimes capitalized by the National Council of Old People, Institute of Research for the Life's Quality from the Romanian Academy, Queen Mary of Romania Foundation, NGO's-Associations and Foundations but also by the General Divisions of Social Assistance – institution about we shall talk herewith because the development of the social assistance activities must be a priority with involvement at the decision makers' level and corelated, unfortunately, with the degree of economic development, but it has also to be a scientific challenge of great interest and up to date in order to identify the best social, legal, economic solutions and not only.

We have to say from the beginning that **the subject of our discussions is the healthy old person,** with full legal capacity, but **socially dependent...** which claims support not only from his care point of view, but also from quality of life in old age point of view – and this quality is given also by exercise of all or the most of the legal deeds and acts, expression of his full legal capacity.

1. Mandate represents one of legal institutions able to provide representation of the natural person with legal capacity but who cannot move in fulfilment of his social needs or he/she hasn't the necessary knowledge or ability to solve his objectives in his/her legal relationships with third parties in order to conclude a specific legal document and he/she appeals to the attorney institution regulated by the Civil code or representation by a lawyer based upon a legal assistance agreement concluded according to Lawyers Law no. 51/1995 and which is the most common and easiest way of representation either as a document under private signature or as an authentic document (even at his/her domicile) but he/she can also go for known forms of representation

2. Trusteeship (curatorship) in order to offer special protective measures to able persons, who, because of the age, health or other reasons stated by law cannot manage their assets and or protect their interests, the curatorship bringing no damage to the capacity of the represented one, meaning actually another way of protection of the old person affected by this physiological status, the applicable rules being actually the same as for the mandate, except for the case when, at the interested person request or ex officio, the court shall decide to empower the trustee with the rights and obligations of an administrator in charge with the simple management of another person's assets.

3. We have also **another variant** that provides for the assistance of the adult within different discussed structures, namely Law no. 17/2000 regarding social assistance of old persons.

The beneficiaries of this law are old persons that the law is defining them as being persons who are at the retirement age according to the law. (art. 1 par. 4 from the Law)

In order to benefit of the protection offered by Law no. 17/2000 provisions, reaching the legal retirement age is not enough as this is simple to compute by anyone (*standard retirement age is 63 for women and 65 for men, minimum contribution period is of 15 years and complete contribution period is of 35 years, both for women and men but fulfilment of these coordinates is reached through a gradually increase according to the law)* this requirement is added to that one that the old person applicant is within one of the cases described by art. 3 of the law, non cumulative cases, proving to the authority institution that the old person: either *does not have a family* or *he/she is not in the general care of one or several persons*; *or he/she does not have a house neither the possibility to provide for one through own means, either does not have an income or they are not enough; or as he/she is getting older he/she cannot manage himself/herself being in the impossibility to provide for the quality of his/her living*[1] – thus the temporal right to social assistance services is ceasing in case that those conditions for its obtaining are not fulfilled any longer[2].

[1] According to art. 3. of Law 17/2000 – The elderly person, defined in art. 1 para. (4), who is in one of the following situations:

a) he/she does not have a family or is not in the care of a person or persons obliged to care for him/her, according to the legal provisions in force;

(b) has no accommodation and is unable to provide for himself/herself from his/her own resources;

(c) has no income of their own or their income is insufficient to provide the necessary care;

In order to establish an objective criteria for inclusion within one of the above mentioned categories, the law maker has stated that **the needs of old persons** taking to total or partial autonomy loss **is assessed through a social investigation** carried out *within 24 hours* since the claim's[3] registration, the survey thus representing the third item added to the first two above mentioned requirements (*quality of being an old person and being included within categories stated by art. 3 of the Law)*[4], social services following to be provided depending on the degree of social dependence established by the social investigation and national evaluation standards approved through Governmental Decision.

Once this investigation is done and established that this one can be framed within one of the categories who justifies the involvement of tutelar authority in the old person's protection, the later or after case, the legal advisors of the local council from the area where the old person has this/her domicile **are obliged to grant** (*only at his/her request, not ex officio)* **free of charge advise** in order to conclude sale-purchase, donation or loan agreements with real estate guarantees legal documents having as subject **movable or immovable properties of the respective old person**, the law maker's enumeration from law no. 17/2000 art. 30 being a ***limitative one.***

However, if the above mentioned documents are concluded in order to take care of the old person, he/she **will be assisted, not only at his/her request** but also for **ex officio assignment of guardianship authority** through *a representative of the local council guardianship authority* in whose territorial area the respective old person has his/her domicile, the maintenance and caring obligation as well as their practical execution following to be expressly mentioned in the legal document concluded by the public notary, under nullity sanction[5].

We have to notice, on one hand as a criticism for the superior protection of the old person when he/she is concluding legal documents against payment and related to transfer of ownership against taking care of a person – although contract is concluded subject to resolution condition of providing maintenance as compared to pure and simple legal documents against price and related to transfer of ownership who are transmitting uno icto the ownership without the chance to bring back the property in the old person's patrimony

d) is unable to manage on his/her own or requires specialised care;

e) is unable to provide for his/her own socio-medical needs due to illness or physical or mental condition.

[2] Article 35. of Law 17/2000 according to which (1) The right to social assistance services ceases if the conditions for granting them are no longer met.

[3] Art. 34. of Law 17/2000 (amended by Law 270/200820/01/2018 – Art. 34. was amended by Emergency Ordinance 34/2016) and provides in paragraph (1) that Within 24 hours of registration of the complaint, the guardianship authority / guardianship body of the administrative-territorial unit in which the elderly person is domiciled or resides shall conduct a social investigation (n.n. paragraph 3 – failure to comply with contractual obligations).

[4] Article 4 of Law 17/2000 states that „The needs of the elderly shall be assessed by means of a social survey based on data on the conditions requiring special care, the ability to manage and meet the basic requirements of daily life, the living conditions and the actual or potential income considered the minimum to meet the current needs of life".

[5] Art. 31. From Law 17/2000 according to which „The obligation of maintenance and care, as well as the practical modalities of its execution shall be expressly provided for in the legal act concluded by the notary public, under penalty of nullity (n.n. introduced nullity)".

[5] CIVIL Decision No 96/A of 25 January 2022 of the Timis County Court, Civil Division I-A.

in case of failure to fulfill contractual obligations – hypotesis where the old person's protection must be increased.

Secondly, in line with the same criticism brought to the law maker there are also other acts of disposition as dangerous as the first ones such as statement for successoral option, deed of liquidation through which the old person's contribution share is declared and that is directly and irrevocable affecting his/her patrimony – without any reference to law or, in his known wisdom, the law maker can leave the possibility for identification and involvement of the guardianship Authority in other legal documents, namely in legal relationships who can possibly affect the old person's patrimony.

Not in the least, we have to understand what is the role played, function and legal nature of such an advise of the guardianship Authority, and the case law has replied to this question showing that free of charge legal advise is granted in order to conclude contracts through which this person disposes of his/her assets or he/she is concluding agreements for ownership's transfer of their own goods, in order to provide for his/her living and caring, but provisions of Law no. 17/2000 „*does not include the legal advise condition for the old person for the validity of the contract, so the request for its annulation is not grounded"* as far as within the maintenance (caring) agreement the old person declared that he/she has been informed with regards to provisions of art. 30 from Law no. 17/2000 and he/she does not want to be assisted by a representative of guardianship authority.

The law maker has also instituted an obligation for the public notary to pay attention to old persons with regards to their rights stated by art. 30 in Law no. 17/2000 regarding social assistance of old people, republished as further amended and changed, the public notary making express mention related to this into the document (art. 80 Law 36) without defining again the old person, sign that the notary's identification of this category is subject to the same definition. The situation is still complicating because the case when the public notary is obliged to inform his/her client is not clear – and now I am thinking if the briefing with regards to the rights included in art. 30 from Law no. 17/2000 takes place only when the application for those documents authentication is submitted or also while preparatory disposition documents related to patrimony are fulfilled (such as legalised copies, statements etc.) by the old person for ownership's transfer deeds.

Therefore, through the law for organization of public notary's profession there is only one obligation – the briefing one because notary shall inform parties, regardless the nature of the document, with regards to those legal notions and institutions that he/she is considering as necessary, so that to be sure that parties did fully understood the content and limits of the concluded agreement, as well as their rights resulting from art. 30 Law no. 17/2000.

Moreover, the old person and not only him/her is taking advantage of another advise, too, this time being regulated by art. 80 of Law no. 36/1995 that provides for the public notary the obligation to clarify legal relationship between parties with regards to the document they want to execute and understanding the parties' aims, their rights and

obligations provided by their agreement to offer them the right advise required for legal effects of the respective document.

Failure in execution of the maintenance and caring obligation by the new owner of assets obtained as a consequence of the sale-purchase document can be notified to guardianship authority/guardianship court from the territorial-administrative unit where the old person has his/her domicile or residence, by any natural or legal person. The guardianship authority cand be also ex-officio notified – being informed with regards to its obligations based upon notary document concluded with the old person – the law stating the public notary's obligation to ex-officio communicate a duplicate of the document executed by the old person to guardianship Authority/guardianship court from the territorial-administrative unit where this one has the domicile or residence address.

Through a social investigation or a survey with regards to the observance of the old persons' rights by the social services provider, the guardianship authority/guardianship court from the administrative-territorial unit where the old person has her/his domicile or residence can initiate due diligence in order to execute obligations provided by the concluded legal document or it can ask directly to the court the cancellation of the maintenance agreement on own behalf and in the interest of the cared person for failure in contractual obligations being able to file, if required, a criminal complaint if the case imposes it.

Any protection from the above described means and applicable to the old persons is vanishing if terms provided by art. 3 in Law no. 17/2000 regarding old people are not fulfiled any longer and oversight of contractual obligations execution is ending when this art. 3 provisions' inclusion from the Law is ceasing.

Therefore, the old person's briefing represents a requirement of social protection but also a professional deed of a justice partner- public notary – based upon the assesment of the beneficiary's right – old person for services provided by Law no. 17/2000, framing in provisions of art. 3, assistance, advising and supervision in the conclusion of legal documents, as well as during their continuous execution such as that one from the maintenance/caring agreement. However, all these protection measures do not replace neither certify the fulfilment of the subtantive or formal conditions regarding a valid conclusion of the contract – items that remain in the same frame of the Civil Code to be checked as for any other legal document regardless the parties are old or young, Law no. 17/2000 being applied to persons able to represent themselves in theory, but being in limitative cases as those described by art. 3 of Law no. 17/2000.

SPECIAL LEGAL RULES IN THE MATTER OF SUCCESSION. DOCTRINAL CLARIFICATIONS ON DISCUSSIONS RELATED TO THE SUCCESSION OF MONKS IN THE ROMANIAN ORTHODOX CHURCH

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Abstract

The regulations in force in the succession matter belong to the civil legislation, which also represents the general legislative framework applicable to all successions. But, as every rule has exceptions, there are also in this matter a series of special regulations, specifically those regarding the succession of Orthodox monks - a more delicate situation, regulated by the Statute for the Organization and Operation of the Romanian Orthodox Church, as an exception to to the general rule, based on solid reasons, which we will show in what follows. Even if there have been criticisms of these regulations, based on the misinterpretation of these norms or on the ignorance of the reasons that led to their enactment, through this study we aim to present these aspects in the light of the true intentions and to definitively clarify these aspects.

Key words: succession, monks, church, law, goods.

1. Analysis of the legal text

As a hypothesis, we will present some eloquent normative provisions that regulate two separate types of inheritance, each with its sensitivities, one belonging to the bishops, and the other to the monks within the Romanian Orthodox Church. It should also be mentioned that these provisions are found in the content of two special normative acts for the Orthodox confession, namely: *the Statute for the organization and operation of the Romanian Orthodox Church* [1] and *Law no. 489/2006 on religious freedom and the general regime of cults* [2] . The legal text is as follows:

Art. 192: "Dioceses have vocation over all the estates of their hierarchs".

Art. 193: "The goods of the monks and nuns brought with them or donated to the monastery upon entry into monasticism, as well as those acquired in any way during living in the monastery, remain entirely with the monastery to which they belong and cannot be the subject of subsequent claims."

Art. 194: "For retired or retired hierarchs, the Holy Synod will regulate their rights in accordance with the statutory provisions and ecclesiastical regulations".

To these three provisions of the BOR Statute we add the following one from Law no. 489/2006 on religious freedom and the general regime of cults:

Art. 27- (1) "Recognized cults and their cult units may have and acquire, in ownership or administration, movable and immovable assets, over which they may dispose in accordance with their own statutes".

(2) "Sacred goods, respectively those directly and exclusively affected by the cult, established according to their own statutes in accordance with the tradition and practices of each cult, acquired by title, are inalienable and imprescriptible and can only be alienated under the statutory conditions specific to each cult".

At a first and brief interpretation of these legal texts we can understand the following: regarding the legacies of the bishops, if they died while in office, the dioceses have a vocation over all the estates, and if they retired or withdrew from function (paretesis), the fate of their assets will be established, as a rule, by the Holy Synod of the Romanian Orthodox Church through its regulations. As for the second type of inheritance, that belonging to the monks, things are perhaps even more different from the way the new Civil Code presents them, the goods of monks and nuns (whether we are talking about goods brought or donated to the monastery at the entrance them in monasticism, or of goods acquired later) to remain, after their death, in totality of the monastery to which they belong; moreover, they cannot be the subject of any claim action.

2. At least three relevant premise-situations

Of course, a relevant jurisprudence in the realm of this issue related to ecclesiastical inheritances and, by way of consequence, related to the resolution of the differences that arise at least in theory between the provisions of the BOR Statute and those of the new Civil Code is, if not non-existent, at least a very poor one. This fact is mainly due to the renunciation of the monk, once he entered monasticism, to all that would be called worldly care, that is, an exclusion from the list of priorities of the monk of pecuniary interest of any nature and to the renunciation of his defense in the court; in other words, at the moment of entering monasticism we witness a social death of the monk. To this main argument, in order to justify the absence of litigation in this area, the provisions of art. 50 lit. e) from the Statute of the BOR, according to which within the triple priestly, teaching, sanctifying and pastoral-missionary ministry, the parish priest [...] with the written approval of the chiriarch, represents the parish in court before the local authorities and before third parties, personally or through delegates . To the same extent, parish clergy by virtue of the oath of obedience (subordination) to the chiriarch submitted at ordination and, respectively, monks, by virtue of the monastic vote of obedience, can compare before the courts only with the prior written approval of the chiriarch, including in cases of personal interest.

The lack, until now, of such a judicial practice, however, cannot justify the assertion that in the future a dispute could not arise that would have precisely an ecclesiastical inheritance as its object; moreover, even if only from a theoretical point of view, the problem in question deserves special attention.

So, starting from the premise that we are in the presence of a successional mass made up of goods, other than sacred ones (that is, those directly and exclusively affected by the cult, established according to their own statutes in accordance with the tradition and practices of each cult) [3], we will build three hypotheses that could constitute a delicate issue both for the court and for the Romanian Orthodox Church, if they materialize.

Thus, a first situation would be that of the Orthodox bishop who has first-degree descendants from a marriage that ended before the moment of ordination, but only through the death of his wife. I added this last condition, of the termination of the marriage only by the death of the wife because, according to the canons of the Romanian

Orthodox Church (especially those adopted at the VI Ecumenical Synod, in the year 681), only archimandrites and widowed priests can acquire the position of bishop, not and those whose marriage has been dissolved. In this case, as is well known, the provisions of the new Civil Code give the descendants successional vocation over the entire successional patrimony, each enjoying an equal share of the inheritance; moreover, the descendants also have the quality of being reserved heirs. In this vein, returning to the provisions of art. 192 of the BOR Statute, the question arises as to whether or not the diocese of the respective bishop still has any right to inheritance, against the descendants? If so, what will be the shares of each of those called to inherit? Moreover, the quality of being a reserve heir will prevail over a probable right to inherit of that diocese?

A second premised situation can be represented by the absence of the surviving wife and descendants, in which context, in the light of the provisions of the new Civil Code regarding legal inheritance, the privileged ascendants and collaterals will inherit, in this order, in the absence, ordinary ascendants or ordinary collaterals, as the case may be. Or, if we take into account the texts of the BOR Statute, this well-known order will not only be overturned, but will be removed outright, the diocese or monastery, as the case may be, being the only one entitled to collect, in totality, the assets of the deceased monk.

The third and last hypothesis, with the greatest importance for our work, is represented by the confrontation that can arise in terms of succession between, on the one hand, the holders of vacant inheritances, as established by art. 1138 of the new Civil Code (namely, the commune, the city or, as the case may be, the municipality in whose territorial radius the goods were located on the date of the opening of the inheritance) and, on the other hand, the dioceses and monasteries whose BOR statutes recognize the succession vocation. Which of the two interests, state or ecclesiastical, protected by the two distinct categories of norms, will prevail?

3. The history of the development of the rule of law

For a better understanding of this institution, of the ecclesial legacies, we will make a short incursion in time to present the norms of law, especially canonical, the rules that governed these special situations in which the people we know today as monks were or monks, both in Christian and pagan culture.

In a first phase we will refer to the vestal women of ancient Rome; despite the fact that in those times the status of women was not one that overflowed with freedom, but on the contrary, the vestals still had the opportunity to dispose of their goods as they pleased, including leaving them tied as they saw fit, not being in any kind of restricted by the state interest or that of the denomination to which they dedicated themselves [4] .

Moving forward from a chronological point of view, we will now refer to an important source of canon law for the Eastern Church, namely, the 40th apostolic canon, a canon that included an at least interesting mention and distinction: "... to be shown the bishop's own possessions and the royal possessions should also be shown, so that the bishop would have the power when he dies to leave his possessions to whoever he wants and how he wants, and that the bishop's belongings should not be lost under the pretense that they were church property, then when he would have a wife and children or relatives or domestics. For it is right before God and men that the Church should not suffer any damage due to ignorance of the bishop's goods, and that neither the bishop nor his

relatives should squander his goods for the sake of the Church or fall into his quarrels and his death cover with insults" [5] .

This rule of canon law will be repeated later, in almost the same wording, in the content of canon 24 of the Synod of Antioch in the year 341: "It is good that those of the Church should be preserved for the Church with all care and with a good conscience and with faith in the All-Seeing and Judge God. [...] For it is right and pleasing both before God and before men that the bishop's own things should be left to whoever he wants; and those of the Church for her to be preserved, and neither the Church to suffer any damage, nor the bishop to be deprived of his goods in favor of the public under the pretext of the Church or those who belong to him falling into the process and, in addition to this, his after death he should not cover himself with reproaches" [6] .

Such a normative direction that includes the distinction between personal and sacred goods, respectively the possibility of the cleric to dispose of the former at will, will no longer be preserved; this is how it happens that, in the contents of a canon adopted at the Synod of Carthage in the year 394, we find the following rule: "... the bishopric decided that, if any bishop would prefer, over the Church, to leave heirs to heretics or pagans, or if they are relatives, or if they are outside his kinship, let an anathema be pronounced even after his death on such a one and his name in no way be mentioned by the priests of God, nor be able to exonerate him, if he dies without a will, because, becoming a bishop, he has the duty to make the proper distribution of his wealth according to his promise" [7] .

And Justinian, in a paragraph of Novel CXXXII, resolves the issue of monks' inheritances in the same note: "If any woman or man embraces the monastic life and enters the monastery and has no children, we order that the monastery be the owner of its properties. [...] If, in all cases, he wishes to distribute his wealth to his children by any means, he will have to keep a part for his monastery. But if he should die before dividing his goods among his children, they shall be entitled to their legal and equal share, and the residue shall belong to the monastery." [8]

Later, the Byzantine emperor Leo VI, referring to the intestate inheritances of the monks, creates, in the XIV Novel, a kind of algorithm by virtue of which they had the right to inherit both the descendants and the monastery, as follows : if there were three descendants, the monastery collected a fourth of the inheritance mass; if the number of descendants was more than three, the monastery was entitled to a share at least equal to them; if only the ascendants had a real vocation to inherit, regardless of their number, the monastery was entitled to half of the inheritance mass; finally, if the monastery had entered the competition only with collateral relatives, it would have been entitled to a share of two thirds of the inheritance. The text of the same novel also shows that these quotas were imperative, mandatory, they could not be reduced by de cujus through legates [9] .

In the following, we will refer to two articles from the Organic Statute of the Greek-Oriental Romanian Church in Hungary and Transylvania, a statute to the adoption of which Metropolitan Andrei Șaguna contributed substantially. Thus, art. 108 shows that the bishop, respectively the archbishop, has the right to make a will only for half of his property, and if he dies without a will, all the property belongs to the diocese. Therefore, by making a will, after his death all debts and funeral expenses will be paid, his legacies will be paid up to half of his estate. Exceptionally, art. 109 indicates that the entire library of the deceased bishop is reserved exclusively for the diocese [10] .

In a final comparative reference, we will present the text of article 194 of the Statute for the organization and operation of the Romanian Orthodox Church from 1948: "... dioceses have a vocation over the entire estate of their hierarchs and are considered reserved heirs of half of this estate, in case they come into competition with the sessian or testamentary successors. The rights of sessional or testamentary successors will relate only to the half not reserved for the dioceses and are regulated according to the provisions of the Civil Code." [11] . We therefore see, in this case, the fact that the dioceses not only have the vocation to inherit, they also have the capacity of reserve heirs, in the conditions where no legal provision of the Civil Code established this aspect.

4. Corresponding references to the domestic statutory text

In the following we will try to present you some corresponding references of the analyzed text from the Statute of the BOR, references that we have selected both from the statutes of the other Orthodox autocephalies [12], from the Code of Canon Law of the Roman Catholic Church, but also in The Code of Canons of the Oriental Churches and from the statutes of the other religions recognized in Romania.

Thus, within the Serbian Orthodox Church, whose statute was adopted in 1957, an at least interesting succession algorithm is established. This is how, in the case of a testamentary inheritance of the bishop, the will expressed mortis causa is an imposed one with precisely predetermined limits, according to art. 37 of this statute: "he [the bishop] will establish a legacy for one third of the estate in favor of his diocese, for another third in favor of an ecclesiastical foundation, and the last third will be at his disposal". Article 38 of the same statute refers to the intestate inheritance as follows: "his movable and immovable assets will be used to cover the burial expenses and personal debts of the deceased, the remainder to be divided by the Holy Synod following the needs of the Church. The bishop's vestments, his library and all his liturgical objects will return to his diocese".

Directing our attention to the Statute of the Russian Orthodox Church [13] , it makes, as is normal, a clear distinction between the two categories of assets of the hierarchs: the first category is made up of ecclesiastical assets (that is, those whose use is intended exclusively religious service) which should enter the heritage of the Russian Orthodox Church; the second category consists of the hierarch's personal assets, which are subject exclusively to the provisions of civil law and private international law applicable on the territory of Russia.

[14] particularly attracted our attention. These provisions, recognized for their radicality, are as different as possible from those found in the Greek civil legislation, as well as from the special norms that make up the Statute of the Orthodox Church of Greece. Thus, art. 101 of the Statutory Book, in the most imperative way possible, establishes that "the wealth of each monk belongs to the monastery to which he belongs, since the said monk gave all his wealth to it in writing before he was cut into monasticism. Also, all the wealth acquired by the said monk after his shearing belongs to the monastery, regardless of whether he died elsewhere. The monastery to which they belong is not responsible for the debts of the monks, since they were incurred without the written permission of the monastery." [15] Taking into account the imperative of this provision we can understand that when we are dealing with a case of inheritance of an

atoned monk, the monastery automatically acquires the asset of the inheritance, without taking into account the liability of the inheritance [16] .

This is also how things are established by the Statute of the Orthodox Church of Cyprus [17] , where it is clearly shown that the monasteries have full successional vocation over the goods of the monks who succumbed in this capacity. However, things are different in Cypriot jurisprudence, where, in the case of the Mahairas Monastery, the Supreme Court of Cyprus resolved the issue of the succession of the monks in favor of the monastery, giving a win to the relatives of the deceased monk. In the justification it is stated that, although the Church has the right to regulate its own property regime, this right cannot also extend to the monks' property; moreover, it is shown that, in reality, the rights of monks cannot be considered, cannot be confused with the rights of the Church itself. In the same vein, it was also noted that each monk retains the right, conferred by the Constitution, to acquire assets and to dispose of them freely, without any intervention on the part of monasteries or other such entities. [18]

The Code of Canon Law of the Roman Catholic Church [19] , in the content of article 668 paragraph 3, shows that "everything that a monk earns through personal work or on behalf of the institute, he earns for the institute". Similar provisions can be found in canons 467 and 468 of the Code of Canons of the Oriental Churches. [20] In a final comparative reference, the provisions of the Statute of the Old Rite Russian Orthodox Church in Romania [21] , in the same concise and radical note, state that "the wealth of bishops cannot be inherited by their relatives or relatives"; in other words, the succession vocation regarding the assets of the hierarchs and monks within this religious cult belongs exclusively to the dioceses or monasteries, as the case may be.

In the case of all other religions recognized in Romania, they do not include in their statutes provisions that are different from those found in the civil legislation applicable on the territory of our country.

5. Personal considerations

Thus, we could affirm that the successor vocation of the diocese or the monastery is as justified as possible because, abandoning life in the civil world, the hierarch or monk voluntarily chooses to enter another order, even a legislative one, obeying to it in its entirety, expressly declaring this in writing.

Even the ban on filing a claim imposed by the final sentence of art. 193 of the BOR Statute can be understood, especially if we place it in the right historical context. Thus it is that, looking into the more or less distant past, we will notice that many of the donations made to the churches were challenged and even annulled, on the grounds that they were made under the influence of a pernicious mystical drunkenness. However, it cannot be denied that, in the analysis of the legality of a donation, the exclusive criterion by which any court is guided is the expression of a valid consent.

In other words, we can accept the fact that the successional vocation of dioceses and monasteries is justified, both from a historical and moral point of view, and, perhaps, from a legal point of view; the legal basis could be constituted by what is called the anomalous inheritance, that construction created by the Roman jurists that finds applicability to this day.

In other words, we cannot overlook the fact that both the related legislation of the NCC and the doctrine on the matter recognize only very few applications of anomalous

inheritance and which are always reduced to only a certain part of the inheritance mass, by no means to whole.

Regarding the legal force of the normative acts whose provisions come into conflict. Thus, the Statute of the BOR, as I stated previously, is adopted by a normative act (HG no. 53 of January 16, 2008) inferior to the new Civil Code, but it represents the special norm in the matter of ecclesiastical inheritances and is applied as a matter of priority. It could be thought that the new civil law, being later and having inserted a provision that abrogates all the contrary provisions, would also abrogate the provisions mentioned in the Statute for the Organization and Functioning of the Romanian Orthodox Church.

This, however, is not possible because the repeal of a special norm through a general norm imposes the obligation of express and not generic repeal, a fact that does not exist in the New Civil Code

In such conditions, we can affirm without fear of making a mistake that the analyzed legal text (namely, the provisions of art. 192-194 of the BOR Statute), regarding the inheritances of hierarchs and monks, is justified, in a modern and democratic society.

The Romanian Orthodox Church has always understood to apply or use these provisions in the situations concerning the church goods of the monks (objects of specific clothing, vestments, liturgical scents, worship books, etc.) which were used for the purpose of the activities of the monastic life itself - said, which by their nature belong to the church heritage and cannot be used by anyone else. Also, the Church chose to exercise its succession vocation over other movable or immovable assets that belonged to the monks in the situation where the inheritance remained vacant.

Moreover, the Church has never restricted the right of monks to dispose of their goods and rights by will or donation during their lifetime, even more so since many monks chose to testate or donate during their lifetime in favor of monasteries or other ecclesiastical institutions (see the will of Metropolitan Bartolomeu Anania who chose a testamentary devolution, complex to which the ecclesiastical institutions had nothing to object to).

On the other hand, *by law ferenda* a clearer and more careful regulation of these situations would be required, the clarification or at least the inclusion in the civil legislation of clear references to the applicable special rules, in order to avoid unnecessary discussions and confrontations being totally superfluous a blind entanglement of state interest with that of the church in such a sensitive area for Romanian society.

Reference

[1] GD 53 of January 16, 2008 regarding the recognition of the Statute for the organization and operation of the Romanian Orthodox Church, published in the Official Gazette, Part I, no. 50 of January 22, 2008 (hereinafter referred to as *the BOR Statute*).

[2] Published in the Official Gazette, Part I, no. 11 of January 8, 2007.

[3] Macovei C., Vieriu V., (2019) *Ecclesiastical inheritances – Hymera juri?*, in School of Organic Law, Hamangiu Publishing House, p. 84

[4] Wildfang, RL(2006), *Rome's Vestal Virgins: A Study of Rome's Vestal priestesses in the Late Republic an early Empire,* Routledge, New York, p. 66-67.

[5] The text can be found in English in PERCIVAL, Henry P, *The apostolic Canons, 1899 apud http://www.newadvent.org/fathers/3820.htm*, viewed on 26. 04. 2022.

[6] The text, in its entirety, can be found at *http://www.newadvent.org/fathers/3805.htm*, viewed on 04/26/2022.

[7] Macovei C., Vieriu V., *ibid.*

[8] Macovei C., Vieriu V., *ibid.*

[9] The XIV Novel of Emperor Leo VI, translated into English in SCOTT, S. P, *The Civil Law,* XVII, Cincinatti, 1932, version also available online at http://droitromain.upmf-grnoble.fr/, viewed on 26. 04. 2022.

[10] Macovei C., Vieriu V., *ibid*.

[11] Macovei C., Vieriu V., *ibid.*

[12] Worldwide, Orthodoxy is represented by several autocephalous and autonomous churches, which make up a hierarchy at the head of which we find the Ecumenical Patriarchate, and at the opposite pole representatives of these churches such as the Orthodox Church of Japan or that of Finland.

[13] The statute can be consulted at http://orthodoxeurope.org/page/3/15.aspx, viewed on May 5, 2022.

[14] Mount Athos or Atos (in modern Greek Άγιον Ορος - Holy Mountain) is a mountain (2,033 m) and a peninsula (with a length of 60 km and a width varying between 8 and 12 km, the total area being 360 km square) in the north-east of Greece , in the Greek region of Central Macedonia , where there are 20 monasteries , 12 hermitages and a lot of Orthodox monastic cells , in which more than 1500 monks live Orthodox (2011 Greek census data indicate a population of 1,830 monks.). About half of the monasteries are conservative, following a strict code of discipline and fasting. The monastic community at Mount Athos is divided into two types of monasteries: cenobite monasteries (also called "communist" or "conservative", the ownership of all objects being common) and idiorhythmic monasteries (also called "liberal" or "individualist", where personal ownership of some objects is allowed). Throughout the history the monks of the monasteries on Mount Athos lived in hermitages, cells, "kalives" (smaller cells, where several monks live as in a family) or hermitages (also called "hisyhasterion", they being cells secluded, often only small grottoes or hollows in the rock, in which only one monk (hermit, hermit or anchorite) always lives; but what defines the hermitage is primarily its secluded location, because there is also a type of housing in Athos where only one monk lives, but who are not isolated and withdrawn, they are called "kathisme". Other atonized monks, also called "vagrants" or "vagrants", prefer to live without having a stable shelter. The region is administratively autonomous, forming a monastic state with the capital at Kareia , in Greek *Καρυές* , and in Latin transcription, *Karyes*.

[15] KONTIS, Athanasios, *Regimul Sfantului munte si moestinirea monahilor,* http://pemptousia.ro/2013/12/regimul-sfantului-munte-si-mostenirea-monahilor-2/, viewed on May 5, 2022.

[16] Macovei C., Vieriu V., *ibid.*

[17] The statute can be consulted at http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Contitution.pdf, viewed on May 5, 2022.

[18] ACHILLES (2011), Emilianides *et aliis*, *Religion and Law in Cyprus,* Kluwer Law International, p. 112-113.

[19] The code can be consulted at http://www.vatican.va/archive/ENG1104/INDEX.HTM, viewed on May 5, 2022.

[20] The code can be consulted at http://www.intratext.com/X/ENG1199.HTM, viewed on May 5, 2022.

[21] Recognized by the provisions of GD no. 398/2008, published in the Official Gazette, Part I, no. 365 of May 13, 2008.

[22] Art. 136: "Private property is guaranteed and protected equally by the law, regardless of the owner".

Section B

PARTICULAR OR DEROGATORY ASPECTS REGARDING THE INHERITANCE JUDICIAL PARTITION PROCEDURE

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Absract

This study aims to review the rules and particularities of the procedure for judicial partition of a inheritance, highlighting them in a step-by-step analysis of the procedure for judicial partition in general, which is also applicable to the division of jointly owned property by shares or in partition of common indivisible ownership (the procedure being, in principle, the same). The most significant feature of judicial partition of a succession is the need to complete the preliminary procedure prior to the court being seised, a procedure which does not apply to the other categories of partition, and also in terms of absolute territorial jurisdiction, since the claim falls within the exclusive competence of the court of the last domicile of either of the deceased, unlike the other forms of partition, which have other rules for determining jurisdiction. There may also be certain aspects specific to the sharing of inheritance, resulting from certain requirements of the content of the preliminary ruling of admission in principle or other procedural or substantial elements which may be applicable, as the case may be. At the same time, the study focuses on identifying and explaining the exceptions to the judicial partition procedure by reference to the ordinary contentious procedure.

Keywords: *judicial partition, inheritance partition, co-ownership, court procedure, preliminary ruling of admission in principle, derogations from common law, partition decision*

1. INTRODUCTION

The Civil Procedure Code regulates the partition as a *special procedure*, however, the rules of this title will be supplemented, as the case may be, with those of the Civil Code (especially those from art. 669-686) or with incidental rules from any special laws. Anyway, the judicial partition procedure provided for in the Code of Civil Procedure is applicable whenever the division/sharing of a common property is requested, as long as no other procedure is provided by special derogatory rules. Moreover, the partition *can only look at the common property*, regardless of whether it is about the common property in shares (co-ownership) or the common property in common indivisible ownership. The judicial partition is carried out according to the rules provided by art. 980 et seq. C. proc. civil, regardless of the form of joint ownership, according to the distinctions made by art. 632 C. civil.

The partition(division) is *the legal operation by which the state of joint ownership is put to an end, in the sense that the asset or assets owned in common are divided, in their materiality, between the owners and* can be achieved either by *good will (voluntary division)* or *by court decision (judicial division),* according to art. 670 Civil Code.

We specify that the *judicial division* can intervene whenever the co-sharers do not agree on how to share the common asset(s), without having any relevance whether or not they have previously contacted the notary public.

At the same time, as I have shown on another occasion [1], judicial division is mandatory in following cases:

a) among the joint owners there are persons without legal competence or with limited legal competence and there is no authorization from the guardianship court for a voluntary division (see art. 674 Civil Code); if there is authorization, voluntary division is possible;

b) for *valid reasons*, one of the spouses asks the court to divide the common assets during the marriage;

c) the personal creditor of one of the spouses asks the court to divide the common assets during the marriage, in order to later track the assets that will be assigned to his debtor's lot;

d) one of the joint owners *is missing*.

2. PARTICULARITIES OF THE PROCEDURE FOR THE DIVISION OF INHERITANCE AND DIVISION IN GENERAL

2.1. While *voluntary partition* is possible, in principle (except for the cases where judicial partition is compulsory, mentioned above – s.n.), in all cases of joint ownership [ordinary co-ownership, forced co-ownership, common property in common indivisible ownership], *judicial partition* is possible, as a rule, only in the case of ordinary co-ownership and common property in common indivisible ownership, being inadmissible in the case of forced co-ownership [art. 632(3) and 671 of the Civil Code], with the exception of judicial partition in the case of common parts of multi-storey buildings or flats with different owners, when these parts cease to be intended for common use [art. 671(2) of the Civil Code], in which case the legal provisions on ordinary co-ownership become applicable.

2.2. Article 669 of the Civil Code expressly states that the action for partition is *not subject to the statute of limitations(imprescriptibility)*, but the following are also not subject to the statute of limitations by extinction: a request for a determination of the partitionable mass (inheritance or otherwise), determination of the status of heir and of the share of the estate, the status of holder of the common property right or share of the common property right etc. (since all requests for determination are not subject to the statute of limitations). On the other hand, some ancillary claims made in the process of partition (e.g. the donation ratio, reduction of excessive liberalities, settlement of the deceased's funeral expenses between the heirs or other debts and charges of the legacy, revocation of the legacy for non-performance of the charge or for ingratitude, surrender of the legacy by private title relating to property of title or rights of claim, annulment of the legacy for a cause of relative nullity etc.) *are subject to the statute of limitations*, and the non-applicability of the statute of limitations does not extend to them. However, where the reduction of excessive donations is sought by way of a *substantive exception* (defence of merits), it is not prescriptible by extinction.

From another point of view, although the partition action is not subject to extinctive prescription, it can be paralysed by invoking the acquisition of exclusive ownership by *usucaption*, the provisions of art. 675 of the Civil Code providing that „partition may be requested even when one of the co-owners has used the property exclusively, *unless he has usucapped it, in accordance with the law"*.

2.3. Prior to the court being seised of an application for *partition of inheritance*, the claimant must comply with a *mandatory preliminary procedure* [a notary public's conclusion on the verification of the inheritance records provided for by the Civil Code, in

accordance with the mandatory provisions of article 193(3) of the Civil Procedure Code], otherwise the application will be declared as *inadmissible*.

2.4. According to article 981 of the Civil Procedure Code, the application for partition shall contain, in addition to the elements of any application for a court action provided for in article 194 of the Civil Procedure Code, the following mentions: a) indication of the persons between whom the division is to take place; b) the title on the basis of which the division is requested, i.e. the title on the basis of which the co-ownership has arisen (it may even be the *certificate of inheritance*, if the parties' disagreement concerns only the actual division of the property); c) the assets subject to division; d) its value; e) the location of the assets; f) the persons who own or manage the assets subject to division, which may be considered *essential* to the application for partition, since, in their absence, the application *could be declared null and void* under article 200(4) Civil Procedure Code if, because of these deficiencies, „the conduct of the civil trial would be extremely difficult and the opposing party would be unable to defend itself against a claim with such vices"[2].

As we have already pointed out[3], as far as we are concerned, we consider as essential to the application for partition the mentions concerning:

– *the persons between whom the partition takes place* (which is equivalent to not indicating the name of the defendant(s));

– *the mass of the property to be divided* (which is equivalent to not indicating the purpose of the claim);

– *the title or titles on the basis of which the division is carried out* (because, in the absence of these elements, it is not possible to establish territorial jurisdiction – this being different, depending on whether we are talking about a partition of inheritance, a partition of the joint property of the spouses or an exit from the indivision in the case of joint co-ownership by shares –, it is not possible to know whether or not the prior verification of the succession records had to be carried out, or whether or not the joint ownership and the shares could be established, if the title which constitutes the source of the joint ownership is missing etc.). However, there are also *particular situations which are not attributable to the claimant* (e.g. the plaintiff does not have the title deed to the asset/one of the assets subject to partition, but it is in the possession of the defendant/one of the defendants; if the plaintiff's status as heir has not been established, he cannot obtain a certificate of the taxable value of the property, of which he is not the title holder, but can at most obtain an extract from the land register (when the property is registered) etc.). In any hypothesis where the claimant is objectively unable to attach a particular document to his application, the court may not annul the application under Article 200(4) Civil Procedure Code.

– *the value of the property to be divided*, which may, however, be *temporarily estimated* (failure to indicate a value, even an estimated value, means that the court is unable to determine the amount of the stamp duty and, therefore, the first deadline for the trial), in which case the value may be amended once the expert's report has been finalised, in accordance with article 204(2) point 2 of the Civil Procedure Code.

With regard to the requirement of indicating *the place where the property subject to partition is located,* the sanction of nullity could intervene only if only one immovable property is indicated in the partitionable estate and the condition of submitting the title deed of the property or at least an extract from the land register (from which its address would result) is not fulfilled, because in such a situation it would not be possible to determine the

absolute territorial jurisdiction under article 117 of the Civil Procedure Code. If there is more than one immovable property in the partition and the court seised is the court of the place where one of them is located (and this is not a case of partition of inheritance), but the title deed/land register extract is missing and there is no indication of the address of *an immovable property other than the one in the area of the court seised*, the issue is no longer relevant for determining the jurisdiction of the court. Also, in the case of a *partition of inheritance*, jurisdiction is determined by the last domicile of the deceased and not by the location of the immovable property, so that the indication of the location of the immovable property is no longer an essential element. As regards *the failure to indicate the place where the movable property is located*, this aspect is not essential either in order not to have recourse to the stage provided for in article 201 of the Civil Procedure Code, since it does not prevent either the proceedings or the formulation of defences by the opposing party.

The same is the solution that applies to the requirement to indicate the *persons who own or administer the assets subject to the division*, which is not an essential element and can be established at a later date, starting with the first trial.

Therefore, except for the essential elements described above (and under the conditions described above), we consider that the decision *to invalidate(annul)* the partition application *for lack of any of the requirements* of article 981 of the Civil Procedure Code is excessive, especially since this rule does not indicate an express sanction, and the assessment of the incidence of this sanction in application of article 200(4) Civil Procedure Code has been made only in those situations in which the principle *ubi eadem est ratio, eadem solutio esse debet* could be applied, with reference to art. 194-196 Civil Procedure Code. An additional argument, of textual topography, is constituted by the subsequent rule (art. 982 Civil Procedure Code), according to which the court will inform itself on the majority of these elements, *taking statements from the parties*, aspects which – by hypothesis – can occur only from the first trial date, granted in public hearing.

2.5. Where the co-parties include minors, missing persons or persons under interdiction, according to art. 983(2) sentence II of the Civil Procedure Code, the division of property may be carried out by mutual agreement, but only *with the prior consent of the guardianship court* and, if needed, of the *legal guardian or legal representative* (see also art. 674 of the Civil Code).

2.6. The rule is that according to which the partition is carried out *in kind*, *by the formation of separate lots for each co-partitioner*, corresponding to the share of property of each, according to article 676(1) of the Civil Code, taking into account the *value of the goods subject to division*, a rule also expressly stated in art. 984 (2) of the Civil Procedure Code, and the inequality of the lots is compensated by the payment of a sum of money, called a *tribute*.

If the *asset is indivisible* or *not easily divisible in kind*, art. 676(2) of the Civil Code provides (expressly and restrictively) that the division shall be made: (i) either by assigning the entire property, in exchange for a sum of money(tribute), in favour of one or more co-owners, at their request, (ii) or by selling the property in the manner determined by the co-owners or, in the event of disagreement, by public auction, in accordance with the law, and distributing the price to the co-owners in proportion to the share of each of them. As such, the particularity of the case is that the manner in which the partition is carried out is not left to the full discretion of the court, but is strictly regulated and will be applied in the specific circumstances of the case. If partition cannot be carried out in any of these three ways, the

solution of closing the case (which will be discussed in point 3, on exceptions – s.n.) will be used.

2.7. In order to resolve the petition for partition, the court must also take into account the criteria set out in article 988 of the Civil Procedure Code (agreement of the parties; the amount of the share due to each of them; the mass of the property to be divided; the nature of the property; the residence and employment of the parties; the fact that some of the co-owners, prior to the petition for partition, had made constructions, improvements, with the consent of the co-owners) or similar, depending on the particular circumstances of each case.

2.8. As regards *the division by assignment of assets*, the court shall issue *a preliminary ruling*, which shall also set the deadline by which the co-owner to whom the property has been assigned must deposit the sums of money representing the equivalent value of the shares due to the other co-owners (the „tributes"), in accordance with art. 989(1) sentence III Civil Procedure Code.

If the sums have been deposited within the time limit, the court will directly pronounce *a decision on the merits of the case*, definitively assigning the property to the co-owner to whom the property was originally provisionally assigned, and if the sums are not deposited within the time limit set by the co-owner to whom the property was provisionally assigned, the property will be provisionally assigned to another co-owner. The decision provisionally assigning the property to a co-owner *may only be appealed against together with the merits*, pursuant to article 466(4) Civil Procedure Code.

At the same time, article 990 of the Civil Procedure Code regulates the hypothesis in which, in view of the circumstances of the case, the provisional assignment phase governed by article 989 of the Civil Procedure Code may be skipped, the court being able to pronounce directly on the *final decision assigning the asset* to a co-party and *determining the amounts of tribute* that the co-party will have to pay to the other co-parties.

2.9. Regarding *the partition by sale of assets*, this is *an extreme way of liquidating the undivided estate*, which is only used if: (i) partition cannot be carried out by the other two methods, (ii) the property cannot be divided in kind or assigned to a co-partitioner (or none of the co-partitioners requests assignment in kind), (iii) all the co-partitioners request this method [4]. In this case, the court will also issue *a preliminary ruling* determining whether *the sale is to be made voluntarily*, directly by the co-parties (in which case it must also *fix in the preliminary ruling the time limit within which the sale is to be made*), or whether the sale it *is to be made by an bailiff.*

If (for whatever reason) the sale is not completed within the time limit set in the judgment under article 991(2) of the Civil Procedure Code, the court will subpoena the parties and issue *a new preliminary ruling*, ordering the sale to *be carried out by a bailiff*, in accordance with article 992 of the Civil Procedure Code. However, in order to initiate the *auction sale procedure* through the bailiff, it is necessary that the preliminary ruling provided for in art. 991(3) of the Civil Procedure Code *must be definitive*, either by rejecting the appeal as baseless or by annulling it, or by the expiry of the appeal term without either party exercising this appeal.

Distinguishing between the importance and nature of the assets, the legislation provides that the time limit for the auction set by the bailiff may not exceed 30 days in the case of movable assets and 60 days in the case of immovable assets, calculated from the moment of receipt of the court's preliminary ruling, and that the publication of the sale must be drawn

up and posted at least 5 days before the time fixed for the auction in the case of movable assets and at least 30 days before in the case of immovable assets. If the sale takes place, *the price will be recorded at the court's disposal* by the bailiff, who will then divide it according to the right of each co-owner. In accordance with Art. 677(2) of the Civil Code, any of the co-owners may request the liquidation of debts arising in connection with the co-ownership and which are due or become due during the year in which the partition takes place, and the amount necessary to liquidate these obligations *will be taken, in the absence of a stipulation to the contrary, from the price of the sale of the common property at the partition and will be borne by the co-owners in proportion to their respective shares.*

2.10. *The final partition decision constitutes an enforceable title* (except in the exceptional case provided for in article 996 of the Civil Procedure Code) and is *constitutive of rights*, according to article 680 of the Civil Code and art. 995 of the Civil Procedure Code and – if applicable – the court will also order the division of the sums deposited by the co-owner to whom the property has been provisionally assigned or those resulting from the sale of the property by the court of good will or by the bailiff, *directly proportional to the shares of each co-owner*.

By operation of law, due to constitutive effect, each co-owner becomes the exclusive owner of the property or of the sums allocated to him as *from the date on which the partition decision becomes final*.

Moreover, according to article 680(2) of the Civil Code, with regard to immovable property, the effects of the partition *take effect from the date of entry in the land register of the final partition decision*, the rule implicitly obliging such an inscription. Where applicable, the documents concluded by a co-owner, in accordance with the law, in respect of the common asset *remain valid and may be relied upon against* the person to whom the asset was assigned following the partition (see article 681 of the Civil Code in conjunction with article 641 of the Civil Code). At the same time, article 682 of the Civil Code provides for *guarantees* given by a co-owner in respect of his share, stating that they are *de jure transferred* to the asset assigned to him or, as the case may be, to the sums of money assigned to him by partition.

2.11. Another particularity is that, according to article 995(3) of the Civil Procedure Code, the partition decision is subject *only to appeal* and not to recourse, i.e. it becomes *definitive* on the date of delivery of the decision of the court of appeal or, as the case may be, on the date of expiry of the time limit for appeal, without the appeal having been exercised or, although it has been exercised, it has been annulled or the appeal has been withdrawn. However, the *principle of the uniqueness* of the appeal (article 460 of the Civil Procedure Code) must also be considered, regardless of whether the application for partition was made as the main application, as an incidental application or as an accessory application.

2.12. When the final partition judgment is not willingly executed, the interested party may request *enforcement within a prescription term of 10 years* [article 995(4) of the Civil Procedure Code in conjunction with art. 706(1) 2nd sentence of the Civil Procedure Code], if the enforcement concerns the assets in their materiality (compulsory surrender of assets assigned to a co-party). Enforcement of the tribute, however, may be requested within the general time limit of 3 years, according to art. 706(1) sentence I of the Civil Procedure Code, as this is a right of payment (the payment being, by hypothesis, *certain, liquid and due*, from the date of the final decision of partition).

3. DEROGATIONS FROM THE ORDINARY LITIGATION PROCEDURE

3.1. An unique solution in Romanian procedural law is ruled by article 673 of the Civil Code (in the case of judicial partition), which provides that the court seized with the partition application may „*suspend the pronouncement of the partition"* for a *maximum of one year*, in order not to cause serious damage to the interests of the other co-owners. If the danger of such prejudice is removed before the expiration of the time limit, the court will, at the request of the interested party, review the measure. This is a special rule of civil procedure governed by the Civil Code.

As we have already pointed out [5], the terminology of the special rule of article 673 of the Civil Code is inappropriate and inadequate, as the Code of Civil Procedure does not specifically provide for an institution of „*suspension of judgment"*, and if a new procedural institution was to be introduced, an appropriate rule should also have been provided. We observe that, from the point of view of civil procedural law, it may be either a *suspension of judgment* or a *postponement of judgment*[6]. Since postponing the judgment would not be an appropriate measure for the situation envisaged by the legislation (since there is no justification for the parties to put forward their conclusions on the merits and the court to declare the debates closed, and then pronounce the decision after a long period of time, without hearing the parties), it has been shown that the provisions of article 673 of the Civil Code do not cover anything other than *a particular case of optional (judicial) suspension of the judgment* in the matter of judicial partition [7], an opinion we share.

The measure of *suspension of partition* can be agreed upon by all the holders (co-parceners), but only if the following conditions (cumulative, in the case of immovable assets) are complied (established according to article 672 of the Civil Code): (i) the agreements on the suspension of partition must not be signed for a period of more than 5 years; (ii) in the case of partition of *immovable assets*, the agreements on the suspension must be signed *in authentic* form and are subject to the publicity formalities required by law.

3.2. As regards the *jurisdiction of the court*, there are a few exceptions from the ordinary law.

By way of derogation from the provisions of article 94 point 1(k) of the Civil Procedure Code – *as is common law as regards material jurisdiction according to the value criterion* – article 94 point 1(j) and (j1) of the Civil Procedure Code establishes the material jurisdiction of the court, *irrespective of the value of the assets subject to partition,* which means that the value criterion does not apply in this matter. [Of course, when the application for partition is *accessory* (in addition to the application for divorce or dissolution of marriage) or *incidental* (in the context of enforcement appeal or by filing a counterclaim in the divorce or dissolution of marriage proceedings), the *legal prorogation* of jurisdiction will apply, according to the rules laid down in article 123 of the Civil Procedure Code, so the court having jurisdiction to hear the main claim will also become competent to judge this claim (which will also be the court, in relation to the examples of main claims mentioned above)].

As regards *territorial jurisdiction*, it differs according to whether it is a matter of a *division of inheritance*, *division of joint property or division of property acquired by co-determination, copossession etc.* As the object of the study concerns the division of inheritance, we will simply point out that, in this case, jurisdiction is established in favour of the court of the *last domicile of the deceased* (article 118 of the Civil Procedure Code), even if the succession includes immovable property situated in the jurisdiction of another court,

and when the application for partition concerns several successively opened inheritances, the application is exclusively within the jurisdiction *of the court of the last domicile of any of the deceased* (article 118 (1) point 2 and (2) of the Civil Procedure Code).

3.3. There is also a derogation for *procedural capacity*.

First of all, *procedural capacity* is circumscribed by a limited number of subjects and cannot belong to any person. According to article 669 of the Civil Code, the end of co-ownership may be requested at any time, unless the partition has been suspended by law, legal act or court decision, and, with particular reference to the inheritance partition, article 1143(1) of the Civil Code, after establishing that no one may be obliged to remain in the indivision, provides that *the heir* may at any time request to leave the indivision, even where there are testamentary agreements or clauses providing otherwise. So, the *active procedural capacity* belongs *to any of the holders of the common property right.*

The *assignees of succession rights* who are subrogated to the rights of the co-partitioners also have legal capacity[8]. However, those who have renounced the succession do not have legal capacity[9]. Apart from the co-partitioners and, of course, their successors in title, partition may also be requested by their *personal creditors* or by the creditors of the succession, as well as by the *public prosecutor*, in the cases provided for in article 92(1) of the Civil Procedure Code.

However, although the proceedings may also be brought by certain persons, other than the co-owners, under the conditions required by the law, this does not mean that all those bringing the proceedings are also co-owners, so that the property will not be divided to them, as they are not the holders of the right of co-ownership de facto.

Third parties may also intervene in the partition process, either on their own initiative or at the request of one of the original parties [10]. It has been decided that a person who bought a specific item of property from one of the co-heirs while it was undivided is the successor in title of the seller's heir and therefore has an interest in intervening in the partition procedure [11]. Moreover, any challenge to the status of heir must be examined before the application for partition is heard on the merits [12], which is logical in the light of the peremptory nature of the exception of lack of legal standing, but also in view of the fact that, when the court chooses to grant a judgment in principle, it must be clear as to the status of the parties involved in the trial.

At the same time, *the claimant* in the partition application *is required to summon all the other co-owners* (since article 684 of the Civil Code provides imperatively that the partition made without the participation of all the owners is *null),* otherwise the *exception of lack of passive legal capacity* is applicable. However, the peremptory effect of this exception can be avoided if the court, on the basis of article 78(2) of the Civil Procedure Code, *of its own initiative*, refers to the other parties the question of whether the missing co-party should be brought into the case and at least one of the parties agrees (as follows from the *per a contrario* interpretation of article 78(2), second sentence, of the Civil Procedure Code]. *The nullity of the partition* can only be invoked by means of an objection and not by an action for annulment and, in any event, the court cannot reject the application for partition of the omitted heir, who cannot be opposed to it and who cannot exercise the remedies [13]. As has been pointed out in doctrine [14] and jurisprudence, the process of partition is characterised by the fact that it gives rise to a double judgment (*iudicium duplex*), with the defendant also being considered as the claimant, since he can obtain the „condemnation" of the original claimant, even without having made a claim against him. In practice, *each party*

is both claimant and defendant at the same time, a feature which also has effects in terms of expenses, which *will in principle be compensated* [15].

3.4. *Preliminary procedure* – public policy character, by derogation 193(3) of the Civil Procedure Code.

In the matter of judicial inheritance partition, prior to the application to the court, the claimant must comply with a ***mandatory preliminary procedure***, the failure to comply with which will result in the rejection of the partition application as *inadmissible*. In concrete terms, the claimant must attach to the application for partition *a notarial statement issued by the notary public on the verification of the inheritance records provided for by the Civil Code*, in accordance with article 193(3) of the Civil Procedure Code. The procedural means of invoking the irregularity consisting in the absence of this statement is ***the exception of inadmissibility*** *(substantive, absolute, peremptory exception)*.

3.5. *Derogations regarding the claims of the parties to the partition.*

In the process of partition, the court must consider and determine the claims of the parties as to the inclusion of all assets in the partition, and *such claims may be brought before the court without necessarily requiring an express amendment of the action by the claimant or a counterclaim by the defendant.* Thus, the addition to the mass of assets can also be made at the defendant's request.

By way of *derogation* from the ordinary law, the provisions of article 210 of the Civil Procedure Code concerning *the disjunction of the counterclaim from the main claim are not applicable in partition matters*, a point which has been consistently held in doctrine and jurisprudence [16] developed under the old procedural rules, and which is still maintained today.

As we have already pointed out on another occasion [17], for the same reasons, *in matters of partition*, we consider that article 209(4) of the Civil Procedure Code is not applicable and, *de lege ferenda*, an express derogation should be established, in the sense that ***a counterclaim*** *concerning the composition of the partitionable mass (whether it is a question of an addition or a reduction of it, by removing one or more assets), the extent of the rights of the co-sharers, the existence of other co-sharers (who were not included in the initial claim) and the method of division* ***may be formulated at any time before the closure of the proceedings before the first court.*** An argument is also made by the provisions of article 986 of the Civil Procedure Code, which allow for *an additional order of admission in principle* to be made after such an order has been made under article 985 of the Civil Procedure Code and prior to the delivery of the partition judgment. As has been pointed out in the doctrine [18], „the interlocutory nature of the decision of admission in principle *should not be understood as meaning that it is not possible to supplement it subsequently* if it is established (for example, due to joinder, a counterclaim or a principal intervention) that there are other co-owners or that certain assets which should have been subject to division have been omitted, without there having been an adversarial debate on those co-owners or those assets. In such cases, the court may, after summoning the parties, make a new (supplementary) preliminary ruling, including, where appropriate, the omitted co-owners or assets". But, by hypothesis, the delivery of a preliminary ruling of admission in principle on the partition application *can only occur after the first trial term*, *so that the time limit within which the statement of defence and counterclaim can be formulated, under the conditions of common law*, is always exceeded, and – nevertheless – *article 986 of the Civil Procedure Code indirectly allows the partition application to be supplemented and/or amended with*

such claims. There is no doubt about this possibility, but if we wish to qualify the application requesting such additions or amendments, we must recognise that it may have the *legal nature* of either a *statement* of claim or a *counterclaim* [19].

It has been held [20] that the inclusion of all the assets in the partition *is not necessarily subject to the express modification of the claim by the plaintiff or the filing of a counterclaim by the defendant.*At the same time, it has been pointed out that the claims regarding the partition, „*whether they are made by way of a counterclaim or by way of a separate claim which has been linked to the partition claim, since they supplement the latter claim, must be settled by the same decision and it is therefore not possible to separate them"* [21]. The counterclaim in partition is closely related to the main claim, since it concerns the defendant's claims regarding the composition of the inheritance, the extension of the rights of the co-heirs and the method of division, so that the solution of severing the counterclaim in proceedings for leaving the undivided estate is contrary to the interests of the heirs [22]. It has even been decided that the court is required to include the assets indicated by the parties before the court in the partition, *without necessarily having to modify the main claim or make a counterclaim* [23]. It has also been consistently held in doctrine and jurisprudence[24] that, where the main claim concerns the succession debate and judicial partition and the counterclaim concerns the defendant's claims concerning the composition of the succession mass, the extent of the heirs' rights and the method of division, it is not possible to separate the counterclaim, given the close link between it and the main claim, and a contrary solution would be contrary to the interests of all the co-parties. Furthermore, according to the general rule, *it is not possible to separate the counterclaim from the main claim even if the parties' claims are based on the same title* [25]. Moreover, separation may not be provided for in cases specifically foreseen in law or *if the hearing of both claims is necessary for the unified resolution of the case* [article 210(2) second sentence of the Civil Procedure Code], as in the case of partition, and this is an additional argument for our proposal for a *lege ferenda*. In previous practice it has been decided that „when an action for leaving a partition is brought by a claimant in court, the defendant in the same action may also orally request the court to oblige the claimant to bring to the partition certain assets which are in his possession but form part of the partition" [26]; the defendant *does not have to make a counterclaim* to require the claimant or any other participant in the partition to bring other property not included in the claim to the partition, as this is a defence [27]. By the *Minutes of the Meeting of the Presidents of the Civil Divisions of the High Court of Cassation and Justice and of the Courts of Appeal* – Court of Appeal Bacău, 23-24 June 2016 [28], at point 8, it was unanimously stated that: „In the situation in which the action brought by the claimant does not contain a head aiming at establishing the status of co-owner and the shares, but only concerns the partition (since, previously, for example, a certificate of heirship was issued, which recognizes these qualities and shares), we consider that the defendant, if he objects the shares established, must file a counterclaim, aiming at the annulment of the certificate of heirship, application that will be stamped in accordance with art. 3(1) of O.U.G. no. 80/2013, in relation to the right which the defendant seeks to enforce by bringing the claim. If, however, the claimant has himself requested the court, by way of the claim, to establish the status of co-owner and the shares, the defendant does not owe any more stamp duty if he objects to the shares requested by the claimant, since the court has already been empowered to establish the shares to which the co-owners are entitled and stamp duty has been paid for that action, *the*

defendant's defences being capable of being put forward in the defence and not by way of a counterclaim'.

Therefore, there are enough arguments to support our thesis that, in the partition process, *both the change of the main action and the filing of a counterclaim can be made at any time, until the closure of the proceedings before the first court*, as well as the fact that, for certain claims which, in common law, would require the filing of a counterclaim, in partition, they can be qualified as a *defence*. However, once the debates have been closed and the first court has delivered its judgment, it is no longer possible to add to or modify applications for partition (if they are made, *they will be considered as new requests on appeal* and will be dismissed as *inadmissible* under article 478(3) of the Civil Procedure Code], and it will be necessary to submit a new partition request in respect of the assets in question. The same is also stated in article 684(3) sentence II of the Civil Code, according to which „*an additional partition may be made at any time for the missing assets"*. The solution adopted in the new Civil Code was already established in doctrine and jurisprudence. Thus, it was decided that only when certain assets have been missed out *an additional partition* is admissible [29]. In fact, if in the partition, for various reasons, some assets have been missed out from the liquidation of the co-ownership or community property, another claim can be made for an additional partition, the right of action for an additional partition also being non-extinguishable[30].

3.6. *Admission in principle*. Except for forms of intervention by third parties in civil actions, which require a ruling on admissibility in principle, and remedies of retraction, which also have a limit on admissibility in principle (as does the appeal filter procedure of recourse, for actions commenced when such rules were in force), in civil actions only partition can give rise *to a ruling on admissibility in principle*, which – *de lege lata – is not mandatory but optional*.

Thus, when the formation of the lots requires an expertise of measurement, evaluation, and the court does not have sufficient information for this, it will determine, *by a decision of admission in principle,* the assets subject to division, the title of co-ownership of the parties, the quota share of each one, etc, the amount of the claims arising out of the joint ownership which the co-owners have against each other and, where the subject-matter of the partition is an inheritance, the court shall determine the debts transferred by the inheritance, the debts and amounts owed by the co-owners to the deceased and the duties of the inheritance. However, if the court has enough elements to determine the parcels, it will, after debate, *directly pronounce the partition decision*. This solution follows from article 984 of the Civil Procedure Code, which provides that, if the parties do not agree, the court will determine the assets subject to division, the title of co-owners (joint tenants or devisees), the share to which each is entitled and the debts arising from the joint ownership which the holders have against each other. On the basis of these elements, the court will proceed with the formation of the parcels and their allocation.

Given that it has the nature of a court decision *lato sensu*, the dispositif of the *admission in principle* must be found in the summary drawn up during the deliberations. We are of the opinion that *the absence of the summary decision* constitutes a nullity of the preliminary ruling, as well as a nullity of the decision, according to articles 425-426 of the Civil Procedure Code in association with article 179(3) of the Civil Procedure Code. If the summary ruling is not given at the time when the „ hearing „ took place, it is necessary to have *a summary of the hearing*, because otherwise the legality and the substance of the

summary ruling cannot be verified. It has been decided in jurisprudence [31] that the interlocutory summary ruling is pronounced following a trial activity, fulfilling the conditions of *a genuine court decision,* so that it is subject *to clarification* within the meaning of the provisions of article 281^1 of the Civil Procedure Code 1965 (currently under article 443 of the Civil Procedure Code – n.n.). It has also been decided[32] that the admission in principle of the preliminary ruling is subject *to review* under the procedure provided for in article 281 of the Civil Procedure Code 1865 (now under article 442 of the Civil Procedure Code- n.n.), if it contains material errors.

The decision of admission in principle pronounced according to article 985 must *also be motivated*, according to article 425 of the Civil Procedure Code, given the fact that it is given after the administration of proof and contradictory debates [33] and has an *interlocutory character*, the court being unable, in principle, to reconsider what has been established by the preliminary ruling [34]. However, as it results from the correlated interpretation of article 985 with article 986 of the Civil Procedure Code, *the interlocutory nature* of the admission in principle is *relative*, since, by way of derogation from the ordinary law (in the matter of interlocutory judgments in general), this does not prevent the court from supplementing or even modifying the initial judgment by *an additional admission in principle*. Thus, *an additional judgment of admission in principle* could be given if, because of the joinder of a counterclaim or a principal intervention, the need arises to include other assets in the partition, or simply in the circumstances expressly referred to in article 986 of the Civil Procedure Code, which provides that if, after the judgment provided for in article 985 of the Civil Procedure Code has been given but before the judgment of partition has been given, it is found that there are other co-owners or that certain assets which should have been subject to partition have been omitted, without there having been any adversarial debate on those co-owners or those assets, *the court may give a new judgment*, which will include, as the case may be, the co-owners or the omitted assets. Under the same conditions, the court may, with the consent of all the co-owners, remove an asset which has been erroneously included in the partition.

3.7. *The settlement of accessory claims to partition by a preliminary admission in principle* is also a derogation from the ordinary law. Article 985(2) of the Civil Procedure Code, as an element of novelty, provides that where, in addition to the main application for partition, ancillary applications have also been made in connection with the partition and on the resolution of which the partition depends, or an application for reduction of excessive donations or an application for a report of donations and the like, *the court must also rule on these applications by a decision of admission in principle*. The provision is natural. How could the court, by a decision of admission in principle, determine the status of co-owner, the share due to each co-owner and the claims or charges arising from the joint ownership which the co-owners have against each other, if it did not first determine whether the donation is related or not, whether the gifts are excessive or not etc., if it did not first resolve these ancillary claims? Basically, the decision of admission in principle still has the legal nature of a judgment, in practice, we could say that it is a *partial judgment*, because, by what it orders, the court resolves an important part of the claims relating to partition.

3.8. *The additional decision of admission in principle.*

Although the preliminary admission in principle has an interlocutory character, by way of derogation, article 986 of the Civil Procedure Code provides for situations in which the *conclusion may be supplemented* in regard to certain assets or certain persons or *may be*

amended by removing certain assets from the mass of assets to be divided, which is why we have already pointed out above that it is a question of a *relative interlocutory character.* Even if the *additional preliminary admission in principle decision* were to supplement or amend *the previous preliminary admission in principle decision*, its legal nature does not change, so that a *new summary* has to be written, on the *penalty of invalidating* the partition judgment and the new preliminary admission in principle decision [35].

3.9. *Remedies*. According to the legal rule in article 987 of the Civil Procedure Code, the preliminary admissions provided for in Article 985(1) of the Civil Procedure Code and article 986of the Civil Procedure Code can *only be appealed against together with the merits*. By way of exception, even if the appellant does not expressly state in the appeal against the judgment that he is also appealing against the *preliminary ruling on partition*, the court of appeal will also examine the legality and merits of the appeal, of course, taking into account the limits of the appeal, as shown by the grounds of appeal.

3.10. *The procedures for the judicial partition* are expressly provided by law. These include *partition by assignment of property* (which is used when it is not possible to divide the property in kind, or when it would cause a significant reduction in its value or would adversely affect its economic purpose or for other objective reasons – s.n.) involves a *provisional assignment* of the property to one of the co-owners, at the request of a co-owner, according to article 989 of the Civil Procedure Code. According to Art. 989 para. (1) sentence III of the C. proc. civ., the court shall decide on the preliminary decision on the provisional assignment of the property to one of the co-owners, at the request of a co-owner. According to article 989(1) sentence III of the Civil Procedure Code, the court shall decide on the assignment in a judgment, in which it shall also set the time limit within which the co-owner to whom the property has been assigned must deposit the sums of money representing the equivalent value of the shares due to the other co-owners (tributes). If the sums have been deposited within the time limit, the court will give a direct *decision on the merits*, *definitively allocating* the property to the co-owner to whom the property was originally provisionally allocated. If, however, the co-owner to whom the property was provisionally allocated does not deposit the sums within the time limit, the court will provisionally allocate the property to another co-owner. This decision provisionally assigning the property to a co-owner *can only be appealed against together with the merits*, pursuant to article 466(4) of the Civil Procedure Code, since there is no other legal provision.

However, depending on the specific circumstances of the case, the court may also resort directly *to the final assignment*, according to article 990 of the Civil Procedure Code, by directly pronouncing the final assignment of the asset to a co-party and determining the tributes that the latter will have to pay to the other co-parties.

As regards *partition by sale of the asset*, to which article 991 et seq. of the Civil Procedure Code refers, by way of derogation, both the *decision ordering the sale of the asset directly by the co-sharers* and the *decision ordering the sale at auction by a bailiff* are subject *to appeal, separately,* and therefore not together with the decision on the merits, thus differing from the preliminary rulings of admission in principle which the court may issue in partition proceedings. Moreover, article 991(4), second sentence, of the Civil Procedure Code provides imperatively that if these decisions may not be appealed together with the decision on the merits, *unless they have been appealed separately*. In other words, by not appealing against these decisions provided for in article 990 of the Civil Procedure

Code, they become *final* as regards the measures ordered by the court by means of them, the liquidation of the co-ownership status by sale becoming mandatory in that partition file. *De lege lata*, a *special* time limit, *derogating* from the ordinary appeal period, *of 15 days from the pronouncement is established*.

And with regard to the *procedure of sale by auction*, *through the bailiff*, expressly ruled by article 992 of the Civil Procedure Code, although the provisions on enforcement apply by analogy, there is a *derogation*, namely that the parties (co-owners) may agree either that the sale of the goods shall be made *at any price* offered by the persons participating in the auction, or they may agree on a minimum price below which the sale shall not be made [article 992(5) of the Civil Procedure Code]. If the sale has taken place, *the price shall be recorded at the court's disposal* by the bailiff, who shall then divide it according to the right of each co-owner. In addition, with regard to the price of this sale at auction, account will be taken (if applicable) of article 677(2) of the Civil Code, a.i. any of the co-owners may request the extinction of debts arising in connection with the co-ownership and which are due or become due during the year in which the partition takes place, and the amount necessary for the extinction of these obligations *will be taken, in the absence of a stipulation to the contrary, from the price of the sale of the common property on the occasion of the partition and will be paid by the co-owners in proportion to their respective shares.*

3.11. *Some derogatory aspects of the partition decision.*

The claim for partition is settled by the court by a decision which, having become final, in principle, constitutes an *enforceable title* (except in the exceptional case provided for in article 996 of the Civil Procedure Code) and has *the character of a constitutive right*, according to article 680 of the Civil Code and article 995 of the Civil Procedure Code. By this decision, the court will also order the division of the sums deposited by the co-owner to whom the property has been provisionally assigned, i.e. the sums resulting from the sale of the property by the court or by the bailiff, *directly proportional to the shares of each co-owner*. Article 994(3) of the Civil Procedure Code establishes a specific, peremptory solution, but which *will not be res judicata on the merits of the case*, *not even with regard to any preliminary rulings of admission in principle*, given in accordance with articles 985-986 of the Civil Procedure Code. Thus, if partition in kind is not possible and all the co-parties refuse to be assigned the asset and it cannot be sold, the court *will decide to close the case*. It has been pointed out that this solution is necessary because it is impossible to put an end to the state of undivided ownership, but a new application for partition may be made at a later date [36]. The solution for the closure of the case is also ordered by a decision *(judgment)* and not by a preliminary ruling.

There is also an exception to the court's provision on *legal expenses*. Even in the absence of an express rule, the doctrine and judicial practice have unanimously enshrined the rule that, in matters of partition, the costs of the proceedings *are to be set off against each co-party*. Thus, it has been decided [37] that the expenses of the trial are to be paid, in principle, by all the co-parties *according to their own share*. This solution is justified by the fact that the partition judgment will benefit all the parties to the trial (the coparceners), thus ruling out the idea of *procedural fault*, which is the basis for awarding legal expenses. At the same time, it has been decided that, in the event that a co-party has submitted claims which have been found to be unsubstantiated, the expenses incurred will be paid exclusively by that party [38].

The article 996 of the Civil Procedure Code, which provides that if the parties expressly declare that they do not request the delivery of the property (except in cases where some of the co-parties have been obliged to pay money, in respect of which the decision can be enforced within 3 years – s.n.), the partition decision is not subject to enforcement, also derogates from the rule established by article 995 Civil Procedure Code and from the common law in general. In order to take possession of the property assigned to him and refused by the other co-owners, the interested party must bring an *action for reclaim* [39]. As we have already pointed out [40], although the co-sharer to whom the property has been assigned has acquired exclusive title to it by a final partition decision, which has a constitutive character [and has also entered it in the land register, in accordance with the provisions of article 680(2) of the Civil Code, the co-sharer who has been assigned the property has not acquired exclusive title to it. (2) of the Civil Code], he does not in fact have possession of the assigned property, and the party in possession refuses to hand it over voluntarily, and if, prior to the delivery of the partition decision, *on the basis of particular considerations*, the parties have expressly declared that they do not request the handing over of the property, then the exclusive owner of the property, like any non-possessory owner, has a claim against the non-possessory possessor. In the absence of an express declaration of the kind referred to in the first paragraph of article 996 of the Civil Procedure Code, the decision is presumptively enforceable, and the handover of the property may be requested within the limitation period of 10 years stipulated in article 995 of the Civil Procedure Code and article 706 of the Civil Procedure Code, therefore the rule of article 996 of the Civil Procedure Code is only *an exception to the rule of enforceability of the decision*.

References

1. Gabriela Răducan, „Civil Procedural Law. Appeals. Non-judicial litigation. Special procedures", Ed. Hamangiu, 2017, p. 369.
2. Mihaela Tăbârcă, „Civil Procedural Law", vol. III, Ed. Universul Juridic, Bucharest, 2017, p. 485. G. Boroi, M. Stancu, Drept procesual civil, Ed. Hamangiu, 2017, p. 899-900.
3. Gabriela Răducan, *op. cit.*, p. 377-378.
4. V.M. Ciobanu, G. Boroi, T.C. Briciu, „Civil Procedural Law. Selective course for undergraduate", Ed. C.H. Beck, 2011, p. 462.
5. Gabriela Răducan, *op. cit.*, p. 370.
6. In the same sense, see also G. Boroi, C.A. Anghelescu, B. Nazat, Civil Law.Rights in rem., 2nd edition, Ed. Hamangiu, 2013, p. 117.
7. Ibidem.
8. D. CHIRICĂ, „Civil law. Successions", Ed. Lumina Lex, Bucharest, 1996, p. 297.
9. Court Strehaia, Civil decision of 27 December 1993, with critical note by A. Sitaru and approving note by C. Turianu, in Dreptul no. 12/1994, p. 52-54.
10. See also V.M. Ciobanu, G. Boroi, T.C. Briciu, *op. cit.*, p. 453-454.
11. C.S.J., col. civ., dec. no. 1352/1949, in J.N. no. 5/1950, p. 664, with note by I. Stoenescu; Supreme Court, col. civ., dec. no. 1325/1956, in C.D. 1956, p. 361, in G. Boroi, O. Spineanu-Matei, *op. cit.*
12. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 452-453.
13. Supreme Court, s. civ., dec. no. 2508/1988, in R.R.D. no. 8/1989, p. 71.
14. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 452-453.

15. Bucharest Court, s. civ., dec. nr. 440/1990, in C.P.J. 1990, p. 130.

16. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 452-453; I. DELEANU, „Treatise on Civil Procedure", vol. II, Ed. All Beck, Bucharest, 2005, p. 770-793.

17. Gabriela Răducan, *op. cit.*, p. 382.

18. G. Boroi, M. Stancu, *op. cit.*, p. 907.

19. Gabriela Răducan, *op. cit.*, p. 382.

20. Supreme Court, s. civ., dec. no. 2727/1988, in R.R.D. no. 9-12/1989, p. 134 apud I. DELEANU, *op. cit.*, vol. II, p. 710.

21. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 452-453; C.S.J., s. civ., dec. nr. 1997/1991, in „Issues of law from the jurisprudence of the Supreme Court of Justice in the years 1990-1992", p. 151; Court Maramureș, dec. civ. nr. 686/1977, in R.R.D. nr. 6/1979, p. 46; Court Hunedoara, dec. civ. nr. 1054/1978, in R.R.D. nr. 2/1979, p. 61.

22. C.S.J., s. civ., dec. nr. 1997/1991, in G. BOROI, O. SPINEANU-MATEI, „Code of Civil Procedure Annotated", 3rd ed. Hamangiu, Bucharest, 2011, p. 899-900.

23. Supreme Court, s. civ., dec. no. 2727/1988, in R.R.D. no. 9-12/1989, p. 134; Court of Appeal Brașov, civil decision nr. 423/R/1994, in C.P.J. 1995, p. 17.

24. G. Boroi, „Annotated and Commented Code of Civil Procedure", vol. I, Ed. All Beck, Bucharest, 2001, p. 335; V.M. Ciobanu, G. Boroi, T.C.. Briciu, *op. cit.*, pp. 215-216; G. Boroi, M. Stancu, *op. cit.*, p. 409-410, D. Anghel, „Judicial partition in the regulation of the new codes", Ed. Hamangiu, București, 2015, p. 183; Supreme Court, s. civ., dec. nr. 652/1970, in C.D. 1970, p. 241; dec. nr. 159/1977, in C.D. 1977, p. 176; C.S.J., s. civ., dec. nr. 1997/1991, in Law magazine nr. 7/1992, p. 78; Court of Bucharest, s. a IV-a civ., dec. nr. 1321/1995, in C.P.J. 1995, p. 287; Court of Appeal Ploiești, dec. civ. no. 252/1996, in C.P.J. sem. II 1996, p. 169, apud.G. Boroi, M. Stancu, *op. cit.*, p. 409; Court of Appeal Brașov, dec. nr. 702/R/2005, portal just.ro.

25. G. BOROI, M. STANCU, *op. cit.*, p. 410.

26. Trib. reg. București, dec. no. 356/1952, in J.N. no. 1/1953, p. 129, in G. BOROI, O. SPINEANU-MATEI, *op. cit.*

27. C.A. Brașov, s. civ., dec. nr. 702/R/2005, in C.P.J.C. 2005, p. 197, idem, p. 900-901.

28. https://inmlex.ro/fisiere/d_2442/Minuta%20intalnire%20presedinti%20sectii%20civile%20Bacau%20iunie%202016.pdf

29. Supreme Court, civil decision no. 785/1988, in R.R.D. no. 2/1989, p. 71.

30. I. DELEANU, *op. cit.*, vol. II, 2005, p. 770-793.

31. Court of Appeal Cluj, s. civ., dec. nr. 839/2002, in B.J. 2002, p. 181, idem, p. 905.

32. Supreme Court, s. civ., dec. no. 2102/1975, in Repertoriu III, p. 144, apud G. BOROI, O. SPINEANU-MATEI, *op. cit.*

33. See also Supreme Court, s. civ., dec. no. 1522/1986, in R.R.D. no. 6/1987, p. 72, ibidem.

34. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 452 et seq.; I. DELEANU, *op. cit.*, vol. II, 2005, p. 386; M. TĂBÂRCĂ, Civil Procedure Law, vol. II, Ed. Universul Juridic, Bucharest, 2005, p. 273; M. TĂBÂRCĂ, GH. BUTA, Civil Procedure Code commented and annotated with legislation, case law and doctrine, Ed. Universul Juridic, Bucharest, 2007, p. 1495, comment 3.

35. See also G.C. FRENȚIU, D.L. BĂLDEAN, Code of Civil Procedure commented and annotated, Ed. Hamangiu, Bucharest, 2008, p. 1486.

36. V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 464.

37. Supreme Court, s. civ., dec. nr. 1085/1972, in Repertoriu II, p. 378, nr. 148, in G. BOROI, O. SPINEANU-MATEI, *op. cit.*

38. Supreme Court, s. civ., dec. no. 1410/1976, in C.D. 1976, p. 242.

39. See also V.M. CIOBANU, G. BOROI, T.C. BRICIU, *op. cit.*, p. 465, as well as Plenary of Supreme Court, Guidance Decree No. 3/1968, para. 2, in interdisciplinary adjustment, pp. 379-380.

THE SURVIVOR'S SPECIAL AVAILABLE QUOTA. DOCTRINAL AND JUDICIAL PRACTICE SOLUTIONS

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Abstract
Without constituting an element of novelty, the institution of the available quota of the surviving spouse establishes a special protection of the descendants from a previous marriage of the deceased against the excessive, exaggerated liberalities that their father could make to the spouse from a marriage. subsequent. However, what brings the new, current regulation of the Civil Code, is the way of calculating this special quota, the practice and the doctrine not being unitary in this sense.
Keyword: *surviving spouse, legal reserve, liberalities, inheritance transfer*

1. Regulation of the special available quota

The special provisions of **art. 1090 para. 1 The Civil Code regulates a new institution to be a new one[1], respectively the special available quota of the surviving spouse.** Thus, „ the non- ***transferable liberalities made to the surviving spouse, who inherits in competition with descendants other than their common ones, may not exceed a quarter of the inheritance, nor the part of the descendant who received the least".***

Without constituting an element of novelty, the existing institution, and the previous regulation, establish a special protection of the descendants from a previous marriage of the deceased against the excessive, exaggerated liberalities that their father could make to the husband from -a subsequent marriage.

The purpose of this provision is to protect the descendants of the deceased's previous marriage from the influences or pressures that the current spouse might exert on their parent, or to limit the deceased's ability to dispose of unreported benefits, so that the surviving spouse is not a favored heir, privileged[2].

What brings the new regulation of the Civil Code[3], is the way of calculating this special quota, the practice and the doctrine not being unitary in this sense.

2. The concept of „descendants other than their common ones"

First, the text covers both children from a previous marriage of the deceased, whether the marriage was annulled, dissolved by divorce or terminated by the death of one of the

[1]P.E. Ispas, *New Institutions Regulated by the New Civil Code,* Justice Communications Scientific Session, Rule of Law and Legal Culture, Institute of Legal Research of the Romanian Academy, Universul Juridic Publishing House, Bucharest, 2011, pp. 545-554; Predescu, Nicoleta Ramona, Human Dignity – A Right or a Principle of Human Rights?, The International Conference on Law, European Studies and International Relations, 6th edition, Ed. Hamangiu, Bucharest, 2018.

[2]F. Deak, R. Popescu, *Succession Law Treaty,* vol. II, Testamentary Inheritance, Universul Juridic Publishing House, Bucharest 2019 p. 288.

[3] A.L.Morarescu*, Compared aspects on injuriy and the theory of unpredictibility in the new Civil Code*, Revue Europene du droit social, vol XXXIII, Bibliotheca, Publishing House, Bucharest; D.C. Chifor, *The valences of the notion of risk contracted*, in the volume of the International Conference on Law, European Studies and International Relations, fourth edition, 2017.

spouses, and children out of wedlock, as well as adopted children. by the deceased. The only condition imposed indirectly by the legal text is that they be conceived, not necessarily born, outside the new marriage, respectively the adoption is approved before the conclusion of the last marriage of the deceased.

Secondly, the term „descendant" includes both first-degree descendants, children of the deceased from the previous marriage, out of wedlock or adopted, and second-degree, third-degree descendants etc., stating that in their case lastly, the extent of the reserve is determined not by their number, but by the number of strains, i.e., the first-degree descendants from which they come[4].

The text also applies whether the descendants invoking it come from a single previous marriage or even from several marriages.

Thirdly, the descendant who avails himself of the provisions of art. 1090 C. civ., Must meet the conditions of the right of legal inheritance: to have capacity[5], to have a succession vocation, not to be unworthy, not to be a waiver. In other words, he should be able to collect the inheritance of the deceased ascendant[6].

3. The liberalities envisaged by the legal text

The text refers exclusively to the exempt relationship donations made to the surviving spouse (during the marriage of the husband from the second marriage or from the subsequent marriage, prior to the marriage of the husband from the last marriage, if the donation was made for marriage), but also the legacies of the deceased. Regarding the latter aspect, the question of whether the legal text also considers a will, containing the legacy left by the deceased in favor of the wife, with a date prior to the conclusion of the last marriage, has been discussed in the literature. The doctrine stated that the text also considers the will having a date prior to the marriage, with the motivation that if the text would apply only in the case of the will with the date after the marriage, the testator could evade the provisions of art. 1090 C. civ. by an earlier will[7].

In addition, relatively recently, solutions of judicial practice have appeared that have admitted the applicability of the legal text also in the case of wills with the date prior to the conclusion of the marriage, containing ties in favor of the concubine, who later became a wife[8].

4. Determination of the amount of the ordinary available quota and the special available quota

Application of the provisions of art. 1090 of the Civil Code presupposes the hypothesis in which the deceased's descendants come in competition with the surviving spouse from the second marriage and liberalities were made by the deceased. The most common

[4] Frăsinei Mădălina; collectively, in the *New Civil Code commented,* Hamangiu Publishing House, Bucharest, 2013, commentary on art. 1090 Civil Code.

[5] For details on the person's ability, see LC Gavrilescu, *Civil Law. General part,* University course. Universul Juridic Publishing House, Bucharest, 2015, p. 89; Marian Nicolae, Vasile Bîcu, George Alexandru Ilie, Radu Rizoiu, *Civil Law. Persoanele*, Ed. Universul Juridic, Bucharest, 2016, p. 200.

[6] For details on the transfer of assets and legal effects, see I.R.Urs, P.E.Ispas, *Civil Law. Theory of real rights,* Hamangiu Publishing House, Bucharest, 2015, pp. 11-12; P.E.Ispas, *Civil law. Main real rights. Synthesis. Jurisprudence.* Hamangiu Publishing House, Bucharest, 2022, pp. 8-9.

[7] F.Deak, *op. cit.*, pp. 293.

[8] The sentence of the Buftea court no. 2743 of 11.05.2018, unpublished.

situation in practice is when the surviving spouse is established as a universal legatee and comes into competition with one or more children of the deceased from a previous marriage. This raises the question of how much will the surviving spouse reap from the inheritance?

In this case, it is necessary to first establish the inheritance reserves of the children and the surviving spouse, because only for the rest of the deceased's property can be disposed either in favor of the children, or in favor of the surviving spouse or in favor of another person.

The limitation to this right of the deceased is provided only in the case of liberalities made to the spouse in a subsequent marriage, which will not be able to receive as a donation or bequeathed to the deceased spouse only an equal share of the legitimate share of the child who taken at least and without, in any case, liberality exceeding a quarter of the goods.

In this respect, the above provisions establish a special available quota, which is included in the ordinary available quota, without being able to cumulate with each other and without being able to reach legal reserves, in which case the liberalities must be reduced to the limit of legal reserves.

Please note that a descendant cannot receive less than the legal reserve of succession due to him, so the *descendant who received the least* will be the one who benefited only from the legal reserve. The special available quota is therefore limited to a minimum and a maximum limit, which is equal to the minimum succession reserve of the descendant and to the maximum share of ¼ in the inheritance[9].

In conclusion, the spouse of the deceased's last marriage cannot be gratified by the deceased within the limits of the ordinary available quota, but only within the limits of this special available quota, which has a variable maximum (the part of the child who took the least. his succession reserve) and, at the same time, a fixed maximum (a quarter of the inheritance).

The part that represents the special available contribution is deducted from the ordinary available contribution; an aspect unanimously admitted in the doctrine. However, in terms of calculus, two ways have been identified[10]. We reproduce the simplest, and which has been applied to other similar cases[11]. First, the reserve of the surviving spouse and descendants is deducted, in relation to the entire inheritance. Subsequently, the reserve of the surviving spouse is added to that of the descendants, and the amount obtained is deducted in full, obtaining the ordinary available quota. From the ordinary available quota is deducted the special one, which cannot exceed 1/4 from the inheritance, nor the part of the child who took less. This comparison can be made by reference to the succession reserve of one of several descendants. In the last stage, art. 1090 para. 2 Civil Code" *If the deceased did not dispose through liberalities of the difference between the available quota established according to art. 1089 (ordinary quota) and the special available quota, then this difference belongs to the descendants"*. Thus, unlike the previous Civil Code, the current regulation establishes „expressis verbis" that the difference between the general available quota and

[9] I. Popa, *Succession reserve and reserve heirs in the regulation of the new Civil Code,* in Law no. 6/2011, p. 42.

[10] G. Boroi, L. Stanciulesu, *Civil Law Institutions,* CH BECK Publishing House, Bucharest, p. 616.

[11] Civil sentence no. 86 of January 31, 2014 of the Sinaia court, available on *i.drept.ro*, Buftea court sentence no. 2743 of 11.05.2018, unpublished.

the special one belongs to the descendants. In the Civil Code of 1864, the difference was distributed according to the rules of legal inheritance.

In this context, we cannot agree with the view[12] that the surviving spouse should not receive less than 1/4 of the inheritance, the share he or she would have received as a legal heir. (In the absence of liberality). This special quota is lower than the indicated percentage, for example in a contest with 5 heirs, the surviving spouse can only collect 1/5 of the inheritance, although a universal legatee was established.

5. Sanction for exceeding the special available quota

Art. 1090 Civil Code does not expressly provide for any special sanction for violating the limits within which the deceased could make donations or wills in favor of the surviving spouse who inherits in competition with children from a previous marriage or out of wedlock. In this context, the sanction provided for exceeding the ordinary available quota is applied, namely the reduction of excessive liberalities, but with some specificities. Since the will left by the deceased violates the special available quota, the sanction is its reduction, as excessive liberality.

As a rule, the reduction of excessive liberalities may be requested by the reserved heirs, by their successors, as well as by the unsecured creditors of the reserved heirs, according to art. 1093 Civil Code. Instead, the reduction of excessive liberalities based on the provisions of art. 1090 Civil Code can be invoked exclusively by the descendant of the deceased who is not common with that of the surviving spouse, and only if the descendant comes to inheritance, respectively is not unworthy or renouncing. In other words, the reduction can only be requested by the descendants in favor of whom the special available quota has been established.

At the same time, art. 1092 Civil Code expressly provides that liberalities that violate the reserve of succession are subject to reduction on request. Thus, the reduction of excessive liberalities does not operate by law but must be invoked. Likewise, the reduction of the liberalities that violate the special available quota of the surviving spouse are subject to the reduction on request.

From a procedural point of view, it must be distinguished, as the object of the liberality to be reduced, is in the possession of the beneficiary (the surviving spouse) or in the possession of the descendant from the previous or out-of-wedlock marriage. If the property subject to the liberality is in the possession of the gratuity (surviving spouse), the descendants will request the reduction of the liberality through a lawsuit (reduction *action*). Being a personal action, the action for reduction is prescriptive within the general limitation period of 3 years. As a rule, the limitation period of the action in the reduction of excessive liberalities starts to run from the date of opening the inheritance, at which point the right to action of the descendants out of wedlock is born. Exceptionally, in the case of liberality and in favor of the surviving spouse whose existence was not known to the descendants, the limitation period shall run from the date on which they became aware of the existence of the liberality or its nature to infringe the survivor's special available quota.

[12]F.Deak, R. Popescu, *op. cit.,* pg. 299.

If the object of excessive liberality is in the possession of the descendants from outside the marriage or from a previous marriage, and who refuses to hand them over (a rare hypothesis in practice), the beneficiary of the liberality (surviving spouse) will exercise his right to action (action in handing over the bequest, action in sharing). In this process opened by the surviving spouse, the descendants will defend themselves by invoking the exception of reduction, following the partial ineffectiveness of the excessive bequest left to the surviving spouse, respectively its reduction to the limit of the special available quota. In this case, when it is invoked by way of exception, (exception of substance) the reduction is time-barred.

THEORETICAL AND PRACTICAL ASPECTS OF THE TRANSFER OF PROCEDURAL STATUS IN THE EVENT OF THE DEATH OF THE PARTY

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Abstract
The death of the party during the civil proceedings is of interest both from the point of view of substantive and procedural law. What are the legal consequences of the death of the party in the process? Under what conditions will the legal proceedings continue and against whom? What happens when the party has no heirs or, even if he does, they do not accept the inheritance? What conditions must be met in order to transfer legal standing? Who is to bear the costs if the plaintiff dies before the claim is brought and the defendant learns of it after the statement of claim has been lodged and a lawyer has been engaged? These are just some of the questions we will try to answer in the course of this study.
Keywords: *inheritance, death, legal standing, transmission of legal standing, divorce*

1. Brief considerations on the civil action

The civil action, as defined by art. 29 of the Civil Procedure Code, constitutes the set of procedural means provided by law for the protection of a subjective right claimed by one of the parties or of another legal situation, as well as for the defence of the parties in the process.

The civil action may be regarded as a means of defending the civil subjective right or as a procedural right granted to the holder of the alleged material subjective right.

First of all, it must be emphasised that the exercise of civil action is free[1], so it could be said that no one can be held liable for making claims that have proved to be unfounded. However, this liability will operate in the event of abuse of procedural law, in which context there are three types of sanctions: procedural, judicial fines and civil damages.

On the other hand, civil action is optional. For this reason, no one can be forced to bring it against his will. This characteristic is also fully in line with one of the principles of civil procedure, namely the principle of availability.

Therefore, in order to bring a civil action, it is necessary to be willing to act, primarily, and secondarily, to meet the following conditions for bringing a civil action, as provided for in Article 32 of the Civil Procedure Code, namely, the assertion of a right/the making of a claim, the interest (represented by the material or/and moral benefit sought by the person bringing the civil action), the capacity to sue and be sued (for use and exercise) and the capacity to sue and be sued (active and passive).

As far as standing is concerned, it is the plaintiff who has to prove both his standing and the defendant's passive standing. Thus, in the application, the plaintiff must state the subject-matter of the claim (Article 194(c) of the Civil Procedure Code) and the grounds in fact and in law (Article 194(d) of the Civil Procedure Code). This verification of standing is made by the court after the court has been seised, before the start of the proceedings or

sometimes after the start of the proceedings on the merits of the case (when, for example, the plea of lack of standing is raised in actions in rem). In this respect, the following hypotheses can be made:

– the law determines who has standing: for example in the case of divorce (art. 915 et seq. Civil Procedure Code)

– actions which enforce a claim – both the active and passive parties are determined in the legal relationship in question;

– actions which enforce a principal right in rem – the same evidence must be submitted as to prove the claims asserted.

The right to bring proceedings may also belong, in the cases and under the conditions laid down exclusively by law, to persons, organisations or institutions which, without justifying a personal interest, act to defend the rights or legitimate interests of persons in special situations. This is because, according to the provisions of Article 37 of the Civil Procedure Code, in the cases and under the conditions laid down exclusively by law, applications may also be made or defences raised by persons, organisations, institutions or authorities who, without justifying a personal interest, act for the defence of the rights or legitimate interests of persons in special situations or, where appropriate, for the protection of a group or general interest.

2. Transfer of procedural status

The rights and obligations which are the subject of the dispute may be transferred in the course of the proceedings. In this case, there is also a transfer of passive or active procedural status. The transfer may be legal or contractual.

In the case of natural persons, legal transmission will operate by succession[2], with the heirs who accept the succession taking over the procedural position of their author (with the exception of claims of a personal nature).

There are also situations in which a civil action cannot be brought directly against the heirs of a particular person, but can be continued against them. For example, heirs could not bring a divorce action against one of the spouses, since only the spouses have standing to bring such an action, but where the divorce action is based on the fault of the defendant and the plaintiff dies during the proceedings, leaving heirs, the heirs will be able to continue the action, which the court will allow only if it finds that the defendant spouse is solely at fault; The same applies to an application for revocation of a gift on the ground of ingratitude, which may be brought only against the donor, but if he dies during the proceedings, the action may be continued against his heirs, in accordance with the provisions of Article 6(1)(b) of Regulation (EC) No 44/2001. 1024 paragraph (2) of the Civil Code.

In the case of legal persons, legal transmission takes place by reorganisation or transformation of the legal person, by merger or division.

As for the transfer by agreement, this occurs on the basis of an agreement between the litigants and a third party: assignment of the claim[3], assumption of the debt[4], if the creditor consents, sale or donation of the disputed asset. In cases where the transfer of procedural status takes place after the first trial date, the successor takes over the case in the state in which it was at the time when it intervened or was introduced into the case [Article 39(2) final sentence of the CPC], it will not be able to invoke defences for which the time limit for invoking them has been exceeded[5].

Also, in terms of the extent of the transfer of procedural status, it may be:

- universal (case of sole heir and universal legatee, merger by absorption or amalgamation, transformation of the legal person);
- by universal title (in the case of legal heirs and legatees by universal title, trustees, total or partial division of the legal person);
- by private title (legatee by private title, conventional transmission).

2.1 The procedural situation of the alienor and his successors in title

In the case of transfer of title, the provisions of Article 39 of the Civil Procedure Code lay down the rules applicable to the transferor and his successors.

If, in the course of the proceedings, the right in dispute is transferred by inter vivos deeds with private title, as a rule, the proceedings will continue between the original parties [Article 39(1), sentence I of the Code of Civil Procedure]. By exception, the second sentence of the same Article states that, if the transfer is made, in accordance with the law, by deeds with private title on account of death, the proceedings will continue with the universal successor or with the universal title of the author, as the case may be.

In all these cases, the purchaser by private title is obliged to intervene in the proceedings, if he is aware of the existence of the proceedings, or will be brought into the proceedings at the request of one of the original parties or ex officio by the court.

The court shall order the person who has acquired the right to be summoned to appear in court against the original parties to the proceedings. In this context, the court will determine according to the circumstances and taking into account the position of the other parties whether it will continue the proceedings only with the acquirer, with the alienator being removed from the proceedings, or whether it will continue the proceedings with both the acquirer and the alienator. In other words, if the court is informed of the act of transfer, the court will decide, depending on the circumstances and taking into account the position of the other parties, whether the transferor or his universal or universal successor in title will remain in the proceedings or, as the case may be, will be removed from the proceedings (Article 39(2), second sentence of the Civil Procedure Code), it being clear from the wording of this legal text that the court is not obliged to order the removal from the proceedings of the party who has transferred the right in dispute.

The intervention of the sub-debtor by private title, according to Art. 39 para. (2) CPC, is not a form of voluntary intervention within the meaning of Art. 61-67 C.proc.civ. In the case of the transfer of legal standing by private legal acts, the intervention of the sub-sub-seller is made in order to determine whether or not he will replace the transferor or, as the case may be, his universal successor or successors in title in the proceedings[6].

Even when the acquirer by private title has not intervened and has not been joined in the proceedings, the judgment rendered against the alienor or his universal or universal successor in title, regardless of his procedural position, shall also have legal effect against the acquirer by private title and shall be enforceable against the latter, in accordance with Article 39(3) of the Civil Procedure Code. In other words, the third party acquirer of a litigious right will bear the effects of the judgment, whether he intervenes (in which case he would be a party to the proceedings) or not, unless he cannot be evaded according to the law.

2.2. Sanction of lack of standing

Lack of standing may be pleaded by way of exception by the party concerned, the prosecutor or the court of its own motion at any stage of the proceedings. If the objection is upheld, the action shall be dismissed as having been brought by a person without locus standi or against a person without locus standi. The plea of lack of standing is a substantive, absolute and peremptory plea. Since the plea is peremptory, the effect will be to extinguish the proceedings without the court having to rule on the substance of the case.

However, a new application may be brought by the party who has standing or against the party who has no standing, since the judgment dismissing the application on the basis of the admission of the plea of lack of standing is final only as regards those parties, which means that a new claim may be brought by the person who has standing against the same defendant as in the first proceedings (where the first claim was dismissed on the ground of lack of standing), or by the same claimant (as in the first claim) against the real debtor in the legal relationship between the parties (where the first claim was dismissed as being brought against a person who does not have standing). There is also no res judicata if the first claim is dismissed as being brought by a person without locus standi/against a person without locus standi, and the second claim contains the same parties but the cause of action is different[7].

3. Transfer of standing, amendment of the application, lack of capacity to sue or be sued or stay of proceedings?

The time of the party's death is relevant in order to determine whether the plea of lack of capacity to sue may be raised or whether the case may be suspended by operation of law until the heirs are brought into the case.

In this respect, if the death of the party occurred before the application was lodged[8], the application shall be brought against a person who does not have the capacity to sue[9]. According to Article 56(1) of the CPC, any person having the use of civil rights may be a party to the proceedings. Lack of capacity to sue may be invoked at any stage of the proceedings, both at first instance and on appeal, and on appeal, according to Art. 488 para. (2) CPC, only if the grounds referred to in paragraph (1) could not be raised on appeal or during the appeal proceedings, or although they were raised within the time limit, they were rejected or the court failed to rule on them.

Where it is established that the defendant is deceased at the date of the application, the court is not obliged to require him to indicate his heirs and the provisions of Article 412(2) of the EC Treaty do not apply. (The latter provisions are unequivocal in the sense that the introduction of heirs may take place when one of the parties dies during the course of the proceedings, the purpose of which is to prevent the case from being suspended by operation of law[10]. However, the plaintiff may „save" the application by amending it until the first trial date on which he is legally summoned to appear before the first court, in order to bring the heirs of the deceased defendant into the case as defendants (as a result of the legal transfer of the passive procedural status). Thus, according to Article 204(1) CPC, „*the plaintiff may amend his claim and propose new evidence, under penalty of forfeiture, only up to the first deadline on which he is legally summoned, in which case the court shall order the case to be adjourned and the amended claim to be served on the defendant, with a view to filing a statement of defence, which, under penalty of forfeiture, shall be filed at least 10 days before the deadline set and shall be examined by the plaintiff in the case file".* In the

absence of such an additional request, the plaintiff's claim will be dismissed for lack of capacity to sue on the defendant's part.

If the death of the party occurs during the civil proceedings (i.e. after the filing of the application), the provisions of Article 412(1)(1) CPC become applicable, i.e. the case will be suspended[11] until the heirs are brought into the case, unless the party requests a time limit for bringing them into the case. In the latter case, if the party fails to indicate the heirs within the time allowed, the case will be automatically stayed. In practice, the plaintiff is often unable to indicate the heirs of the deceased party because, in most cases, they have not opened the succession file with a notary public. However, in order to avoid a stay, the party could indicate the heirs of the deceased party[12], of course, to the extent that he knows them. This is because the heirs by descent are heirs by virtue of the law and do not need a certificate of inheritance attesting their status as such.

The practice of the Supreme Court is also in line with the above-mentioned practice, which in decisions in this case has ruled that the filing of a claim by a predeceased person at the date of the court's referral requires the decision to admit the party's lack of capacity to act for failure to meet a condition for bringing a civil action, in this situation the institution of the introduction of heirs in the case, governed by Art. 243 Civil Procedure Code (art. 412 NCPC), since it is based on the premise that the requirement of the party's civil capacity was met at the date of the referral, but the party died during the settlement of the dispute. The High Court stated that the remedy for an action brought against the predecessor defendant at the time of the filing of the action is for the plaintiff to bring an application to amend the procedural framework by calling the heir to court, within the time limits allowed by procedural law[13].

4.Who shall bear the costs if the plaintiff was deceased at the time the claim was brought?

An interesting issue in court practice is the question of who bears the costs of litigation[14] when the plaintiff was deceased at the time the application was lodged and the application was made through a lawyer. Thus, the question arises as to who will bear the costs when the plaintiff was deceased at the time of filing the claim and the defendant learns of this at the first court hearing in the context of the filing of the death certificate by the heirs of the deceased party, i.e. after the filing of the statement of claim/counterclaim and the engagement of a lawyer. In the light of the facts presented, the plea of lack of capacity of the plaintiff must be raised by the defendant or by the court of its own motion (being an absolute plea) and the claim must be dismissed as being brought by a person without capacity to sue.

According to the provisions of Article 453(1) CPC, the losing party shall be obliged, at the request of the winning party, to pay the costs of the proceedings.

In the light of the above situation, we consider that two opinions can be outlined. Once the plea of lack of capacity of the plaintiff is accepted, the court will oblige the heirs to pay the costs without identifying them, and then, when the succession is debated, the costs will be charged to them. However, such a solution is not immune from criticism. First of all, the heirs have not been brought into the proceedings and are therefore not parties. Secondly, the text of Article 453 speaks of „the party who lost the case", but the party who died at the time the application was lodged cannot be regarded as having that status.

A second view would be that the defendant should bear its own costs, in view of the fact that there has been no investigation of the merits by which the plaintiff has lost the case, but that the dispute has been settled since the first hearing by admitting a plea with the effect of extinguishing the proceedings. Based on the shortcomings of the first point of view, we consider that the second opinion is the correct one, even if the defendant was obliged to pay some costs as a result of the plaintiff's claim (lawyer's fees, stamp duty in the event of a counterclaim).

Conclusions

In the course of civil proceedings there may be a transfer of rights and obligations of the party, in which case there is also a transfer of passive or active legal standing. As far as legal transmission is concerned, this will take place through succession, with heirs who accept the succession taking over the procedural position of their author. The transmission of legal standing can only take place during the proceedings, i.e. after the application has been lodged.

References

[1] see, R. Perrot, Droit judiciare prive, I, Les Cours de Droit, Paris, 1976, pg. 42

[2] For details on the evolution of successions, see A.M. Axente, Curs de drept privat roman, pp. 252-295.

[3] see, P.E. Ispas, Civil Law. General Theory of Obligations, 2nd edition, Hamangiu Publishing House, 2022, pp. 265-276.

[4] See, I.R. Urs, P.E. Ispas, Civil Law.Theory of Obligations, Hamangiu Publishing House, Buc., 2015 pp. 405-409

[5] For example, the successor will not be able to rely on the plea that the court seised has no exclusive material or territorial jurisdiction after the fir st court hearing at which the parties were legally summoned and could make submissions

[6] G. Boroi, M.Stancu, Civil Procedural Law, Hamangiu Publishing House, 2017, note 1, p. 47

[7] *Res judicata* presupposes the triple identity of parties, subject matter, cause of action; if one of the three elements is changed, res judicata no longer applies.

[8] For example, the defendant was deceased at the time the action was brought and the plaintiff had no knowledge of this fact.

[9] For details on the exception relating to the lack of capacity to sue, see M. Tăbăraș, Excepțiile de fond în procesul civil, ed. a II-a, Ed. C.H. Beck, Buc., 2009

[10] Court of Appeal Oradea, civil decision no. 139 of 18 June 2020, jurisprudenta.com

[11]case of legal suspension by law

[12] The heirs are the surviving spouse, the privileged ascendants and the descendants

[13] High Court of Cassation and Justice, Decision No 606 of 24 February 2015 handed down on appeal by the Second Civil Chamber of the High Court of Cassation and Justice, ruling on the absolute nullity of the land sale-purchase contract, www.juridice.ro

[14] The costs of the proceedings constitute all the sums of money advanced by the parties in the course of the proceedings, including court fees, the fees of lawyers, experts and specialists, the fees of the lawyers acting as curators (where appropriate), the travel expenses of witnesses, transport and, where appropriate, accommodation costs and any other expenses necessary for the proper conduct of the civil proceedings.

PATRIMONY TRANSMISSION – THEORETICAL AND PRACTICAL PROBLEMS

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Abstract

The transmission of the patrimony in its entirety is possible only at the death or, as the case may be, at the termination of the legal person. Through this paper, we will try to analyze the conditions under which the patrimony is transmitted to the heirs of the deceased and what are the rights and obligations subject to transmission. We will also analyze some court decisions that established the conditions under which the transfer of assets operates to the deceased's successors, but also important issues regarding inheritance as a way of acquiring the right to patrimony.

Keywords: *transmission; patrimony; successors*

[1] THE PATRIMONY

Definition, functions

Patrimony, as legal universality, represents the set of pecuniary rights and obligations that belong to a person. It has traditionally been rightly held that patrimony can only be transferred in full until the death of the natural person or, as the case may be, the termination of the legal person. [1]. It is true that given the dynamic side of patrimony and its continuous transformation can lead to the idea that patrimony can be alienated by legal acts; however, it should not be overlooked that patrimony, being a legal universality, cannot be transmitted in its entirety by legal acts between living beings. It is also true that during the lifetime or during the existence of the legal person, the holder of the patrimony may dispose of the rights [2] with patrimonial content, without this affecting the existence of the patrimony as legal universality.[3].

It should also be noted that according to Article 31 Civil Code, „*any natural or legal person is the owner of a patrimony that includes all the rights and debts that can be valued in money and belong to it".* Thus, the existence of the natural or legal person cannot be dissociated from the existence of the patrimony. [4]

Regarding the functions of the patrimony, the doctrine analyzed this problem and three functions that the patrimony fulfills were analyzed: the general pledge of the unsecured creditors, the subrogation and the transmission[5].

From the perspective of the theme analyzed in this paper, the function of patrimony transmission is important, analyzed together with the inalienable character of patrimony. The inalienability of the patrimony represents in fact the impossibility of its transmission in its entirety by legal acts between the living, taking into account also those previously exposed regarding the legal connection that exists between any natural or legal person and the existence of the patrimony.

By virtue of the function of the transmission, it can be realized in three forms: universal transmission, by general title transmission and by particular title transmission. The transmission of the patrimony is a notion that has appeared since Roman law, but with a certain specificity compared to the current legal system. In Roman law, the transmission of

patrimony was not seen as a way of transmitting a pre-existing power, but a way in which the heir acquired a new power over a patrimony, an independent possession being created.[6]. In Romanian civil law, as a result of the patrimonial transmission, a new dominion is not born, but the successor continues, in essence, the legal personality of its author, if we talk about the universal and by general title transmission; we make this clarification, which we consider very important because in the doctrine it has been appreciated that only the universal and by general title transmission constitute functions of the patrimony for the considerations that we will analyze in the following.

The universal transmission of the patrimony occurs in case of the death of the natural person when the entire patrimony is transmitted to a single heir (legal or testamentary), while the by general title transmission involves the transmission of the patrimony to two or more heirs. There are only quantitative and not qualitative differences between the two forms of transmission, because in the case of universal transmission the patrimony is transmitted in its entirety to a single person, while as a result of by general title transfer, fractions of the estate are passed on to two or more heirs.

With regard to the by particular title transfer, it concerns one or more individually determined assets, which is why this form of transfer of assets can be explained independently of the notion of assets as legal universality.

Patrimonial rights and obligations subject to transmission

As mentioned above, the transmission of the patrimony in its entirety must be distinguished from the transmission by deeds between the living which may take place with regard to certain elements that make up the patrimony during the life of the holder.

Upon the death of the natural person or on the termination of the legal person, the rights and obligations of the author are transmitted to the successors, according to the rules established by law or by the will of the owner of the patrimony, in case we are in the presence of a testamentary succession, but it is necessary to analyze which are the rights and obligations that are subject to the transmission[7].

In order to answer this question, it is necessary to analyze the rights and obligations that fall within the scope of the notion of patrimony. As mentioned above, the patrimony is represented by the totality of the rights and obligations that can be valued in money, so the set of patrimonial rights and obligations.

In support of the transfer of both patrimony rights and obligations are the provisions of Article 1282 of the Civil Code which state that „*upon the death of a party, its contractual rights and obligations shall be transferred to its universal successors or by general title, unless otherwise provided by law, stipulation of the parties or the nature of the contract.”*. Thus, according to the article cited above, all the contractual rights and obligations of the deceased are transmitted to the universal successors or by general title, except for those situations in which the rights and obligations resulting from contracts cannot be subject to transmission. This conception of transmission to successors has been shared since Roman law [8] but also under the rule of the Civil Code of 1864 [9], keeping in mind that the patrimony, being made up not only of rights but also of obligations, through the effect of inheritance are transmitted not only the rights but also the obligations, the hereditary transmission is active because it shifts rights and passive because it shifts obligations. Concerns about the topic addressed in this paper also exist at the level of the European

Union, not with direct application, but with regard to issues related to the realization of judicial cooperation in civil matters. [10]

Non-patrimonial rights and obligations will not fall into the category of rights subject to transmission, nor will patrimonial obligations which expire on the death of their holder, having a lifelong character or having an *intuitu personae* character, resulting from the law. Equally, the obligations that are closely related to the person's person or those that were born from *intuitu personae* contracts cannot be subject to the patrimonial transfer.

Consequently, the patrimonial rights and obligations will not be subject to transmission if they have a lifelong character or if they have an intuitu personae character, a character that results from the law or from the will of the parties.

When we talk about the transfer of patrimony rights and obligations, we must keep in mind that they are not transmitted as rights or obligations viewed individually, but as component parts of the legal universality, this being an additional argument for the transmission to the universal successors and by general title of both the rights and the patrimonial obligations resulting from the contracts.

With regard to the quality of successor of an associate of a deregistered company, in the practice of the courts it was retained, being analyzed the notion of patrimony and the notion of successor that „*Being a set of rights and obligations, in the case of patrimony it is a question of a legal universality independent of its active or passive content, with which it is not confused. The patrimony is not confused with the rights and debts that are in its content nor with the goods upon which the respective rights belong. Goods are things, corporeal (which have a material substance) or intangible, which are the object of a patrimonial right. Universal successors and successors by general title are those persons who have acquired, in whole or in part, the patrimony regarded as a universality of rights and obligations. The successor who has received the vocation to the whole patrimony is the universal successor. The successor who received the vocation to a mathematical fraction of the patrimony is the successor by general title. Successors by particular title are those persons who have acquired a certain right in their own right, not acquiring a patrimony or part of the patrimony. Compared to the provisions of Article 237 (10) of Law no. 31/1990, the court holds that the associate of a deregistered company does not acquire as a result of its deregistration the quality of universal successor or by general title, as the claimant wrongly claims, for the text of the law does not provide for the transmission to the associate of the company's patrimony in its universality (or of a fraction of its universality), that is, of a set of rights and obligations (assets and liabilities), but provides that only the assets remaining from the patrimony of the legal person deleted from the trade register, ie only assets of the patrimony, are transmitted to the associate*”[1]. As is clear from the judgments cited in the judgment, not all transmissions can be considered universal or by general title transmissions. If it results from the law that only elements of the assets of the deregistered legal entity are transferred to a person, the associate does not have the quality of universal successor, nor successor by general title, because these categories of successors acquire, as we have shown above, rights and obligations in their entirety or only fractions of them, and not just rights.

[1] In this regard, see Brașov Court of Appeal, Decision no. 711/2016, www.rolii.ro.

[2] PRACTICAL issues regarding the transmission of PATRIMONY

The sale of the inheritance

The sale of the inheritance is regulated in Article 1747-1754 of the Civil Code. According to Article 1747 (1) of the Civil Code, for the purposes of this section, inheritance means the right to collect an open inheritance or a share thereof". Therefore, the right to collect the inheritance, as belonging to the universal successor or successors by general title, may be the subject of the contract of sale.

In the literature, the right question has been asked about the nature of the right to collect the inheritance, this right is a real right, a right of claim; Is the passive subject of the legal relationship determined or indeterminate? With a strong legal argument, the quoted author concludes that the succession patrimony or, as the case may be, a share of this patrimony becomes a patrimonial mass within the patrimony of the heir, and the sale of the right to collect the inheritance or a share of it has as object the right of the heir over this patrimonial mass which has the nature of an intangible good, object of the patrimony right in the patrimony of the heir. It was appreciated by the same author that after the opening of the inheritance, the succession patrimony represents a patrimonial mass that has the nature of a de jure universality. If the heir is a universal one, he takes over the entire estate, ie all the rights of the deceased that did not die at his death, as well as the debts transferable within the limits of the asset acquired through the transfer of rights, and if the heir is by general title, he becomes the holder of an individual share of the estate[11].

It is true that in connection with the sale of the inheritance, the provisions of the Civil Code impose certain special rules that must be met for the validity of the contract for the sale of the right or a share of the right to collect the inheritance. In this sense, the formal conditions required by law must be analyzed; according to Article 1747 (2) of the Civil Code, „*under the sanction of the absolute nullity of the contract, the sale of an inheritance is concluded in authentic form ,,*. In the practice of the courts, it was noted that „*What is specific to the sale of an inheritance is the fact that the alienation does not concern one or more determined goods, but has as object the alienation of a succession patrimony, either in its entirety, or only a fraction of it, so that the appellant's assertion that there was only one patrimony in the estate of the deceased is irrelevant in terms of the qualification of the act concluded by the parties.*

However, from the provisions of Article 1747 (2) of the Civil Code, according to which, under the sanction of absolute nullity of the contract, the sale of an inheritance is concluded in authentic form, it follows that the sale of an inheritance, by way of derogation from the rule of the consensual character of the sale, is a solemn act, being conditioned ad validitatem by its conclusion in authentic form.

In the present case, the parties did not authentically conclude the contract for the sale of the inheritance, so that the sanction of absolute nullity for lack of form is incidental.

Although the appellant first invoked in the appeal the nullity of the act on which the plaintiff bases her claims, considering that its classification as a sale of an inheritance or a renunciation of an inheritance would have violated the provisions of Article 1747 of the Civil Code and, respectively, of Article 1120 of the Civil Code, which impose the authentic form as a requirement ad validitatem, the Court considers that the inadmissibility of these grounds of appeal cannot be upheld, as absolute nullities can be invoked in any state of the case, even directly in the court of appeal or appeal, if they have not been raised at first instance.

However, having regard to the provisions of Article 1260 of the Civil Code governing the principle of conversion of legal acts, according to which a contract struck by absolute nullity will nevertheless produce the effects of the legal act for which the substantive and formal conditions provided by law are met, the Court considers that although absolutely void as a contract for the sale of an inheritance, the contract concluded under private signature on November 23, 2015 is valid as a promise to contract within the meaning of Article 1279 of the Civil Code, which gave rise to obligations to conclude, ie to conclude in the future, in an authentic form, the promised contract[2]„.

As is clear from the considerations of the judgment cited, the reason why the legislature regulated this exception to the rule of the consensual nature of the sale is given by what is the object of the transfer, either an entire estate acquired by inheritance or a share thereof.

Equally, the interpretation of the court in the sense of applying the provisions of Article 1260 Civil Code governing the conversion of the act, is correct as long as according to this article the contract struck by absolute nullity will still produce the effects of the legal act for which the substantive and formal conditions are met as provided by law; the provisions of Article 1260 of the Civil Code must be corroborated with the provisions of Article 1279 of the Civil Code according to which the promise to contract must contain all those clauses of the contract which the parties seek to conclude, without which the parties could not fulfill the promise. With regard to the form which the promise to contract must comply with, the High Court of Cassation and Justice, the Panel for the Settlement of Matters of Law, has established that „*In interpreting and applying the provisions of the first sentence of Article 1279 (3) and Article 1669 (1) of the Civil Code, the authentic form shall not be binding on the conclusion of a promise to sell a building in order to give a judgment in lieu of an authentic deed"*[3].

The provisions on Article 1753 of the Civil Code concerning advertising formalities must also be examined with regard to the rules applicable to the sale of the inheritance; according to the legal provisions invoked, the buyer of an inheritance acquires the real rights over the real estate included in the inheritance only according to the rules regarding the land book, the buyer is not able to oppose to third parties the acquisition of other rights included in the inheritance unless he has fulfilled the formalities required by law for the opposability of the acquisition of these rights. In this regard, we will deal with issues that may arise, both in theory and in practice in the following section, dedicated to inheritance as a way of acquiring patrimony rights, we will also analyze this particular case in the sale of the inheritance and the conditions that the buyer of the inheritance must meet in order to make his right opposable.

In the practice of the courts[4] situations were also identified in which, although the sale contract alienated the assets considered individually, the parties insisted that the deed of sale is a sale of the inheritance, an aspect sanctioned by the court with the following arguments: „*In relation to the appellant's criticisms of the first instance solution, the court notes that, according to the doctrine and jurisprudence of civil law, the object of the sale of the inheritance is the entire estate (as universality, including correlative rights and obligations) or the undivided share of a universality (if there are several heirs). Therefore, if the legal or*

[2] Cluj Court of Appeal, Decision no. 221/2020, www.rolii.ro.

[3] High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 23/2017, published in the Official Gazette of Romania no. 365/17 May 2017.

[4] In this regard, see the Buzău Tribunal, Decision no. 728/2021, www.rolii.ro.

testamentary heir sells successor assets considered ut singuli in whole or in part, and not the estate or a fraction thereof, the sale will be subject to the rules of common law sale (being a pure and simple sale-purchase), and not the special rules of the sale of an inheritance, these being conceived in consideration of the particularities of the transfer of a the estate. According to the Civil Code, the interpretation of the contract, as an operation of determining and clarifying the content of the contract, its clauses, in order to establish the rights and obligations arising from it, its classification in a certain category, which determines a certain legal regime, which distinguishes it from another contract in another category, is made according to the common intention of the contracting parties at the time of its conclusion, and the common intention of the parties results from the object, purpose of the contract and from the contractual clauses, and not from the name given by the parties or from other expressions of will subsequent to the conclusion of the legal act".

Important aspects of inheritance as a way of acquiring the right of private patrimony

As we have shown throughout this article, in order to operate the transmission of assets, in its entirety, this legal transaction may take place by inheritance[5], either the inheritance is a legal or testamentary one, or both the legal and the testamentary heirs come to the inheritance.

The first issue that needs to be clarified regarding inheritance as a way of acquiring the right to private patrimony is the nature of the inheritance to be an original mode of acquisition or, conversely, a derivative mode of acquisition. In the literature [12] the question was whether we can consider that only in the case of testamentary inheritance there is the will of the de cuius to transfer the patrimony right, a will that results from the will drawn up by him, with the consequence of considering only the legal inheritance as an original way of acquisition, considering that in this respect the transmission of the patrimony is done ex lege, and not by the will of the deceased. It was concluded by the cited authors that both legal and testamentary inheritance are derivative methods of acquisition. The solution is a correct one from a legal point of view, precisely considering that the inheritance appears as a transmission that is made on the deceased's patrimony, a transmission that can operate by virtue of his will or as an effect of the law.

Inheritance is listed in Article 557 (1) Civil Code, among the ways of acquiring the right of ownership, the Civil Code regulating that the right of ownership can be acquired by legal or testamentary inheritance. Although in the current Civil Code system, tabular rights are acquired, amended and extinguished only in compliance with the rules of the land register, nevertheless in Article 887 (1) the Civil Code provides certain methods of acquisition not subject to entry in the land book, as follows: „*real rights are acquired without registration in the land book when they come from inheritance, natural accession, forced sale, expropriation for reasons of public utility, as well as in other cases expressly provided by law".*

Therefore, according to the legal provisions, inheritance is not a way of acquiring the patrimony right subject to registration. However, in accordance with Article 887 (3) of the Civil Code, „*In the cases provided for in (1), however, the holder of the rights thus acquired will not be able to dispose of them by the land register until after the registration has been made.".*

[5] We will refer exclusively to the situation of natural entities.

In the context of Article 887 (3) Civil Code, in conjunction with Article 1753 of the Civil Code, cited in the previous section, the question arises as to which of the parties to the contract of sale of the inheritance is required to carry out the first real estate advertising formalities? As it follows from the provisions of the Civil Code, according to Article 887 (3) of the Civil Code, the heir may not dispose of the patrimony before he has registered his patrimony right, whereas according to Article 1753 of the Civil Code, the buyer of the inheritance acquires the real rights over the real estate included in the inheritance only according to the rules regarding the land book[6], and with regard to (2) of the same article, the opposability towards third parties operating from the moment of registration in the land register is regulated.

In order to answer the above question, taking into account the relevant legal provisions, it is the seller who must first complete the advertising formalities. As stated in the literature [10], If the seller of the inheritance has not already registered his acquisition before the sale of the inheritance, this acquisition as well as the transfer of the real estate to the buyer may be entered at the same time, pursuant to Article 894 Civil Code according to which: „*If a right subject to entry in the land register has been the subject of successive transfer without the entries having been made, the latter entitled will not be able to request the registration of the right in his favor unless he requests, together with his registration, the registration of the previous successive acquisitions which he will prove with original documents or legalized copies, as the case may be".*

It is true that if the seller, prior to the conclusion of the contract of sale of the inheritance, has not fulfilled the formalities of real estate advertising, the buyer has at hand the action in tabular service [3], by means of this action governed by Article 896 of the Civil Code, the purchaser may apply to the court to order the registration.

[3] **Conclusions**

The transmission of patrimony can raise issues, as it results from the above, both in theory and in practice. Although the transmission is apparently a simple function of the patrimony, it involves controversial issues but also requires a good knowledge of the matter of successions because these two institutions can not be dissociated, but must be analyzed and interpreted together to ensure the application of the relevant legal provisions in the spirit and at the same time in the letter of the law.

References

[1] Urs, I.R., Ispas, P.E.(2015), Drept civil. Teoria drepturilor reale (Civil law. Real rights theory), Hamangiu Publishing House, pp. 7-8.

[2]Tăbăraș, M., (2012), Contractul de vânzare-cumpărare (The sale-purchase contract), C.H. Beck Publishing House.

[3] Ispas, P.E., (2022), Drept civil. Drepturile reale principale (Civil law. Principal real rights), Hamangiu Publishing House, p. 6, pp. 315-316.

[4] With regard to the moment when the natural or legal person becomes the subject of law and implicitly the owner of a patrimony and the issues related to the capacity to

[6] With regard to the constitutive effect of rights of entries in the land register, it should be noted that according to Article 56 (1) of Law no. 71/2011, it will be applied after the completion of the cadastral works and real estate advertising on each administrative-territorial unit separately. In these circumstances, the provisions of Article 1753 (1) of the Civil Code should also be extended until then.

exercise, see Urs, I.R., Todică, C., (2015), Drept civil. Teoria persoanelor, Hamangiu Publishing House, pp. 11-45, 45-66; Urs, I.R., Todică, C., (2015), Drept civil. Teoria generală (Civil law. General theory), Hamangiu Publishing House, pp. 229-231.

[5] Bîrsan, C., (2020) Drept civil. Drepturile reale principale (Civil law. Principal real rights), Hamangiu Publishing House, pp. 18-24.

[6] Axente, A.M., (2020), Instituții de drept privat roman(private Roman law institutions), vol. I, Hamangiu Publishing House, pp. 262-263.

[7]on the transmission of the active/passive procedural capacity during civil proceedings following the death of the party, see, Dinu, M., (2020) Drept procesual civil (Civil procedural law), Hamangiu Publishing House, pp. 60-62

[8] Axente, A.M., (2022) Instituții de drept privat roman (private Roman law institutions), vol. II, Hamangiu Publishing House, p. 12.

[9]Eliescu, M. (1997), Curs de succesiuni (Course on Succession), Humanitas Publishing House, p. 28.

[10] Ispas, G.L., Panc, D. (2021), Organizarea justiției în Uniunea Europeană (Organizing justice in the European Union), Hamangiu Publishing House, pp. 336-345.

[11] Dincă, R., (2016), Legislația procesuală nu este una imuabilă și infailibilă, ea fiind întotdeauna perfectibilă, ca orice operă a omului. Vânzarea unei moșteniri, in the 'Română de Drept Privat' Review no. 1/2016.

[12] Pătrașcu, B., Genoiu, I., (2019), Câteva aspecte de interes în legătură cu transmisiunea succesorală, in the 'Dreptul' Review no. 11/2019.

ENACTMENT OF THE EUROPEAN DIRECTIVE 2019/1023 IN ROMANIA. BENEFITS OF THE RESTRUCTURING AGREEMENT PROCEDURE

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Abstract

Since 2011, a series of measures have been adopted by European Union, with the initial purpose to harmonizing of the very specific aspects of substantial law of insolvency, including restructuring, but also regarding the company law. The enforcement of Regulation (EU) 2015/848 on insolvency proceedings aimed solving the conflicts of jurisdiction in cross-border insolvency proceedings and ensuring the recognition of insolvency decisions on the territory of the Union. However, the Regulation did not seek to harmonize the substantial law of insolvency in the Member States.

Even though in some Member States, including our country, the Commission's Recommendation was received as a useful proposal to undertake insolvency reforms (adoption of Law 85/2014 regarding the insolvency and insolvency prevention procedures in Romania), it did not succeed in generating uniform changes in all Member States to facilitate the rescue of companies in financial difficulty and to enable entrepreneurs to benefit from a second chance. The Recommendation did not have the expected effects because its partial implementation, even at the level of countries where real reforms have been made regarding the insolvency law. In this context, this study aims at an analysis of insolvency prevention procedures in our country, reported to the Directive of the European Parliament and of the Council, on preventive restructuring frameworks.

Keywords: *restructuring frameworks, insolvency, preventive concordat, ad-hoc mandate*

General context of preventive restructuring. Function and objectives of insolvency and recovery measures

Like many Member States, Romania was influenced by the economic crisis of 2009, which in turn influenced the modern development of insolvency, corporate rescue and restructuring procedures.

The Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009[1], had the aim of providing a buffer against the wave of insolvencies, which were not necessarily justified by a real cessation of payments. These early reforms, however, were not as effective as hoped. After the Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009 came into force, it was foreseeable that the insolvency claims would be drastically reduced for a period of at least 6 months afterward. Unfortunately, the effectiveness of the concordat was minimal.

[1] Published on M.O. no. 870, Part I, december 14, 2009.

The debtors preferred to file for insolvency and financial institutions were resistant to the procedure, resulting in a slow take-up of the concordat.

Against this background, Romania introduced revised versions of the ad-hoc mandate and preventive concordat procedures in 2014, which seems to have improved the position of the concordat. While this law was intended to protect the interest of both debtors and creditors, the Law no 85/2014 is more creditor friendly.

The law contains concrete pre-insolvency instruments aimed at obtaining the amicable negotiation of claims through the ad hoc mandate and the conclusion of a preventive concordat. Reforms may include continuing the flow of interest for secured creditors; simplifying the approval of the arrangement; and introducing the private creditor test, which also allows public creditors to vote on a concordat project.

The shorter duration of pre-insolvency proceedings and their greater flexibility should encourage the parties to use pre-insolvency procedures when the business has a temporary and repairable shortfall in liquidity[2].

Pre-insolvency procedures aim to restructure the company through a conventional restructuring of debts subject to negotiations with creditors. Unfortunately, the debtor's protection against potential enforcement procedures from the non-adherent creditors is less effective. For this reason, most debtors prefer to open insolvency proceedings and propose a reorganisation plan to fully benefit from the protection against enforcement.

In Title I of law no. 85/2014 on insolvency prevention and insolvency procedures, insolvency prevention procedures are regulated, respectively the ad-hoc mandate and the preventive arrangement.

The ad-hoc mandate[3] is a confidential procedure initiated at the request of the debtor in financial difficulty. An ad-hoc agent is then designated by the court and negotiates with creditors to reach an agreement between (one or more of) them and the debtor with the aim of overcoming the debtor's financial difficulties[4].

The preventive concordat[5] is a contract between the debtor and creditors that hold at least 75% of accepted and undisputed value of claims, which is homologated by the syndic judge. The debtor proposes a workout and recovery plan with the aim of covering the creditors' claims and the creditors, in turn, support debtor's efforts to overcome the financial distress. The concordat procedure is opened only at the request of the debtor. The most important effect of its approval is that an insolvency procedure against the debtor cannot be opened during the concordat period.

On 20 June 2019, it was addopted Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. Member States have two years from publication in the Official

[2] Codul Insolventei Adnotat, „întărirea mecanismului insolvenţei în România" www.just.ro/wp-content/uploads/2016/03/Cod-adnotat- FINAL.docx.

[3] Law no. 85/2014 on insolvency prevention and insolvency proceedings, published in M.O. no. 466, June 25, 2014, art. 10-15.

[4] *Idem*, art. 5 align. 1.36.

[5] *Idem*, art. 5 align. 1.17.

Journal of the European Union to implement the new provisions, but in duly justified cases they may request an additional year from the Commission to implement them[6].

The general objectives of the Directive are to contribute to the proper functioning of the internal market, to reduce the most important barriers to the free movement of capital and to the freedom of establishment resulting from differences between Member States in restructuring and insolvency frameworks. and to strengthen the culture of rescuing businesses on the basis of the second chance principle[7].

Substantial aspects in the field of preventive restructuring, by reference to the provisions of Directive 1023/2019 of the European Parliament and of the Council of Europe

The Stay of Individual Enforcement Actions

Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks imposes the need to grant a suspension, from the moment the preventive restructuring frameworks are called into question, such a suspension of enforcement having a duration of be reasonable between 4 months and a maximum of 12 months. The reason for granting this suspension lies in accessing the restructuring frameworks as efficiently as possible, before and as a priority, the opening of insolvency proceedings[8]: *member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework*[9].

A moratorium does not automatically arise under the ad-hoc mandate. Following the appointment of the ad hoc agent by the president of the tribunal, majority creditors should grant the debtor a suspension of individual enforcement of outstanding or short-term claims (postponement of enforcement, judicial or extrajudicial proceedings or insolvency proceedings against the debtor).

In the procedure of the preventive concordat, based on the offer to be agreed, the debtor may request the syndic judge to suspend all individual forced executions, regardless of the object of execution or the quality of the following creditor. The temporary suspension of the individual forced pursuits is maintained until the pronouncement of an executory decision approving the concordat or until the rejection of the offer of concordat by vote by the creditors whose uncontested claims make up the credit table, according to the law.

Also, the provisions of art. 29-30 of Law no. 85/2014 provide for the suspension of individual enforcement actions. According to these provisions, from the date of communication of the decision approving the preventive concordat, the individual proceedings of the signatory creditors against the debtor and the limitation of the right to request the forced execution of their claims against the debtor are suspended. The flow of interest, penalties and any other expenses related to receivables is not suspended from the signatory creditors, unless they expressly express, in writing, their agreement to the contrary, an agreement that will be mentioned in the draft agreement.

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[6] Phoenix Magazine, no. 4/2019.

[7] https://www.unpir.ro/obiectivele-stabilite-si-masurile-propuse-de-directiva-ue-20191023-privind-cadrele-de-restructurare.

[8] Phoenix Magazine, no. 69/2019, p. 8.

[9] Art. 6 align. 1 from Directive.

The most important effect of the approval of the preventive concordat is that all enforcement procedures are suspended, and during the composition period the insolvency procedure cannot be opened against the debtor. Any creditor who obtains an enforceable title over the debtor during the procedure may file an application to join the preventive concordat or may recover his claim by any other means provided by law.

In the opinion of the practitioners, the temporary suspension of the individual forced execution provided by art. 29 para. (1) of Law no. 85/2014 shall apply only if the provisional suspension has not been previously requested and obtained pursuant to the provisions of art. 25 para. (1) of the law. Also, the suspension provided by art. 29 para. (1) has the character of *ope legis* and enters into force from the date of communication of the approval decision to the signatory creditors, as opposed to the suspension provided by art. 30 para. (1) which has a judicial character and produces legal effects from the pronouncement[10].

In the future, legal provisions are needed, relating to certain claims or categories of claims excluded from the scope of the suspension of individual enforcement proceedings, in well-defined circumstances where such exclusion is duly justified and also to avoid abuse of law. Also, the initial and total duration of the suspension of the individual enforcement proceedings and the categories of creditors to which these legal provisions apply will have to find a strict regulation.

The role of creditors in adopting preventive restructuring plans

Dispozițiile The provisions of art. 9 paragraph 2 of the Directive imposes on the Member States the obligation to ensure that the affected parties, with certain exceptions provided by art. 9 paragraph 3, have the right to vote on the adoption of a restructuring plan.

In the insolvency prevention procedures provided by Law no. 85/2014, the creditors have the right to vote on the reorganization / restructuring plan, either directly or indirectly.

The list of creditors, in the procedure of the preventive concordat, is elaborated by the administrator, together with the debtor[11]. Legislation offers the debtor a great freedom to identify the creditors to whom he wants to propose a restructuring plan.

Creditors have the right to vote on the preventive composition offer, with any amendments resulting from the negotiations, and the vote is exercised, in principle, by correspondence[12]. Certain creditors are restricted from the right to vote, respectively creditors who, directly or indirectly, control, are controlled or are under common control with the debtor. This category of creditors can vote on the composition agreement only if it grants them less than it would receive in the event of bankruptcy.

In insolvency prevention proceedings, creditors are not separated into categories and do not have priority rank for the purpose of exercising the vote. The preventive concordat is approved with the vote of the creditors which represents at least 75% of the value of the accepted and uncontested claims.

All legal provisions governing the categories of creditors are set out in the chapter on judicial reorganization, which is part of the insolvency proceedings. These provisions

[10] R. Bufan, A.O. Stănescu ș.a, „Tratat practic de insolvență", Ed, Hamangiu, București, 2014, p. 117; N. Țăndăreanu, „Codul insolvenței adnotat. Noutăți, examinare comparativă și note explicative", Ed. Universul Juridic, Bucuresti, 2014, p. 80.

[11] Art. 23 align. 3 of Law no. 85/2014.

[12] Idem, art. 27 align. 1.

should be extended in future to insolvency prevention proceedings so that national law complies with the provisions of the Directive, in order to ensure fair treatment for all creditors of the same rank, to respect the decision of the majority, while allowing other creditors to obtain payments equal to or greater than what he would receive in the event of bankruptcy.

Debtor in Possession

The Directive requires Member States to ensure that debtors who resort to preventive restructuring proceedings retain full, or at least partial, control over their assets and their day-to-day business[13].

All Romanian restructuring processes require the appointment of an expert or administrator. The insolvency practitioners do not take over the business, rather the management stays in control; as such, the Romanian pre-insolvency procedures are „*debtor in possession*" mechanisms.

In the ad-hoc mandate procedure, the ad-hoc agent, chosen from among the insolvency practitioners, fulfills the role of a mediator between the debtor and one or more creditors, in order to overcome the state of financial difficulty.

In the preventive concordat, the concordat administrator has the role of supporting the debtor, elaborating together with him the preventive arrangement offer.

Doctrine[14], sayd that almost unanimously, the judicial administrator knows much less about the management of a concrete business than the former governing bodies, so that the alleged supervision of the insolvency practitioner turns into a formal verification of the debtor's documents. carried out during the observation period, without real business advice.

The appointment of an insolvency practitioner by a judicial authority should not be mandatory in all insolvency prevention proceedings. Both the ad hoc mandate and the preventive concordat are based on the agreement of the parties, ie the debtor and his creditors. Being an agreement of wills, which presupposes trust between the parties, means that the very conclusion of such contracts for the amicable settlement of the debtor's dispute with its creditors is a gain in itself for the debtor, since what a debtor lacks in the first place which reaches a state of financial difficulty is the trust of its creditors. By signing such agreements, the debtor regains, at least in part, the lost trust of creditors and business partners[15].

Draft law amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency proceedings

Amendment of Law no. 85/2014 on insolvency prevention and insolvency proceedings by introducing measures to support the restructuring of debtors in difficulty, in order to prevent the entry into insolvency, was not only necessary but also mandatory.

The bill regulates two insolvency prevention procedures, which are in addition to an insolvency treatment procedure: the restructuring agreement, the preventive arrangement (called the restructuring plan, despite the name in Chapter III) and the judicial reorganization. All three of these proceedings are judicial in nature.

[13] Art. 5 align.1 from Directive.

[14] https://www.unpir.ro/legea-nr-852014-un-drum-catre-maturitate.

[15] Gh. Piperea, „Legea concordatului", Ed. Wolters Kluwer, Bucureşti, 2010.

The entire chapter II of the Law, regarding the ad-hoc mandate, will be, according to the draft law, repealed.

Compared law aspects

National legislation on insolvency prevention procedures is largely adapted to the provisions of the Directive and similar to the regulations of other European countries.

In Italy there are three procedures that meet the definition of preventive restructuring: (judicial composition with creditors, the debt restructuring agreement, and the long-term restructuring agreements).

The *concordato preventivo* (judicial composition with creditors) allows a distressed company to avoid opening an insolvency liquidation proceeding by means of an agreement with a majority of its creditors.

The plan is proposed by the debtor, and in some cases by the creditors if they represent at least 10% of the indebtedness, which is known as a competing plan.42 A competing plan can only be submitted in response to a procedure initiated by the debtor. Competing plans are not admissible if an independent expert certifies that the debtor's proposal ensures the payment of at least 30% of the unsecured claims. Upon request by the debtor at court filing, the judicial composition features an automatic stay on enforcement actions; priority for new financing (priority cannot, however, trump secured creditors); termination of executory contracts; intra- and cross-class cram-down; and a stay on recapitalisation obligations. After the approval of the plan by the required majority of creditors, it becomes binding only after judicial confirmation, which will rely on an expert's report certifying that (1) the financial and economic data used in the plan are truthful as to the current situation, and reliable as to the prospects, and (2) that the plan is feasible, and, if implemented, suitable to overcome the crisis.

The *accordo di restrutturazione dei debiti* (debt restructuring agreement) allows for the confirmation of an out-of-court agreement reached by the debtor with at least 60% by value of a company's creditors, supported by an expert's report confirming that the agreement can ensure the full payment of nonconsisting creditors. The key features of this debt restructuring agreement are a temporary stay on enforcement actions, which is automatically granted by the court upon request by the debtor; priority for new financing (not including secured creditors); and a stay on recapitalisation obligations.

The *accordo di ristrutturazione ad efficacia estesa* (debt restructuring agreement binding on dissenting creditors) also allows for the confirmation of an out-of-court agreement. The differentiating feature is that it is also binding on dissenting creditors. The debtor may form one or more classes of creditors on the basis of commonality of interest and an equivalent ranking. All creditors included in a class are bound by effects of the agreement if at least 75% of the total amount of creditors of the relevant class have consented; this results in the remaining 25% of non-consenting creditors being bound. There is no cross-class cram-down provision, meaning that if the 75% threshold is not reached in a certain class, the creditors remain unaffected by the agreement. The key features of this alternative debt restructuring agreement are the temporary stay on enforcement actions at the request of the debtor; an intra-class cram-down; priority for new financing (not over secured creditors, as in the concordato preventivo); and a stay on recapitalisation obligations.

In France, three main preventive restructuring procedures are currently used: the ad hoc mandate, the conciliation procedure and the safeguard procedure.

The French model seems to be one of the most advanced preventive restructuring models in the European Union, although it has continually reformed its legislative frameworks, sometimes without enough time to fully test the procedures in practice. Relative to many other jurisdictions, France has given an early priority to business recue, unless the business is in such a dire situation that liquidation could be the only foreseeable outcome. The French model of insolvency and preventive restructuring has, since the recession of the 1980s, tended to favour the rescue of businesses in order to preserve employment, at times to the detriment of creditors and saving functionally non-viable businesses. Three new insolvency laws were passed during the 1980s, one of which introduced a pre-insolvency process for the first time. These laws placed the focus on reorganisation, rather than liquidation with the aim of protecting employment. The focus on employment preservation has changed over the last couple of decades, however, the importance of job preservation is still a clear aim of the French rescue culture.

In the Netherlands, the only preventive restructuring procedure currently available to debtors is the suspension of payments.. Besides the suspension of payment, there are no specific formal or pre-insolvency restructuring proceedings available. With that said, it is worth noting that, in practice, the Dutch bankruptcy proceeding is often used to facilitate the restructuring of insolvent debtors.

Germany and Denmark, on the other hand, do not currently offer debtors any preventive restructuring procedure, in the spirit or in accordance with the provisions of the Preventive Restructuring Framework Directive.

While Germany does not yet provide a truly preventive proceeding, their insolvency law does provide for the possibility of proposing a restructuring plan. The Insolvenzordnung of 1999 (the „InsO") provides a unified insolvency procedure with three paths, one of which is an insolvency plan through which there is a possibility to agree a plan with creditors. This can preserve the company as a legal entity by waiving certain residual claims owed to debtors of the company through the plan. The plan also aims for higher and quicker repayments to debtors than would otherwise be available in a liquidation.

Denmark`s current insolvency framework provides for a restructuring proceeding that aims to overcome insolvency by negotiating a plan, which consists of either a compulsory composition or for the debtor's assets to be sold as a going concern. Functional insolvency is, however, required to utilise this procedure.

Conclusions

National legislation on insolvency prevention procedures will need to be further adapted and amended in order to comply with the provisions of Directive 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks.

Although out-of-court debt restructuring agreements are not expressly governed by relevant Romanian legislation, the Insolvency Law and Judicial Practice encourage out-of-court debt restructuring agreements and pre-insolvency proceedings, which aim to safeguard companies through conventional debt restructuring, which is achieved through negotiation with creditors. Unfortunately, the protection of the debtor against potential foreclosure proceedings by non-compliant creditors is less effective. For this reason, most debtors prefer

to request the opening of insolvency proceedings and propose a reorganization plan in order to fully benefit from the protection of the law against enforcement.

Bibliography

Treatises, monographs, courses, other works

Revista Phoenix nr. 4/2019 (octombrie-decembrie 2019)

Arin Octav Stanescu,Simona Maria Milos,Stefan Dumitru,Otilia Doina Milu, Procedurile de preventie a insolventei: concordatul preventiv si mandatul ad-hoc. Reorganizarea judiciara, Ed. Universul Juridic, 2010;

Nasz Csaba Bela, „Procedurile de prevenire a insolventei", Ed. Universul Juridic, 2015;

R. Bufan, A.O. Stănescu ș.a, „ Tratat practic de insolvență", Ed, Hamangiu, București, 2014;

N. Țăndăreanu, „Codul insolvenței adnotat. Noutăți, examinare comparativă și note explicative", Ed. Universul Juridic, Bucuresti, 2014.

Bibliographic resources on the INTERNET

https://www.citr.ro/analize/Articles-Detail/187-restructurarea-si-a-doua-sansa-in-contex tul-propunerilor-de-reglementare-emise-de-comisia-europeana/6593/0

http://www.bursa.ro/restructurare-vs-reorganizare-a-fi-sau-a-nu-fi-05362130

https://www.juridice.ro/480139/proceduri-de-preventie-si-proceduri-prefabricate-sau-ac celerate-de-insolventa.html

https://www.beckshop.ro/procedurile-de-preventie-a-insolventei-concordatul-preventiv-si -mandatul-ad-hoc-reorganizarea-judiciara

https://www.unpir.ro/documents/phoenix/pdf/revista32.pdf

https://ibn.idsi.md/sites/default/files/imag_file/Concordatul%20preventiv%20%E2%80% 93%20procedura%20de%20prevenire%20a%20insolventei%20reglementata%20%C3%AEn %20legislatiile%20europene.pdf

www.just.ro/wp-content/uploads/2016/03/Cod-adnotat- FINAL.docx

https://www.unpir.ro/documents/phoenix/pdf/revista36.pdf

https://www.universuljuridic.ro/chestiuni-interpretabile-cu-privire-la-planul-de-reorgani zare/2/

https://www.juridice.ro/495431/scurte-consideratii-asupra-posibilitatii-completarii-unui- plan-de-reorganizare-inaintea-etapei-confirmarii-de-catre-judecatorul-sindic.html

http://www.prospectiuni.ro/files/PRSN-Plan%20de%20reorganizare_%2024082017.pdf

https://www.juridice.ro/wp-content/uploads/2018/08/CP-UNPIR-Modifiari-Legislative- 180810.pdf

CURRENT ISSUES REGARDING THE INSTITUTION OF JUDICIAL SUCCESSIONAL INDIGNITY

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Abstract
The successional indignity operates both in the case of legal and testamentary devolution, this being a novelty brought by the new civil code, in addition to the possibility of forgiving the unworthy successor, and produces effects only with regard to the perpetrator, not in relation to other persons called to inherit. Judicial indignity is one of the forms of successional indignity, along with legal indignity, constituting the legislative element of absolute novelty in this matter.
Keywords: *deception, legacy, undignity, judicial, successor, successively*

I. Considerații preliminare

In the context of the adoption of the new civil code, in 2011, the regulation of the institution of judicial indignity was conceived and appears as an element of absolute novelty, as a specific difference of the new civil code in relation to the normative set materialized by the old civil code.

Broadening the framework of the analysis, it is observed that the regulation of the indignity of succession in the new civil code is subject to the assumed general goals of the new civil codification, namely the renewal of outdated legal institutions, the creation of a modern normative and conceptual framework in the field of civil law and the updating of the civil legal lexicon.

It obviously contributes to the achievement of these desired both the updating of the factual situations that materialize cases of legal indignity, but in particular the introduction of judicial indignity, as a specific legal institution, with its own identity.

With regard to legal indignity, the new elements consist in the elimination of two of the factual and legal situations representing cases of indignity in the regulation of the old civil code, the adaptation of the third and the introduction of a new case of indignity.

We remind you that under the rule of the Civil Code of 1864, they represented cases of indignity: a)conviction for murder or attempted murder against de cujus; b) the capital charge declared slanderous against de cujus; c) failure by the successor to report the murder committed on de cujus [1].. Or, in the view of the New Civil Code, legal indignity is circumscribed to the idea of conviction for committing the crime of murder, in two variants, regulated by art. 958 para. 1:

- the person criminally convicted for committing a crime with the intention of killing de cujus;
- the person criminally convicted for committing, before the opening of the inheritance, a crime with the intention of killing another successor which, if the inheritance had been opened on the date of the act, would have removed or restricted the vocation to inherit the perpetrator.

II. Judicial indignity in the current regulation

2.1. Cases of judicial indignity

As shown above, in the regulation of the New Civil Code, judicial indignity represents one of the forms of successional indignity, along with legal indignity, constituting the legislative element of novelty in this matter.

Cases of judicial indignity are provided for in the New Civil Code of art. 959 para. (1), which states that it can be declared unworthy to inherit:

a) the person criminally convicted for committing, with intent, against de cujus, serious acts of violence, physical or moral, or, as the case may be, acts that resulted in the death of the victim;

b) the person who, in bad faith, hid, altered, destroyed or falsified the will of the deceased;

c) the person who, through deception or violence, prevented the person leaving the inheritance from drawing up, modifying or revoking the will.

2.2. Criminal conviction for committing crimes

Regarding the case of judicial indignity provided by letter a) of art. Art. 959 para. (1) of the New Civil Code, it should be noted first of all that the law imposes in this case also the requirement of the existence of a criminal conviction (even if it is a judicial indignity), and secondly the fact that in the generic category of acts that can attract such a conviction are included, on the one hand, serious acts of physical or moral violence, committed with intent, and on the other hand, acts that resulted in the death of the victim, that is, acts committed with the guilt form of preintention (intent exceeded) [2]. The first category includes, in turn, two distinct types of acts, acts involving physical violence and acts involving moral violence.

By reference to the criminal legislation in force, we appreciate that it falls under the category of serious acts of physical violence, in the sense of art. 959 para. (1) lit. a) at least the following crimes: bodily injury (regulated by art. 194 Penal Code), ill treatment of minors (art. 197 Penal Code), illegal deprivation of liberty (art. 205 Penal Code), slavery (art. 209 Penal Code), human trafficking (art. 210 C.pen.), submission to forced or compulsory labor (art. 212 Penal Code), pimping (213 par. (2) Penal Code), exploitation of begging (214 par. (2) letter b) Penal Code), rape (art. 218 Penal Code), sexual aggression (art. 219 Penal Code), torture (art. 282 Penal Code).

With regard to the offense of beatings and other violence (regulated by art. 193 Penal Code), as judicial practice is almost non-existent, and in the specialized literature there are contradictory positions [3], it is difficult to formulate a decisive statement, however, starting from the requirement and at the same time the delimitation made by art. 959 para. (1) lit. a), in the sense that it must be „serious acts", we are of the opinion that the facts materialized in this crime do not fall into the category of serious acts of physical violence that attract judicial indignity.

As for serious acts of moral violence, it can be said with certainty that at least the following crimes fall into this category: threats (regulated by art. 206 par. (1) Penal Code), blackmail (regulated by art. 207 C. pen.), harassment (art. 208 Penal Code), human trafficking (art. 210 Penal Code), submission to forced or compulsory labor (art. 212 Penal

Code), pimping (art. 213 para. (2) Penal Code), exploitation of begging art. (214 para. (2) letter b) Penal Code).

Regarding the category of acts committed with pre-intention and which resulted in the death of the victim, it is generally accepted that this category includes, first of all, blows or injuries causing death (regulated by art. 195 Penal Code), but also other crimes in which the original intention was exceeded, producing a more serious effect from the fault of the perpetrator [4], such as interruption of the course of pregnancy which caused bodily injury to the pregnant woman or which resulted in the death of the pregnant woman (art. 201 par. (3) C. pen.), unlawful deprivation of liberty which resulted in the death of the victim (art. 205 paragraph (4) C.) pen etc. Since we are talking about crimes committed with pre-intention, in all these cases, it will be taken into account that the crimes that resulted in the victim's injury or death are committed with intent, only the more serious result being caused by fault.

2.3. Concealment, alteration, destruction or falsification of the the testator's will

Regarding the case of judicial indignity provided by letter b) of art. Art. 959 para. (1) from the New Civil Code, in a first analysis, it must be specified that the modification or removal of the manifestation of the last will of the deceased through interventions on the will can occur before the moment of opening the inheritance, but without the testator having knowledge of them, or after this moment, on the act entered into the civil legal circuit.

We appreciate that, although the law does not specify, this case of indignity concerns only the form of the handwritten will [5], since only in the case of this testamentary form are the actions of the successor capable of leading to the modification or removal of the manifestation of the last will of the deceased. It should be emphasized, however, that the validity or defects of the will are not important, because the sanction of indignity concerns the successor-testator relationship and the successor's attempt to affect the testator's freedom of will and the personal character of the will.

In order to order the sanctioning of the heir with the sanction of indignity of succession, the Civil Code requires the existence of bad faith, which implies his intention to create or modify legal effects through lying. This subjective element is, from a civil procedural perspective, a fact that must be proven by the one who invokes the commission of this illegality.

By concealment the will is understood as putting the will in a hidden or inaccessible place, in order to be taken at another time in safe conditions, as well as removing it from the deceased's home or from the place where he kept it, so as not to be found by those interested.

Alteration of the will means the material modification of the text of the written document by another person through additions, substitutions, deletions of words, numbers, dates, punctuation marks etc. Also, the alteration can consist in damaging all or part of the content of the testamentary document by scribbling (covering the text, making it indecipherable), by using external agents (water, ink etc.) or by breaking the will [6].

Falsification of the will can be done by forgery of writing, namely by imitating, fraudulently reproducing it, giving it a false authentic character and by forging the signature, which is achieved either by applying a totally foreign signature, or by creating an apparent signature of the testator.

The destruction of the will represents the total and irreversible degradation of the material support in which the will is incorporated and which results in the impossibility of its recovery, without having any importance the action by which this fact is achieved (breaking, burning, melting, throwing etc.). The consequence and at the same time the meaning of the destruction of the handwritten will is its non-existence, an extremely serious consequence, which explains and justifies the sanction of indignity.

2.4. Preventing de cujus, by fraud or violence, to draw up, modify or revoke the will

The case of judicial indignity provided by letter c) of art. Art. 959 para. (1) of the New Civil Code, legally materializes situations of negative interference by the successor in the process of forming and expressing the will of the decedent, who intends to draw up, modify or revoke a will, provided that this interference is manifested under the shape of deception [7]. and violence [8]., as defects of consent expressly regulated by the Civil Code. This interference must obviously consist of an action capable of producing an impediment of de cujus to draw up, modify or revoke the will. In other words, in the absence of the appropriate nature of the act of interference, we find ourselves in the presence of a putative impediment, existing only in the conscience of the de cujus or the other successors, but which cannot attract the indignity of the successor in question.

2.5. Invocation of judicial indignity

The legal action requesting the declaration of judicial indignity can be brought to the competent court, within a decay term of one year, by any of the successors. In the situation where the possible unworthy person is, at the date of the opening of the succession, the only successor of the de cujus, the territorial administrative unit (community, city or municipality, as the case may be) in whose territorial radius the successional assets are located can have active procedural status in the formulation of the declaratory action of judicial indignity [9].

In the case of judicial indignity provided by letter a) of art. Art. 959 para. (1) of the New Civil Code, the one-year term begins to run from the moment of the opening of the inheritance, if at that time there was a final criminal conviction and from the moment when the judgment of conviction remains final, when this decision was pronounced after the opening heritage.

In the cases of judicial indignity provided by letters a) and b) of art. Art. 959 para. (1) of the New Civil Code, the one-year limitation period runs from the date on which the successor became aware of these facts.

III. Final considerations

For the laborious process of drafting and adopting the new civil code, successional indignity represented an open space for lexical and legal updates and institutional reformulations, but also a fertile field for legislative innovations, in the conditions in which the form of successional indignity regulated by the Civil Code of 1864 was overcome by the new social and legal realities and no longer served the legal needs of society.

By regulating the indignity of succession in the New Civil Code and especially by introducing judicial indignity, as one of the forms of successional indignity, along with the

indignity of law, the objectives envisaged by the legislator were, for the most part, achieved, as we have shown above.

However, the attempt, perhaps excessive, of legal innovation has also created many conceptual ambiguities and problems of interpretation, the deepening of which will be the subject of a future analysis.

Notes and bibliographical references

[1]. Art. 655 of the Civil Code of 1864: „*The following are unworthy of succession and therefore excluded from succession: 1. Convicted for killing or attempting to kill the deceased. 2. The one who made a capital accusation against the deceased, declared by the court to be slanderous. 3. The major heir who, having knowledge of the deceased's murder, did not report it to the justice*."

[2]. According to art. 16 para. (5) of C. pen. there is an exceeded intention when the deed, consisting of an intentional action or inaction, produces a more serious result, which is due to the fault of the perpetrator.

[3]. Francisc Deak, Romeo Popescu, Succession law treaty, updated and completed 3rd edition, Publisher Universul Juridic, Bucureşti, 2013, page 34.

[4]. Constantin Mitrache, Romanian criminal law. The general part, 5th edition revised and added, Publisher Universul Juridic, Bucureşti, 2006, pagee 110.

[5]. Art. 1041 civil code – „Under the penalty of absolute nullity, the holographic will must be written in its entirety, dated and signed by the hand of the testator"

[6]. Francisc Deak, Romeo Popescu, work cited, page 111.

[7]. According to art. 1.214 paragraph (1) Civil Code: „Consent is vitiated by fraud when the party was in an error caused by the fraudulent actions of the other party or when the latter fraudulently omitted to inform the contractor about some circumstances which he ought to have disclosed to him."

[8]. According to paragraph (1) of art. 1.216 Civil Code: „The party that contracted under the rule of a justified fear induced, without right, by the other party or a third party" can request the annulment of the contract, and according to paragraph (2) of the same article: „There is violence when the instilled fear is of such that the threatened party could believe, according to the circumstances, that, without his consent, his life, person, honor or property would be exposed to a grave and imminent danger."

[9]. Carmen Tamara Ungureanu, Carmen Simona Ricu, Gabriela Cristina Frenţiu, Dorin Zeca, Gabriela Răducan, The New Civil Code, Commentaries, Doctrine and Jurisprudence, Vol. II, Publisher Hamangiu, Bucureşti, 2012, page.23.

ALTERNATIVE DISPUTE RESOLUTION. THEORETICAL AND PRACTICAL ASPECTS OF MEDIATION AGREEMENTS IN RELATION TO AN INHERITANCE

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Abstract

In terms of inheritance, the alternative settlement of disputes, respectively mediation, is a procedure which may be used only with regard to the method of partition, after the inheritance has been debated and the quality of heirs of the parties, the bequest and the inheritance quotas have been established. The parties may resort to mediation either before going to court or during the settlement of the case pending before the court. In both situations, the provisions of Law 192/2006 on mediation and on the organization of the profession of mediator will apply.

Through mediation, the parties may reach an agreement and may dispose of their rights in accordance with the law, respectively in terms of sharing the assets that they are entitled to by inheritance, sharing the expenses made by the heirs and how they may incur them, matters that concern the ownership right, possession, neighborhood relations, matters concerning the execution or non-execution or improper execution of certain contracts etc.

Keywords: *inheritance and partition, mediation agreement*

Alternative dispute resolution is the fastest and most efficient procedure to manage and settle disputes in an unbiased and neutral manner. Alternative procedures may be used in areas where the parties may dispose of their rights, in accordance with the law.

Mediation, arbitration, conciliation are the best known and most used alternative dispute resolution procedures at national and international level. They are useful tools for relieving courts of a very large number of cases, and allow individuals or legal entities to settle their disputes quickly and at lower costs.[1]

In terms of inheritance, we can discuss the use of alternative dispute settlement procedures, provided that the parties may decide on how to share the inheritance. Thus, mediation, negotiation, transaction may be used successfully in the matter of inheritance partition.

In compliance with the provisions of the Civil Code, the inheritance is the transfer of the estate of a deceased individual to one or more living persons. The opening of the inheritance procedure coincides, according to the provisions of art. 954 of the Civil Code, with the moment when the individual dies, and the opening of the inheritance procedure represents a moment subsequent to the death of the individual, and may be made by any person that has an authority to ascertain the inheritance, either in compliance with law 36/1995, respectively by notifying the notary public, or by filing a lawsuit.

Pursuant to art. 1143 of the Civil Code, no one may be forced to remain in indivisibility, which is why the heir may always request to leave the indivisibility. The inheritance partition is the way by which one may leave the indivisibility, which is the legal

operation that ends the state of indivisibility and that is subject to the provisions of the civil code, of the code of civil procedure, of Law no. 36/1995. The parties' consent may be required both in the event of a provisional partition, and in the event of the final partition.

The notarial inheritance procedure is open on the request of any concerned party, by writing an application which specifies the civil status data of the deceased, the home address of the heirs and the bequest. On the request of the concerned persons, the assets constituting the inheritance are inventoried, in accordance with the provisions of art. 105 and the next of Law 36/1995. The inventory request may be made by any person deemed to be an heir, by the executor of the will, by the creditors of the deceased or of the heirs or by any person who justifies to have an interest in the inheritance. A report will be drafted in this regard.

If all the heirs are present and have full capacity of exercise, the inheritance partition will be settled amicably. The parties may reach an agreement on the inheritance partition by negotiating, trading or by signing a mediation agreement before the mediator. The voluntary inheritance partition may also take place if the heirs include minors, persons placed under interdiction or missing persons, but in compliance with the rules on the protection of persons deprived of their capacity of exercise or with limited capacity of exercise or with regard to missing persons.[2]

In accordance with the provisions of art. 113 of Law 36/1995 insofar as the heirs have agreed amicably, the notary will draw up a conclusion in which he will mention the manner of division and the assets assigned to each heir. Unless otherwise provided by the law, on the request of the legal or testamentary heirs, the notary may liquidate the inheritance liabilities, alienate the asset or share and assign the assets constituting the inheritance in accordance with the heirs' consent.

Also with the consent of the heirs, the notary may proceed to reduce the liberalities up to the limits provided by the law. Provided that the issuance of an additional heir certificate and the resumption of the inheritance procedure is requested, this can be done by the notary public only with the consent of all the heirs; if the heir that has been summoned to be present in order to have the inheritance procedure reopen does not object, then the consent to issue an additional heir certificate will be presumed.

Disputes over inheritance partition can be settled by the alternative path of mediation. In accordance with the provisions of Law 192/2006, mediation is an alternative procedure for the settlement of disputes through a neutral and unbiased third party that administers the procedure and facilitates communication between the parties. The whole procedure is confidential and has the free consent of the parties, which makes mediation an extremely attractive method for the parties who wish to settle disputes as soon as possible, without this matter being made public.

In the event of mediation of conflicts in inheritance matters, the mediation procedure is governed by the provisions of art. 43 and the next of Law 192/2006. Mediation can be requested by one of the heirs, in which case the mediator will send the other heirs a written invitation to inform them and to allow them to accept the mediation, setting a deadline that will not exceed 15 days. If one of the heirs is unable to appear on the set deadline, the mediator may, on the request of the concerned party, set a new date in view of informing them on the mediation and of allowing them to accept said mediation.

Mediation is an extremely effective legal tool for heirs who wish to share the deceased's estate quickly and confidentially. The mediator can help the parties, through a real communication, to reach an agreement that corresponds to their real will and needs, an

agreement without damaging the personal relations between the heirs and without affecting the image of the deceased. The mediator has the obligation to make every effort to reach a mutually convenient agreement for the parties, within a reasonable time but without being able to impose on the parties any solution regarding the negotiated conflict.

The mediation procedure is closed either by concluding an agreement between the parties following the settlement of the conflict, or by the mediator's ascertaining that the mediation has failed, or by the submission of the mediation contract by one of the parties. The mediator will draw up a report on this occasion. If the parties reach an agreement, the mediation agreement will be drawn up.

The mediation agreement resulting from the mediation procedure will be concluded before the mediator and will include the will of the parties and the solution which they have reached in order to settle the dispute. The mediation agreement has the value of an instrument drafted under private signature and must not contain provisions contrary to the law and the public order.[3] The agreement may be affected, in accordance with the law, by terms and conditions and insofar as it concerns partitions and inheritance causes, under the sanction of absolute nullity, the mediation agreement drafted by the mediator will be submitted to the notary public or to the court so that these authorities may check whether the conditions of form and of substance have been satisfied; subsequently, an authentic instrument or a judgment will be issued or given, as the case may be.

As regards the inheritance partition settled by judicial ways, the competent court in matters of inheritance is the one in whose area the deceased had his last home address.

At any time during the trial, the heirs may reach an agreement on the assets making the object of partition, and may ask the court to take note of their transaction.

Mediation in the event of a dispute pending before the court may take place at the initiative of the parties or on the proposal of either party or on the recommendation of the court and may be aimed at settling the dispute over the inheritance partition completely or partially. At the end of the procedure, the mediator will send to the competent court the mediation agreement and the mediation closure report in the situations provided by the law. Once the judgment is handed down, the court will order, on the request of the concerned party, the refund of 50% of the stamp duty paid in cases where mediation concerned partitions and inheritance causes.

In order for the court to take note of the mediation agreement, under the conditions of art. 63 of Law 192/2006 in conjunction with the provisions of art. 438-441 of the Civil Procedure Code, the presence of both parties is required to support the mediation agreement before the court, a matter that confirms that the transaction is the result of their free will. Thus, if a party is not present before the court in order to support the mediation agreement concerning the inheritance partition, the court will reject the request to take note of the agreement.

In terms of inheritance, the mediation agreement may refer to the manner in which the assets of the deceased's estate are shared, in accordance with the established inheritance quotas. In order to obtain a decision of expedient that takes note of the mediation agreement, the vested court has the obligation to check the lawfulness of the act that includes the will of the parties. In terms of inheritance, the mandatory legal provisions contained in the civil code, law 36/1995 are incidental.

The legal inheritance quotas are not established by agreement of the parties, but can be done only by the notary public during the inheritance procedure, by certificates of heir or by

certificates proving the capacity of heir, or by the court, by judgment.[4] In practice, the parties' agreement as a result of negotiation, trading, mediation, may intervene in matters of inheritance only with regard to the partition of the assets constituting the inheritance in the quotas established by the notary public.

In such a situation, the court vested with the authority to give an expedient judgment must verify the lawfulness of the mediation agreement, give reasons in fact and at law for the solution of admitting the request of the parties to take note of the mediation agreement.

In accordance with the provisions of Law 192/2006, in case the dispute has been settled by mediation, the court will give, on the parties' request, a decision in accordance with the provisions of art. 438-441 of the Code of Civil Procedure. Given that the transaction concerns rights that the parties may have, the court will take note thereof in accordance with the Code of Civil Procedure. Once the decision has been handed down, the court will order, on the request of the concerned party, the refund of the judicial stamp duty paid for its vestment.

It should be noted that the court vested with the authority to give a decision that includes the mediation agreement that has been signed in the matter of inheritance partition, based on the evidence submitted to the case file, will acknowledge as open the inheritance procedure and will analyze the validity of the parties' claims regarding their capacity of heirs.

In application of the provisions of Law 192/2006 on the settlement by way of mediation of the dispute regarding the inheritance partition and the fact that the court hands out a decision on the parties' request, the court will take note of the capacity of accepting heirs and of the way to leave the inheritance indivisibility of the parties after ascertaining the opening of the inheritance procedure by death and after ascertaining the order of preference established by the provisions of the Civil Code.

If the court is vested only with an application for inheritance partition, it is necessary to verify whether the parties, the heirs, have debated the inheritance and whether the capacity of heir, the bequest and the quotas of the parties have been established by heir certificates or by an irrevocable judgment.

With regard to the annulment of the heir certificate, a mediation agreement addressing this issue is inadmissible. The judicial practice distinguishes between the respondent's acquiescence in such an action of annulment of the heir certificate, a situation in which the obligation of the court to verify the validity of the reasons for annulment of the heir certificate is maintained, and the situation of the mediation agreement that cannot intervene. In the latter case, the court will reject the request to take note of the mediation agreement.

Consequently, mediation as an alternative dispute settlement procedure can be used successfully solely in matters of inheritance partition.

In terms of inheritance, the imperative provisions of the law, of the civil code and of other laws are incidental, with reference to the renunciation of the inheritance, which is a solemn act and is made in accordance with art. 76 of Law no. 36/1995; the legal inheritance quotas will be established by the notary public during the inheritance procedure through heir certificates or certificates of capacity of heir, or by the court. The parties cannot establish through a mediation agreement the legal inheritance quotas and they cannot operate renunciations of inheritance rights in favor of other heirs, if these they could mask purely abdicative renunciations that must comply with the provisions of art. 76 para. 4 of Law 36/1995 on notaries public.[5]

References

[1] Sîrbu, M. (2020), Metodele ADR în context European și Internațional, Ed. Universul Juridic București;

[2] Codul civil, Ed Hamangiu, ediția 2019, art 1144;

[3] Legea 192/2006 privind medierea și organizarea profesiei de mediator, publicată în Monitorul Oficial nr. 441/22 mai 2006

[4] Culegere de hotărâri judecătorești pronunțate în materia medierii, GEMME, Forumul judecătorilor din România. Ed Universitară, București, 2011

[5] Idem [4]

THE RENOUNCERS SUCCESSIVE RIGHT OF CLAIMING THE PROPERTY ABUSIVELY TAKEN OVER BY THE STATE

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Abstract

The rule of indivisibility of the succession patrimony confers the same indivisible character to the succession option, this not being able to be conditioned by the quantitative aspect of the succession patrimony.

The renunciation of the succession concerns both the assets existing in succession at the date of death and those that would eventually enter the respective succession, and by the effect of renunciation, the heir is considered never to have inherited, his succession vocation will be abolished retroactively.

Keywords: *renunciation of succession, title of heir, reinstatement within the term of acceptance of the succession, reconstitution of the property rights*

Introduction

The express renunciation of the inheritance represents the manifestation of the will of the successor by which he declares that he does not understand to acquire the title of heir, respectively that he does not understand to use the succession rights that his vocation confers to him.

The option to renounce the inheritance can be expressed only after the date of opening the succession, the renunciation of a future inheritance being stopped by law [1], the considerations that oppose the performance of legal acts regarding the assets of an inheritance before its opening being moral. This limitation, which is found in the current Civil Code under the name „legal acts on an unopened succession" [2] also existed in the Civil Code 1864, but under the rule of Caragea Law, as in Roman law, the renunciation of future inheritances, made with the consent of the one to be inherited, they were not considered immoral and therefore were not stopped, as long as the Code of Calimach (by Article 1032) stopped such waivers as being contrary to morality [3].

Legal acts on an unopened inheritance being prohibited by law, are sanctioned with absolute nullity. Both unilateral acts and contracts, free of charge or for a fee, which accept or waive an unopened inheritance or which promise to alienate any rights regarding an unopened inheritance, are covered. Such acts shall be prohibited whether they concern the inheritance of one of the Contracting Parties or the inheritance of a third party. The renunciation of the unopened succession would be the example of a unilateral act, and the understanding by which the presumed successors share a future inheritance would be an example of a contract on the succession of another [4].

Giving up the succession

The heir who renounces the succession is considered to have never been an heir and consequently he is deprived of all the advantages given by the inheritance, but at the same time he is relieved of any obligation which would have arisen from his capacity as heir if he had accepted. succession [5]. Therefore, the title of heir of the renouncer is revoked retroactively, the heir being considered as a foreign person of inheritance.

The successor may choose to give up the inheritance for several reasons, either because the inheritance is insolvent, the liability exceeds the asset, or to keep a reportable donation from which he benefited and whose value is greater than his share. appropriate if he accepts the succession, either for family or other reasons [6].

The legal act of renunciation of the inheritance is in principle irrevocable, but the withdrawal of the renunciation (regulated in article 701 of the Civil Code 1864, being the Civil Code in force at the time of the adoption of Law number 10/2001) is conditioned by non-expiration of the succession option and non-acceptance, meanwhile, of the inheritance, by other successors.

Although the express renunciation of the succession (provided by article 1120 Civil Code) refers both to the assets existing in the succession mass at the date of opening the succession, and to those that would enter in the future in the respective succession mass, after the adoption of special laws reconstituting the right of Numerous requests were made by the property by which the renouncers requested the reinstatement within the term of acceptance of the succession, invoking discrimination against the persons who did not exercise their right of succession option, and who were reinstated within the term of acceptance.

Rescheduling, according to Law number 10/2001

As we will detail in the course of our research, we consider unfounded both the requests for the termination of the renouncing heirs and the invoked exceptions of unconstitutionality, as the termination of the heirs who have expressly renounced the inheritance is a violation of the law, according to which heirs who give up are considered to have never been heirs.

At the same time, it is a violation of the principle of unity and indivisibility of inheritance. According to this principle, the patrimony being considered as a unitary whole, consequently the inheritance is, in principle, unitary, which means that the succession in its entirety is governed by the same rules, without any distinction between the successor assets according to nature or origin. their.

It follows that the inheritance can be accepted or repudiated in its entirety, otherwise the succession would be opened whenever there are changes in assets in the assets or liabilities of the inheritance, contrary to the imperative names of civil law [7].

The jurisprudence in this respect was unitary, showing that the effects of the waiver are established by law, the title of heir of the waiver being revoked retroactively, it being considered as a foreign person of inheritance, losing the part of the inheritance to which he is entitled. The loss is not limited to the assets existing in the inheritance at the time of renunciation, but also to the assets which, in the manner provided by law, could later be inherited [8].

Returning to the provisions of the Special Laws on the Restoration of the Right to Property, Article 3 (1) (a) of Law No. 10/2001 states that they are entitled to remedial

measures consisting in restitution in kind or, as the case may be, by equivalent, natural persons, the owners of the real estate at the date of their abusive takeover „, and in accordance with the provisions of article 4 paragraph (2) of the same normative act, the legal or testamentary heirs of the entitled natural persons also benefit from the provisions of this law.

Paragraph (3) of the same article provides that the successors who, after March 6, 1945, did not accept the inheritance are legally restored within the term of acceptance of the succession for the goods that are the object of this law. The request for restitution has the value of accepting the succession for the goods whose restitution is requested under this law.

Failure to formulate such a request does not lead to the loss of the quality of heir, but has the effect of losing the right to benefit from the remedial measures established by Law number 10/2001, the shares of legal or testamentary heirs who did not follow the procedure provided by law following to take advantage of the other heirs of the entitled person who submitted the request for restitution in time.

By the provisions of Article 4 paragraph (3) of Law No. 10/2001, the successor who did not accept the succession are reinstated by law within the term of acceptance of the succession, but these legal norms must be interpreted in relation to the principles of legal return of inheritance, in the sense that those successors who are not removed from the inheritance by the successors in a degree closer to the cujus are restored within the term of acceptance of the succession.

These provisions of the special law are in accordance with the provisions of the Civil Code 1864 (in force at the time of the adoption of Law number 10/2001), the heirs who have expressly renounced the inheritance cannot benefit from the reconstitution of the property right.

Our opinion is argued by the claim that only heirs who did not accept the inheritance, within the term and conditions provided by article 700 of the Civil Code 1864, and not those who renounced the succession, under the conditions of article, can benefit from the reinstatement within the acceptance period. 696 Civil Code 1864. Moreover, the provisions of Article 13 of Law No. 18/1991 stipulate that the rescheduling concerns only „heirs", ie persons who have „the quality of heir"[9].

However, according to the provisions of article 696 of the Civil Code 1864, the heirs who renounce the succession are considered to have never had this quality, the title of heir being abolished with retroactive effect, the heir being considered as a foreign person of inheritance. Therefore, the one who renounces the succession does not fall into the category of persons who are heirs, as he cannot prove this quality, since in this case it is not a question of not accepting the succession under the conditions of Article 700 of the Civil Code 1864, in which case it is only presumed. by law as a renouncer, but, on the contrary, it is proved with certainty (notarial declaration) that he is not an heir, given the fact that he expressly renounced the succession.

Restoration within the term of acceptance of the inheritance, for the goods abusively taken over by the totalitarian state, in violation of the property right of the holders, has as finality the observance of the principle restitutio in integrum, being in full accordance with the first sentence of Article 44 paragraph (1) of the Constitution. on guaranteeing the right to private property [10].

Conclusions

The purpose of the provisions of Article 4 of Law No. 10/2001 is to put an end to the perpetuation of the state of abnormality established in the conduct of legal relations, and not to grant an undue advantage, arbitrarily established, which would generate an inequality between successors who accepted the inheritance within the established term. by the provisions of the Civil Code and those that are reinstated within the acceptance period by Article 4 paragraph (3) of Law number 10/2001 [11].

We agree with this view, given that the legal act of the succession option is an individual act of each successor who is free to assess, in relation to his interests, whether he renounces the succession, whether he accepts it, simply or under the benefit of inventory.

The transmission of the inheritance is a universal transmission, since it has as object the patrimony of the deceased natural person, as legal universality, that is to say the totality of the rights and obligations that have economic value and that belonged to the deceased. The positive or negative attitude of the heir towards the succession concerns the universality of the inheritance, and not a certain good from the patrimony left by the deceased.

The situation of the renouncer has raised many controversies, both in doctrine and in practice [12], especially in the field of reconstitution of property rights under special post-communist laws. During our research we presented the arguments for which the waiver does not have the quality to formulate the request for reconstitution of the property right, based on the special reparation laws, the arguments presented being both doctrinal and jurisprudential.

References

[1] Article 956 Civil Code: Unless otherwise provided by law, legal acts having as their object rights over an as yet unopened inheritance, such as acts by which the inheritance is accepted or renounced, before the opening, shall be struck down by absolute nullity. they, or the acts by which the alienation of some rights that could be acquired at the opening of the inheritance are alienated or promised.

[2] Unlike the old Civil Code, which did not expressly provide for the authenticity of the authentic form of the declaration of renunciation of the succession, the new code regulates this method, as well as the persons competent in its elaboration.

[3] Bacaci, A., Comăniță, Gh. (2013). Civil law. Successions, Universul Juridic Publishing House, Bucharest, pp. 146.

[4] Kocis, J., Vasilescu, P. (2016). Civil law. Successions, Hamangiu Publishing House, Bucharest, pp. 176.

[5] Ionaşcu, Tr. (1943). Civil law course. Succession and liberalities, Bucharest, pp. 152.

[6] Adam, I., Rusu, A. (2003). Civil Law. Succession, All Beck Publishing House, Bucharest, pp. 420.

[7] High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision No. 5139/2007.

[8] Iaşi Court of Appeal, Civil Section, Decision number 1166/2001.

[9] Constitutional Court, Decision no. 11 of February 5,2007, published in the Official Gazette of Romania, Part I, number 733 of October 30, 2007.

[10] Constitutional Court, Decision no. 1,158 of December 11, 2007, published in the Official Gazette of Romania, Part I, number 5 of January 4, 2008.

[11] Constitutional Court, Decision no. 84 of February 10, 2005, published in the Official Gazette of Romania, Part I, number 274 of April 1, 2005.

[12] For example, the provisions of Articles 3 and 4 of Law No. 10/2001 have been the subject of 18 decisions of the Constitutional Court:

• Decision 956/2011 [R] regarding the exception of unconstitutionality of the provisions of art. 1-3 and art. 14 of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over in the period March 6, 1945-22 December 1989, as well as of the Methodological Norms for unitary application of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over in the period March 6, 1945-22 December 1989, approved by the Government Decision no. 250/2007.

• Decision 994/2010 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (2) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 583/2008 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (1) lit. b) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 738/2006 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (2) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 541/2005 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (1) lit. c) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 308/2005 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (1) lit. c) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 165/2005 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (1) lit. c) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 316/2003 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (2) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over during the period March 6, 1945-22 December 1989, text introduced by the Government Emergency Ordinance no. 184/2002.

• Decision 246/2003 [R] regarding the exception of unconstitutionality of the provisions of art. 3 para. (2) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989, with the subsequent modifications and completions.

• Decision 149/2018 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (3) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over during the period March 6, 1945-22 December 1989.

• Decision 982/2011 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (4) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 216/2011 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (1) and (4) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over during the period March 6, 1945-22 December 1989.

• Decision 911/2009 [R / R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (2) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989 and of art. 676 of the Civil Code.

• Decision 105/2009 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (3) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over during the period March 6, 1945-22 December 1989.

• Decision 703/2008 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (2) and (3) and art. 47 of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989, republished, 2008.

• Decision 1158/2007 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (3) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 243/2007 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (4) and art. 22 para. (1) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945 – December 22, 1989.

• Decision 84/2005 [R] regarding the exception of unconstitutionality of the provisions of art. 4 para. (3) of Law no. 10/2001 regarding the legal regime of some buildings abusively taken over during the period March 6, 1945-22 December 1989.

Section C

THE PLACE AND ROLE OF THE PRESUMPTION OF INNOCENCE IN THE ROMANIAN CRIMINAL PROCEDURE

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Abstract
The presumption of innocence was first enshrined in the Declaration of the Rights of Man and of the Citizen of 1789, which, in art. 9 provided that „every man shall be presumed innocent until proved guilty"[1].
Keywords: *presumption of innocence, ECHR, criminal procedure*

1. Introductory considerations

Subsequently, recognizing its legal nature as a fundamental right, the presumption of innocence was taken over by other international declarations and conventions on human rights, as well as by most national constitutions. Thus, art. 11 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948, states that „any person accused of committing a crime is presumed innocent so long as their guilt hasn't been established in a public court, with respect to the guarantees necessary for the defense". The International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 16, 1966, also provides in art. 14 pt. 2 that „any person accused of committing a criminal offense shall be presumed innocent until proved guilty according to law".

The European Convention on Human Rights provides in art. 6 paragraph 2 that „any person accused of a crime is presumed innocent until his guilt is legally established." Starting from this text, the Romanian constitutional legislator ruled in art. 23 para. (11) that „until the final judgment of conviction remains, the person is considered innocent".

2. Notion. Legal nature

In the doctrine, the presumption of innocence is defined as a fundamental principle of criminal procedural law, according to which any person is considered innocent until his guilt is established by a final criminal decision. [2] Other authors consider the presumption of innocence both a procedural guarantee, linked in its classical sense to the notion of burden of proof and the need to prove the commission of the act beyond any reasonable doubt, as well as a subjective non-patrimonial right of the suspect or defendant, which must be respected by all people and who which needs protection.

Indeed, the presumption of innocence guarantees the protection of persons in criminal proceedings against arbitrariness in establishing and prosecuting. The presumption of innocence is the basis of all procedural guarantees related to the protection of the person in criminal proceedings.

At the same time, the presumption of innocence is closely linked to the right to a fair trial [2] as well as to the finding of the truth and to the correct proof of the factual circumstances of the case, so that the guilt is established with certainty [3].

3. The content of the presumption of innocence

The scope of this important guarantee has been progressively expanded, which at the same time proves its importance and vitality. These extensive interpretations are explained by the fact that the European Convention on Human Rights aims to protect effective and concrete rights, not theoretical or illusory [4].

Traditionally, the doctrine emphasizes two major consequences of applying the principle of the presumption of innocence.:

a) The person of the suspect or defendant is exonerated from the obligation to establish his innocence and

b) If the evidence is insufficient to form the conviction of the judge, if there is any doubt, the suspect or defendant must be released and acquitted [5].

These aspects are taken over in the content of art. 4 of the Romanian Code of Criminal Procedure in force:

(1) Any person shall be presumed innocent until proved guilty according to law.

(2) After the administration of the entire body of evidence, any doubt in the formation of the conviction of the judicial bodies shall be interpreted in favor of the suspect or defendant.

It can be said that, traditionally, European doctrine summarizes the presumption of innocence in the following content:

a) The burden of proof falls on the person conducting the criminal investigation

b) Doubt benefits the accused

c) The prohibition to resort to preventive measures in order to exercise an immediate repression, we understand, as long as the guilt is not outlined.

d) Respecting the presumption of innocence in the press releases.

However, the presumption of innocence has seen a gradual consolidation and expansion. Thus, first of all, the French legislator, by the law of June 15, 2000, introduced in the Civil Code art. 9-1, which in par. (1) stipulates that every person has the right to respect the presumption of innocence. Alin. (2) of this article stipulates that if a person presented to the public, before any conviction, as guilty of facts under investigation or judicial instruction may request the judge to publish a rectification or to issue a statement in order to stop the infringement brought to the presumption of innocence.

Secondly, pursuant to art. 177-1 of the French Code of Criminal Procedure, in the case of a dismissal solution, the investigating judge may order, at the request of the person concerned either the publication of all or part of the decision, or the insertion of a communiqué in one or more newspapers.

Thirdly, in French law, the law of 4 January 1993 regulated the right of reply. It provides that, within three months of the day on which they acquired the authority of res judicata, either a dismissal solution or a decision to release or acquit, the beneficiary may bring an action against the publication in which he appeared on the occasion of the prosecution [6].

The content of the presumption of innocence is constantly expanding as a result of the evolution of jurisprudence.

3.1 Press releases

In principle, it has been stated that no representative of the state should declare that a person is guilty of committing a crime before his guilt can be established by a court [7].

However, informing journalists about the arrest of the defendant, a prosecutor stated that all the evidence converges towards establishing with certainty the guilt and that „no one and nothing can release him from criminal responsibility [8]".

With regard to the echo that such cases reflect the lack of moderation of senior officials, the Court held that in a democratic society, sometimes severe comments from the press are inevitable, but although national authorities are not responsible for the actions of the press, it is very important to choose the terms used by state agents and especially by the judicial authorities that control the conduct of the investigation [9].

A fundamental distinction must be made between a statement that someone is only suspected of having committed a crime and a clear statement, in the absence of a final conviction, that a person has committed the crime in question. The Court noted that the statements in question were made by the prosecutor investigating the case, the Romanian Minister of the Interior and the General Prosecutor of Romania, in a context independent of the criminal investigation itself [10].

3.2 Images presented by the press

It has long been accepted that state representatives must respect neutrality in the legal status of a suspect, and this obligation is also incumbent on individuals, especially journalists. It has been said that the right to information is fundamental, but not fully justified [11].

We gather from this that the right to inform the public does not justify the presentation of the suspect or defendant in situations that seriously harm his dignity. On the contrary, it has been argued that any dissemination of images cannot, however, be considered a violation of the presumption of innocence by the media, either directly or indirectly, given the attitude or negligence of the state authorities [12].

Therefore, the attitude of the journalists is excused, but the attitude of the negligence or more than that of the representatives of the state authorities who watch over the observance of the presumption of innocence is accused. State authorities have an obligation to protect suspects and defendants from exposure in embarrassing, humiliating or even degrading situations that cause mental distress to both them and their families. We exemplify with the images of Judge F.C. from the ICCJ, which during the trial of the fund was presented by all TV stations boarding the van of the Romanian Police, handcuffed together with another detainee, being forced to synchronize his movements with him in order to get in the car. We specify that he was only remanded in custody, against which no court decision was pronounced. Finally, he was sentenced to 3 years in prison with suspension.

We must also mention the endless series of suspects who 2 years ago were presented at the exit of the DNA headquarters handcuffed and passing through a compact group of journalists. We believe that the judicial authorities have the obligation to defend the dignity and prestige of the defendants, even after their final conviction, even more so during the criminal proceedings.

It has been stated that the fundamental principle of the presumption of innocence guarantees to any individual that the representatives of the state will not be able to find him guilty of a crime before a competent court has established this [13].

We believe that it is fundamentally wrong, the principle of the presumption of innocence protecting *erga omnes*. The image of an honest citizen is important not only in front of the authorities but also in the public opinion.

3.3 The right to participate in one's own trial

The accused must be informed of the nature and cause of the charge brought against him, in detail and in a language which he understands [14]. In criminal matters, the right of the accused to participate in his own trial, although not explicitly guaranteed by art. 6 is an inherent right to a fair trial [15]. According to art. 305 para. (1) of the Romanian Code of Criminal Procedure, when the act of notification meets the conditions provided by law, the criminal investigation body orders the beginning of the criminal investigation regarding the committed deed or whose commission is being prepared, even if the perpetrator is indicated or known. Therefore, there is a beginning of the criminal investigation „*in rem"* although the perpetrator is known, which exempts the prosecutor from the obligation to inform him in writing about the beginning of the criminal investigation, putting him in a position not to and could organize the defense.

ECHR jurisprudence has ruled that the right to assistance of a lawyer is applicable to the entire procedure, from the preliminary investigation phase carried out by the police [16]. From the moment the criminal investigation began, either *in rem* or *in personam*, the special methods of supervision or investigation provided by art. 138 of the Romanian Code of Criminal Procedure, without the suspect or defendant being warned about the proceedings against him. It should be noted that the right of defense, alone or with a lawyer, implies a right of access to the file and communication of procedural documents [17]. States must take the necessary positive measures to ensure that the person pursued has the opportunity to understand the allegations made against him and to take a decision on the procedure in accordance with his interests [18].

3.4 The right not to incriminate oneself

The right to remain silent and not to contribute to one's own incrimination is intended to protect the defendant against the abusive coercion of the authorities. The right not to contribute to one's own incrimination is applicable to criminal proceedings concerning all types of criminal offenses, from the simplest to the most complex [19]. This right, as well as all guarantees of a fair trial, is applicable to the pre-trial stage, and consequently includes the right to remain silent during the police interrogation [20]. According to art. 114 of the Romanian Code of Criminal Procedure, any person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case may be heard as a witness, and according to art. 117 of the same code have the right to refuse to be heard as a witness the husband, ascendants and descendants in direct line, as well as the brothers and sisters of the suspect or defendant, the persons who had the quality of husband of the defendant. Practically, before the beginning of the criminal investigation, any person can be heard as a witness, even if, as it results from art. 118 CPP the witness has the right not to accuse himself. We consider that the practice of some criminal investigation bodies to take witness statements from any person in the first stage of the criminal investigation is a breach of the presumption of innocence, all the more so as at this stage the persons in question are deprived of defense..

3.5 The right to settle the case within a reasonable time

Some authors [21] introduce in the content of the presumption of innocence the right to settle the case within a reasonable time. Even if the right to settle the case within a reasonable time is part of the great principle of the fair trial, it is regulated separately in art.

8 of the Romanian Code of Criminal Procedure, so we cannot talk about an aspect of the presumption of innocence [22].

4. Conclusions

Regarding the definition, we consider that, as regulated in art. 4 of the Romanian Code of Criminal Procedure, the presumption of innocence is a fundamental principle of criminal procedure. The presumption of innocence cannot be a procedural guarantee, as some authors consider, as the Code of Criminal Procedure does not provide for any sanctions in case of violation of this principle [4]. The one that turned the principle of the presumption of innocence into a procedural guarantee is the jurisprudence of the ECHR, but from the perspective of the Romanian legislation we cannot speak of a guarantee.

The presumption of innocence is not a subjective civil right [4] because the subjective civil rights are regulated by the civil legislation, and here we are in the field of strict interpretation of the criminal procedure, where the violation of a subjective right does not attract a procedural sanction.

In terms of content, we find that it has a process of continuous expansion, the presumption of innocence is recognized as a component part of the right to a fair trial, which means that everything that goes into the broad concept of fair trial and is not regulated as such can be taken over by the general principle of the presumption of innocence.

References

[1] J. Velu, La protection transnationale des droits de l'homme, Vol. 1, Ed. Kluwer et Bruylant, Paris, 1986, p. 323.

[2] Gh. Mateut, Prezumtia de nevinovatie in lumina Conventiei Europene si a reglementarilor procedurale interne, Dreptul, nr. 11/2000, p. 59.

[3] G. Antoniu, C. Bulai, Dictionar de drept penal si procedura penala, Ed. Hamangiu, Bucuresti, 2011, p. 724.

[4] M. Udroiu, Procedura penala, Partea Generala, Ed. C.H. Beck, Bucuresti, 2018, p. 12.

[5] N. Volonciu, Tratat de procedura penala, Ed. Paideea, Bucuresti, 1996, Vol. 1, p. 122.

[6] J. F. Renucci, Tratat de Drept European al Drepturilor Omului, Ed. Hamangiu, Bucuresti, 2009, p. 407.

[7] B. Bouloc, Procedure penale, Ed. Dalloz, 2006, p. 102.

[8] H. D. Bosly, D. Vandermeersch, Droit de la procedure penale, La charte, Brugge, 2003, p. 23.

[9] B. Bouloc, *op. cit.*, p. 103.

[10] Allenet, c. Franta, Hotararea din 10 februarie 1995, pct. 36

[11] CEDO, Pavalache c. Romania, Hotararea din 18 octombrie 2011, pct. 120.

[12] CEDO, Daktaras c. Lituania, pct. 44; Kuzim c. Rusia, Hotararea din 23 octombrie 2008, pct. 94.

[13] CEDO, G. C. P. c. Romania, Hotararea din 20 decembrie 2011, pct. 55.

[14] J. F. Renucci, *op. cit.*, p. 498.

[15] CEDO, Claes si altii c. Belgia, 46825/1999, J. F. Renucci, p. 498.

[16] CEDO, Butkevicius c. Lituania, 26 martie 2002, O. c. Norvegia, 28 octombrie 2004

[17] T. c. Italia, 12 octombrie 1992, F. Sudre, Drept European si International al Drepturilor Omului, Ed. Polirom, 2006, p. 298.

[18] Murray, 8 februarie 1996

[19] CEDO, Fouche c. Franta, 18 martie 1997.

[20] CEDO, Vaudelle c. Franta, 30 ianuarie 2001.

[21] CEDO, Saunders c. Marea Britanie, 17 decembrie 1996.

[22] Alexandru Zampieri, Aspecte controversate privind nulitatile in procesul penal, Ed. Hamangiu, 2021, p. 148.

INTRODUCTION IN THE CRIMINAL PROCESS OF THE CIVILY RESPONSIBLE PARTY

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Abstract

According to art. 32, paragraph 2 of the CPC, the civilly responsible party is one of the parties to the criminal proceedings.

The importance of its presence in the criminal process is obvious and highlighted in the doctrinal approaches that appeared in the legal space.

The decisions of unconstitutionality incident to the institution created the possibility of thorough and, we can say, inexhaustible analyzes.

In the content of the article I referred both to the proposals of lege ferenda that appeared in the content of some articles of the authors I mentioned, and to the Decision of unconstitutionality no. 257/2017, which refer to the moment until which the part can be introduced. civilly liable in criminal proceedings.

Keywords: *criminal trial, civilly responsible party, introduction, person entitled to request the introduction of the civilly responsible party, decision of unconstitutionality, term of introduction*

Criminal liability is the most severe form of legal liability. For this reason, this form of liability represents an „ultimo ratio" – intervening only in the hypothesis that the other forms of liability (disciplinary, civil etc.) would not be sufficient, compared to the deed committed and the result produced.

As it is well known, according to the express provisions of the Criminal Code, the crime is the only ground of criminal liability (art. 15, paragraph 2 of the Criminal Code). But in order to determine whether a person has committed a crime, the features of the crime must be analyzed. The entire activity is carried out in an organized procedural framework, by judicial bodies that have been invested with certain competencies.

The organized procedural framework is represented by the criminal process, which is carried out by the judicial bodies and in which, following the administration of evidence, it is established whether or not a person has committed a crime. Thus, it is established whether it is appropriate to engage the criminal liability of the person concerned or not.

Committing a crime can also lead to the existence of a prejudice.

In order to identify the damage caused, the injured person has at hand the civil action, which can be exercised in the criminal process. Thus, the injured person may be the civil party in the criminal proceedings, until the beginning of the judicial investigation. In this sense, in art. 84, paragraph 1 of the CPC states that „the injured person who exercises the civil action within the criminal process is called a civil party". Both a natural person and a legal person can be a civil party in the criminal process, as both can be materially harmed by a crime.

In the doctrine, the civil party was defined as „any natural or legal person who has suffered material or moral damage by crime and who has joined his civil action to the criminal action in the criminal proceedings."[1]

[1] Ghe.Mateut, *Tratat de procedura penala, Partea generala*, vol.1, Ed. C.H. Beck, Bucuresti, 2007, p. 78.

Based on art. 20, paragraph 1 of the CPC, the constitution of a civil party is made until the beginning of the judicial investigation, the judicial bodies having the task of bringing this right to the notice of the injured person.

According to art. 86 CPC – „a person who, according to civil law, has a legal or conventional obligation to repair in whole or in part the damage caused by the crime and who is called to answer in the trial, is a party to the criminal proceedings and is called a civilly liable party."

This institution has the role of protecting the person who suffered a material damage against the insolvency of the perpetrator, by this procedural quality regulating the complementary, indirect liability[2] namely, the civil liability of another person than the perpetrator for material damage caused by crime. Both tortious civil liability and criminal liability come into action as a result of committing an illicit act, which infringes on social values protected by law.

According to the criminal procedural provisions (art. 21, paragraph 1, thesis I), the civilly responsible party may be introduced in the criminal proceedings at the request of the entitled party according to the civil law, within the term provided by law.

In connection with the person entitled to request the introduction of the civilly responsible party in question, there are discussions in the „legal space".

For example, there are[3] authors who propose to analyze the need to introduce in the criminal process the civilly responsible party at the initiative of the defendant.

According to the criminal procedural provisions they have already mentioned, the introduction in the criminal process is made only at the express request of the entitled party according to the civil law. In the event that the prosecutor exercises the civil action, for the injured person lacking the capacity to exercise or with limited capacity to exercise, he also has the obligation to request the introduction in the criminal process of the civilly responsible party.

The presentation of the factual situation, as well as the development of the arguments through the use of jurisprudential and doctrinal elements, especially from the sphere of the European Convention on Human Rights, represents a starting point in the analysis by the legislator of this proposal.

The proposed law ferenda of the mentioned authors[4] starts from the premise that „the civil party could intentionally omit or out of simple negligence, attract the civilly responsible party in the process, the lack of possibility for the defendant to formulate an admissible request for the introduction of this parties constitute a shortcoming of the current regulation, leading to unfair solutions regarding the civil side of the case"[5].

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[2] Liviu Pop, S. Ioan Vidu, F. Popa – *Curs de drept civil. Obligatiile*, Editura Universul Juridic, Bucuresti, 2015, p. 300-431.

[3] Alexandru Padurean, Calina Biclescu – *Persoana indreptatita sa solicite introducerea in cauza a partii responsabile civilmente. Inadmisibilitatea formularii unei asemenea cereri de catre inculpat* – Juridice – articole drept penal/ procedura penala, 24.03.2022, pag. 3.

[4] Alexandru Padurean, Calina Biclescu – *Persoana indreptatita sa solicite introducerea in cauza a partii responsabile civilmente. Inadmisibilitatea formularii unei asemenea cereri de catre inculpat* – Juridice – articole drept penal procedura penala, 24.03.2022, pag. 8.

[5] Alexandru Padurean, Calina Biclescu – *Persoana indreptatita sa solicite introducerea in cauza a partii responsabile civilmente. Inadmisibilitatea formularii unei asemenea cereri de catre inculpat* – Juridice – articole drept penal procedura penala, 24.03.2022, pag. 8.

In solving the proposed law ferenda are also taken into account the legislative provisions of the Civil Code – art. 1349 et seq. – according to which from the point of view of substantive law, the object of civil action is to exercise the right to claim reparations through the judiciary and, from a procedural point of view, civil action has as object the criminal liability of persons liable under civil law for the damage caused by committing the deed that is the object of the criminal action (according to art. 19, paragraph 1 of the CPC)[6].

Another argument invoked in support of the proposed law ferenda is represented by the principle of availability, which governs the civil action. This principle is found in the criminal process in the exercise of civil action. „In addition, the civil side of the criminal process is governed by the principle of availability, and the defendant may sometimes have an interest in the civil action being decided by the same court that settles the criminal action[7]".

We share the views of the perpetrators and consider that the legislator could take into account this proposed law ferenda, insofar as the introduction of the civilly liable party at the request of the defendant would not contravene the law and could cover the damage caused by the crime.

Regarding the term of introduction of the civilly responsible party in the criminal process by Decision no. 257/26 April 2017, published in the Official Gazette of Romania, Part I, no. 472 of 22 June 2017, the Constitutional Court admitted the exception of unconstitutionality and found the unconstitutionality of the provisions regarding the term for introducing the civilly responsible party.

According to the provisions of art. 21, paragraph 1 of the CPC, the civilly responsible party may be introduced in the criminal proceedings, within the term provided in art. 20, paragraph 1 of the CPC – „until the beginning of the judicial investigation".

„The Court essentially held that the civilly liable party must be granted full participation in the preliminary chamber proceedings, so that the injured party who has become a civil party may request the civil party to be prosecuted until the investigation begins. judicial proceedings, at any stage of the proceedings, including after the closure of the preliminary chamber procedure, is likely to prejudice the right of free access to justice and the right of defense of the civilly responsible party; the latter must be provided with the possibility to formulate requests and exceptions regarding the legality of notifying the court, the legality of the administration of evidence and the performance of acts by the criminal investigation bodies[8]".

Examining the exception of unconstitutionality, the Constitutional Court finds the possibility of exercising the right to recover the damage, by constituting the injured person as a civil party in the criminal process, the civil action having as object (art. 19, paragraph 1 CPC) the criminal liability of persons liable under civil law for the damage caused by committing the act that is the subject of the criminal action. In motivating the decision, the Constitutional Court considers that the exercise of civil action by the injured person in

[6] Alexandru Padurean, Calina Biclescu – *Persoana indreptatita sa solicite introducerea in cauza a partii responsabile civilmente. Inadmisibilitatea formularii unei asemenea cereri de catre inculpat* – Juridice – articole drept penal procedura penala, 24.03.2022, pag. 8.

[7] Alexandru Padurean, Calina Biclescu – *Persoana indreptatita sa solicite introducerea in cauza a partii responsabile civilmente. Inadmisibilitatea formularii unei asemenea cereri de catre inculpat* – Juridice – articole drept penal procedura penala, 24.03.2022, pag. 9.

[8] M. Udroiu – Coordonator – *Codul de procedura penala – comentariu pe articole* – editia a 3-a, revizuita si adaugita – Ed. C.H. Beck, Bucuresti, 2020, pag. 187 si Decizia CCR nr. 257/2017.

criminal proceedings is a „privilege" that the legislator granted to the injured person to benefit from the content of evidence gathered and administered by the judiciary – to – could motivate the content of the application for civil party, but also the nature and extent of civil claims.

The Court also notes the link that must exist between the act committed and the result produced – between them it is necessary to have a causal link and the damage to be certain and not to have been repaired.

The motivation of the decision also takes into account the existing connection between the defendant and the civilly responsible party, also highlighted by the provisions of art. 86 CPC. According to the provisions of art. 86 CPC, the two parties form a procedural group (consortium littis) which must be liable to cover the damage, the two parties enjoying the same rights. According to art. 87 CPC the difference consisting in the fact that the rights of the civilly responsible party are exercised within the limits and for the purpose of settling the civil action.

In its motivation, the Constitutional Court also invoked the observance of the right to defense and the observance of the principle of „equality of arms in the criminal process", of the principle of adversariality.

The conclusion of the Constitutional Court that we find in the content of the Decision of unconstitutionality, is that the criminal procedural provisions provided in the content of art. 21, paragraph 1 of the CPC, which stipulates that the civilly responsible party may be brought into criminal proceedings, at the request of the party entitled by civil law, „until the start of the judicial investigation" does not comply with the fundamental principles underlying criminal proceedings.

We conclude the importance of the institution of the civilly liable party in criminal proceedings, in covering the damage caused by the crime, the time when this party may be brought (in fact, until) and the persons who may request the introduction of civilly liable party in criminal proceedings.

It is the task of the legislator to make the correspondence between the institutions in order to be able to capitalize on their content and to subordinate them to the purpose of the criminal process.

SUCCESSION OF STATES IN RELATION TO THEIR RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

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Abstract
The subject under research brings to the center of our attention two important institutions of public international law, namely the succession of states and their responsibility for international illegal acts. From the first years of the activity of the International Law Commission (ILC) of the United Nations (UN), the two themes were present on its working table. Part of the problems analyzed, from a theoretical and practical point of view, were codified, but another part remained in the attention of ILC for future analyses. As of 2017, succession in relation to state responsibility is on the working table of the UN International Law Commission.

Keywords: *succession of states, responsibility of states, internationally wrongful act, predecessor state, successor state*

1. INTRODUCTION

The subject under research brings to the center of our attention two important institutions of public international law, namely the succession of states and their responsibility for internationally wrongful acts. Recognizing the existence of several possible levels of interaction between the two fields of international law, the issues regarding the relationship between the succession of states and their responsibility for internationally wrongful acts have returned to the attention of states. From the first years of the activity of the International Law Commission (ILC) of the United Nations (UN), the two themes were present on its working table. Part of the problems analyzed, from a theoretical and practical point of view, were codified, but another part remained in the attention of ILC for future analyses. In the 1962 session, the Commission decided to include the issue of succession in its work program, in this sense it established a subcommittee that was to establish the scope of the subject, the method of approach and outline the necessary documentation. The research carried out on international doctrine and practice determined the division of the subject into three parts, namely: succession to treaties, succession regarding rights and obligations from sources other than treaties and succession to membership of an international organization. In view of the proposed division they appointed themselves as special rapporteurs Sir. Humphrey Waldock, former rapporteur for the law of treaties, for the succession of states to treaties and Mr. Mohammed Bedjaoui for the succession of rights and obligations from sources other than treaties. The five special reports drawn up by Sir Humphrey Waldock on the question of the succession of states to treaties were followed by the report drawn up by Sir. Francis Vallat, the successor of the first special rapporteur. Based on the studies prepared by the UN General Secretariat, but also on the recommendations of the UN Secretary General, taking into account the

comments from the states and international organizations, taking into account the reports of the special rapporteurs and the ILC, the final text of the project was adopted in 1974 regarding the succession of states to treaties. The Vienna Convention on the Succession of States in the Matter of Treaties was adopted in 1978 at the Conference held in two sessions in Vienna, between April 4-May 6, 1977 and July 31-August 23, 1978.[1] The Convention entered into force on November 6, 1996, in accordance with the provisions of Article 49. The Convention adopted in 1978 consists of six parts, respectively 50 articles, including provisions regarding the scope of the Convention, the succession regarding a part of the territory, the effects of treaties in the case of the formation of new independent states, the effects of the unification of states or the separation of the territory of a state on the treaties in force, as well as provisions regarding the settlement of disputes. Succession effects in the cases covered by the Convention will be produced in accordance with international law and in particular with the principles of international law incorporated in the UN Charter. [2]

With regard to the 1983 Vienna Convention on State Succession to Property, Archives and Debts, the Commission completed the first reading of the draft articles on property and debts in 1979, and the issues relating to State archives were finalized in 1980. After the submission of comments by the governments of the UN member states and the expression of opinions within the UN General Assembly, it sent the draft articles of the ILC to be redone according to the positions expressed. In 1981, the Commission re-examined the draft articles in the light of the comments of the governments of the UN member states and adopted the final text of the draft articles, recommending to the UN General Assembly to convene a conference in order to study this project and decide to adopt a convention on this topic. Through the resolution adopted in 1982, the UN General Assembly decided to organize the United Nations Conference on State Succession to Property, Archives and Debts in Vienna in 1983. On April 7, 1983, the „Convention on succession of States in respect of State property, archives and debts", a document that consisted of a preamble, fifty-one articles and an annex. The Convention has not yet entered into force. [3]

Regarding the two conventions, in the specialized literature it is appreciated that with regard to the Convention regarding the succession to treaties from 1978, does not fully reflect customary law and is not a codification success, as the work leading to this treaty was influenced by the process of completing decolonization. Regarding the Convention on the succession of states to assets, archives and debts adopted in 1983, it is appreciated that this constitutes a work of codification that reflects customary law because the principle of equity was taken into account.[4]

In general, liability in international law did not benefit from a complete codification, the debates being long-lasting and controversial, so that, in the field of international liability, legal norms created by conventional means were few in number. Therefore, specialized literature has been closely concerned with the study of the international responsibility of states, and practice has provided us with numerous cases in which the international responsibility of certain states has been established. The importance of responsibility, which can be considered an international principle, and the frequency of cases in practice did not determine the intensification of codification, so that, only after 50 years, the International Law Commission (ILC) presented the draft articles on the responsibility of states for internationally wrongful acts to the UN General Assembly, which adopted it through resolution 56/83 of December 12, 2001. In 2004, the UN General Assembly adopted Resolution no. 59/35 by which the governments of the UN member states were requested to

pay special attention to the Project adopted in 2001 and to express their opinions on the method of codification. The UN Secretary General was given the task of preparing a collection of decisions of international courts and tribunals, as well as of other entities, which, together with the observations of the governments of the member states, should be the subject of discussions on the agenda of the 2007 session[5]. Afterwards, the discussions continued, with the UN General Assembly establishing that the theme of the responsibility of states for internationally illegal acts should be included on the work agenda of the sixty-fifth session. In this sense, the obligation of the governments of the member states to analyze the elaborated draft, as well as the collection of decisions of international courts and tribunals, is reiterated in order to be able to discuss the legal form that the draft adopted in 2001 could take[6]. In 2010, the UN General Assembly established that the theme of the responsibility of states for internationally wrongful acts will be the subject of the discussions of the 68th session, and the possibility of adopting a convention based on the project developed by the ILC will be discussed [7]. Considering the impact recorded in practice and international jurisprudence by invoking and applying the articles that establish the conditions of state liability for internationally wrongful acts, the UN General Assembly requested the governments of the states, through resolution 68/104 of December 16, 2013, to submit additional written comments regarding the impact of the invocation provisions, and the UN Secretary General was requested to provide an update on all aspects of international practice and jurisprudence. The activity of the ILC, of the UN Secretary General, but also the presentation of the comments of the governments of the states are actions that have continued to be supported in this sense by the UN General Assembly Resolutions 71/133 of December 13, 2016 and 74/180 of December 18, 2019.

The codification achieved through the mentioned conventions led to the regulation of the aspects related to the succession of the states, but the problems regarding the responsibility of the states for illegal international acts in the specific cases of succession were not codified. Thus, Article 39 of the Vienna Convention of 1978 excludes from its scope the analysis of the issue of international responsibility. According to Article 39-„The provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States". In a similar sense, such a clause was established by Article 5 of the 1983 Vienna Convention.

2. ISSUES ADDRESSED IN THE DOCTRINE AND PRACTICE OF INTERNATIONAL LAW

In the past, the doctrine largely denied the possibility of the transfer of responsibility to the successor state. In the last 20 years, opinions have been nuanced, admitting in some cases the admission of succession in cases of liability in international law. According to some authors, when the successor state takes over all the rights of the predecessor state, such as in the case of unification, it should also assume the obligations arising from the commission of internationally wrongful acts. In these cases tortious obligations should be treated as contractual debts.

In starting the analysis of the cases identified in international practice and jurisprudence, we will address solutions pronounced in older cases specific to the period of the breakup of colonialism, but also new cases determined by the territorial changes that took place in the contemporary period.

The approach of existing cases in international practice lead to the identification of the applicable rule in the relationship between the succession of states and their responsibility, the decisions issued establishing that the successor state has no responsibility for the illegal acts of the predecessor [8]. In the Robert E. Brown Case(1923), the US claimed £330,000 in damages from Britain for damages caused to American citizen Robert E. Brown caused by the refusal of Boer Republic officials [9] to issue licenses for the exploitation of a gold deposit. Great Britain being considered the successor state, because at the time of the request by the USA, the Republics in question had been conquered and annexed by this state. The tribunal held that the claimant had acquired a property right and that he had been prejudiced by the non-recognition of this right, but this fact did not attract the responsibility of Great Britain. Similarly, reference can be made to the Frederick Henry case (1925) in which several people were unjustly imprisoned by the Government of the Republic of Hawaii, a Republic that was later annexed by the United States of America. Being about the prejudice of some English citizens, Great Britain filed a claim against the United States of America, the republic in question being annexed by this state and therefore bringing to the center of attention a case of succession of states in relation to responsibility in international law. The court also rejected the request in this case, showing as in the present case that the successor state is not responsible for the damages caused by the predecessor state. In this case the defense formulated was different from the previous case in that in the case of Robert E. Brown, the Boers Republics had been annexed by Great Britain following armed conflicts, therefore by force, and in the case of Frederick Henry, the annexation of the Republic of Hawaii by the USA was achieved through peaceful means, this aspect being considered an argument in favor of the responsibility of the USA for the damages caused to British citizens during the existence of the Republic of Hawaii. This aspect was rejected by the Tribunal [10].

As can be seen, the position of the arbitral tribunals outlined in the succession cases determined by the breakup of colonialism emphasized the lack of responsibility of the successor state for the wrongful acts of the predecessor states. However, the position of the tribunals was not unified, in the case of Lighthouses Arbitration the Court found that Greece was considered responsible as a successor state of the Ottoman Empire in terms of concessions, considering that there is a subrogation in respect of the rights and obligations existing in the territories separated from the Ottoman Empire and assigned to Greece by the Treaty of Lausanne. Therefore, the Tribunal found in this case that Greece adopted the illegal conduct of Crete as a successor state and therefore had to bear the financial consequences of the breach of the concession contract.

The recent cases concern the succession situations of the states in the second half of the 20th century, some of which gave rise to situations where the question of liability was raised. These include particularly the Central and Eastern European succession cases of the 1990s, such as the dissolution of Czechoslovakia, Yugoslavia, the Soviet Union, as well as the unification of Germany.

The most important decision of the International Court of Justice was the one pronounced in the case of Gabčíkovo-Nagymaros (Hungary/Slovakia). The dissolution of Czechoslovakia was achieved by agreement and in accordance with the constitutional provisions. The Czech and Slovak national parliaments declaring their readiness to assume the rights and obligations arising from the international treaties of the predecessor state. It is known that in 1993 the International Court of Justice was referred by the governments of

the states regarding this dispute which focused on the implementation of the provisions of the Budapest Treaty of 1977 related to the construction and operation of the Gabčíkovo-Nagymaros dam. It is admitted that Slovakia is the successor state of Czechoslovakia, which automatically makes it part of the treaty. In 1989, Hungary withdraws from the project, causing damages to Czechoslovakia. The court orders Hungary to compensate Slovakia for the damages created by the withdrawal, arguing that Hungary had no right to withdraw, but also claims that Czechoslovakia had no right to put the dam into operation on its own, so Slovakia will have to compensate Hungary for the damage caused by the commissioning of the dam. The Court also suggests that the two states negotiate in good faith in order to comply with the provisions formulated in the Budapest Treaty. Therefore, in the case of Gabčíkovo-Nagymaros (Hungary/Slovakia), the International Court of Justice, referring to the damages claimed by Hungary in the case of the construction of the hydropower complex, emphasized that the liability of Slovakia may consist in obliging it to pay compensation not only for its illegal conduct, but also for the illegal conduct identified in the case of Czechoslovakia before its dismemberment as a successor state.

The breakup of Yugoslavia led to complex succession issues. An important aspect was first of all the fact that the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself at the beginning as a successor state of the Socialist Federal Republic of Yugoslavia. The other Yugoslav republics disagreed, and the UN Security Council and UN General Assembly refused to recognize the Federal Republic of Yugoslavia as a continuing state. The Federal Republic of Yugoslavia later renounced this position. The first case that came before the International Court of Justice and brought into discussion issues related to succession, but also responsibility in international law, was the Genocide case (Bosnia and Herzegovina against Serbia and Montenegro). Regarding the aspects invoked by Bosnia and Herzegovina, the Court shows that they were identified during the period when Serbia and Montenegro constituted a single state. At the same time, the international court emphasizes that Serbia is the state that is considered the defendant in the case, but it must be taken into account that the facts invoked happened when Serbia and Montenegro formed a single state. The same solution was adopted by the Court in the dispute between Croatia and Serbia, a decision that emphasized the connection between the succession of states and their responsibility in international law.

At the same time, we can present the well-known case of the integration of the German Democratic Republic into the Federal Republic of Germany (FRG), an action that took place in 1990 through the „Treaty of Reintegration of United Germany". Through various laws adopted by the FRG for the restitution and compensation of expropriated properties, through the „Property Restoration Agreement", followed in 2001 by the „Property Issue Agreement"; the new state agrees to take over the obligations arising from the international wrongful acts committed by the predecessor state before the date of succession; more precisely we are referring here to the sanctions applied to Germany after the First World War, more precisely to the reparations imposed by the Treaty of Versailles in 1919 in the amount of 296 Reichsmarks, approximately 200 million euros to be exact. These reparations were intended to compensate the losses suffered by France and Belgium in the war, at the same time to help pay the cost of the war for the allied countries. It should be noted that the total payment of this debt was made in 2010, 20 years after the unification of Germany, approximately 92 years after the completion of the first military conflagration of this kind.

As for the USSR, the disintegration of this state determined the establishment of several states with the quality of successor states, but the Russian Federation was considered a continuing state, a state that, according to the existing rules of international law, is subrogated to the rights of the predecessor state, therefore the rule should apply also in the case of liability for internationally wrongful acts. [11].

3. CURRENT TRENDS REGARDING THE MODIFICATION OF ASPECTS RELATED TO THE CONNECTION BETWEEN THE TWO INSTITUTIONS OF INTERNATIONAL LAW

As of 2017, succession in relation to state responsibility is on the working table of the UN International Law Commission. The special rapporteur appointed to coordinate the work showed that although, in the past, the majority opinion supported the fact that in the case of the succession of states, their responsibility for illegal international acts does not operate, however, the connection between the two institutions of international law should be interpreted on a case-by-case basis. Therefore, in the elaboration of the draft articles, the cases regarding the unification, dismemberment, transfer of territories or detachment of the territory of one state from the territory of another state will be taken into account. In these cases of succession, the agreements concluded between the successor states are of particular importance, the existence of these agreements leading to the clarification of the cases that could arise regarding the responsibility for international illegal acts of the states.

In addition, the research launched by the ILC on the responsibility of states in cases of succession, brings to the center of attention the importance of the institution of diplomatic protection, stating that it can be emphasized that this institution can be considered one of the reasons that triggered the need to clarify the rules subject to debate. This invokes the definition and scope established by the ILC in the Draft Articles on Diplomatic Protection adopted in 2006, which establishes that „diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility". Therefore, any state has the interest, the obligation to take all measures for the protection of natural or legal persons who have its citizenship or nationality, being interested in the correct identification of the state that harmed their interests. The research of international practice and jurisprudence demonstrating that there were many situations where the state exercising diplomatic protection failed to protect the rights of natural and legal persons for whom it exercised diplomatic protection due to unclear, unstable rules applied internationally.

In order to establish the rules applicable to the liability of states in cases of succession, it is considered necessary to clarify the terms used, an activity made easier by the codifications made over time by the ILC [12].

Therefore, regarding the definition of succession, this is considered the substitution of a state by another state, the particularity of the definition being imposed by the aspect to which succession refers, namely, international responsibility for aspects of an international nature that occurred on that territory. The predecessor state is considered the state that was replaced by another state by the occurrence of a succession case, and the successor state is considered the state that replaced another state by the occurrence of a succession case. The date of succession of States is considered the date on which the successor State replaced the

predecessor State with respect to international responsibility for internationally wrongful acts committed on that territory. The newly independent state is considered the successor state which, prior to the date of succession, was a dependent entity, an entity that was subject to the rules of the predecessor state. The succession agreement is that agreement concluded between the predecessor state and the successor state providing for those rights and/or obligations of the predecessor state that accrue to the successor state.

Regarding the illegal international act, the definition drawn up by the ILC can be used, according to which there is an international illegal act of the state when its conduct consisting of an action or omission meets two conditions: it is susceptible to be attributed to the state according to international law and constitutes a violation of an international obligation of the state. The qualification of an international act as an illegal act is done only by reference to international law. Such qualification is not affected by the qualification of the same fact as lawful by the internal law of a state. The responsibility of the state concerns the consequences determined by the occurrence of the illegal international act. Considering the fact that we are referring to cases of succession, the definition given to the illegal international act must be completed according to the particularities of these cases. Thus, if the predecessor state continues to exist, the injured state can invoke the responsibility of the predecessor state. At the same time, if the predecessor state has the status of an injured state, it can invoke the responsibility of the guilty state for committing the illegal international act even after the date of succession. If the predecessor state ceases to exist after the date of succession, the wrongful international act must be committed before the date of succession. In this case, the injured state may request reparation from the successor state for the damage caused as a result of the international illegal act committed by the predecessor state. If the predecessor state had suffered damage as a result of the commission of an illegal international act by another state against it, the request for reparation of the damage can be formulated by the successor state if the predecessor state no longer exists after the date of the succession, provided that the damage was not previously covered. In such cases, the emphasis is on the agreement concluded between the predecessor state and the successor state or on the unilateral declaration made by the latter in order to take over the rights and/or obligations from the predecessor state. Where there is more than one successor state, all such states shall assume the rights and/or obligations equitably according to a number of criteria, unless otherwise agreed between the successor states. In the practice of international law, the category of „claims agreements" was also identified, agreements that were concluded between the successor state and the third state that was affected by an illegal international act committed by the predecessor state. Negotiations on probate agreements must be conducted in good faith and within a reasonable time [13].

The particularities of succession cases determine the identification of two specific situations that determine an in-depth analysis in relation to the institution of responsibility for the commission of internationally illegal acts. Thus, the cases in which the predecessor state continues to exist are intensified, but also the situations in which the predecessor state disappears on the date of succession. In the category of cases where the predecessor state continues to exist, international law specialists have identified cases of separation of a part of a state's territory, new independent states, transfer of territories between two states. The specialized doctrine emphasizes the fact that in these cases the rules regarding the succession of states should not be invoked and applied in terms of responsibility for committing internationally wrongful acts, the obligations arising from an internationally

wrongful act of the predecessor state not being transmitted to the successor state. However, a series of exceptions have been identified whose justification is the connection between the illegal international fact and the territory on which this fact was committed, territory that after the date of succession is under the sovereignty of the successor state. The invocation of exceptions is subject to the fulfillment of a series of conditions in each case where the predecessor state continues to exist [14]. In the category of cases in which the predecessor state disappears, international law specialists have identified cases of unification of two or more states and the formation of a new state, but also cases of disintegration in which new states are formed through the dissolution of the predecessor state. When two or more states join, the obligations determined by the commission of an international act wrongful by any predecessor state pass to the successor state. The case of unification also brings into question the situation of a state incorporated in another state, the obligations determined by the commission of the illegal international act committed by the predecessor state pass to the successor state. In the case of the dissolution of a state and the formation of several states, the specialized doctrine emphasizes that the obligations determined by the commission of an illegal international act pass to the successor states based on an agreement concluded between them [15].

The identified cases require clarification of the aspects determined by the nature of the international wrongful act, i.e. whether there is an instantaneous act, continuous act or complex act. At the same time, considering that these cases concern responsibility from the point of view of the determined consequences, there is a concern for identifying those who should formulate the request for the recovery of the damages created, i.e. the establishment without doubt of the injured states, but also of the states that have the obligation to answer for the damage caused, including the ways to repair the damage caused [16].

Conclusion

From the analysis of international doctrine and practice, it can be seen that the positions expressed were different from case to case, which is correct if we refer to the various cases of succession and the particularities generated by them. Therefore, the codification to be carried out by the International Law Commission should be guided towards the regulation of liability in each case of succession. The existence of the succession agreements concluded by the successor states should also contain aspects regarding the liability for the illegal acts identified during the existence of the predecessor state, if it only exists after dismemberment or unification. If the predecessor state continues your existence, the liability should belong to that state even if it is not considered a continuing state. As it is known, the codification activity is a long-term activity, the drafts being submitted to the attention of the governments of the UN member states in order to outline a unitary position to lead a thorough codification. Regarding the cases of succession, as stated by the states' comments on the first articles proposed by the ILC, the cases of succession taken into account are those that occur according to the rules of public international law and the principles established in the UN Charter, i.e. legal cases.

References

[1] Duculescu, V. (2000). Dreptul succesiunii statelor-Tratatele internaţionale şi probleme ale succesiunii statelor (The law of state succession – International treaties and problems of state succession), Veritas Publishing House, Târgu Mureş, p. 38;

[2] Maxim, F. (2021). Aspecte teoretice și practice privind tratatul-Izvor principal al dreptului international public (Theoretical and practical aspects regarding the treaty-Main source of public international law), Universul Juridic Publishing House, Bucharest, p. 15;

[3] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts Vienna, 8 August 1983, Procedural History, https://legal.un.org/avl/ha/ vcssrspad/vcssrs pad.html;

[4] Gâlea, I.(2021).Manual de Drept internațional (Handbook of International Law), Volume I, Hamangiu Publishing House, Bucharest, pp. 195-203;

[5] Compilation of decisions of international courts, tribunals and other bodies, United Nations, General Assembly, sixty-second session, A/62/62, 2007; Comments and information received from Governments, United Nations, General Assembly, sixty-second session, A/62/63, A/62/63/Add.1, 2007;

[6] General Assembly/Res. 62/61 – 6 December 2007;

[7] Maxim, F.(2012). Dreptul răspunderii statelor pentru fapte international ilicite (The law of responsibility of states for internationally wrongful acts), 2nd Edition, Lumina Lex Publishing House, Bucharest, p. 11;

[8] State Succession to International Responsibility, Graduate Institute of International and Development Studies, Volume: 6;

[9] The Boer republics existed on the territory of South Africa, were annexed by Great Britain following the conflict between 1899–1902, were incorporated into South Africa in 1910;

[10] REPORTS OF INTERNATIONAL ARBITRAL AWARDS, F. H. Redward and Others (Great Britain) v. United States (Hawaiian Claims) 10 November 1925 VOLUME VI pp. 157-158, The Republic of Hawaii was the formal name from 1894 until 1898 when it was officially established as a republic. The period of the Republic was between the administration of the Provisional Government of Hawaii which ended on July 4, 1894, and the passing of the Newlands Resolution marking the end of the country, where the Republic believed that annexation to the United States should be recognized as the „Territory of Hawaii" on July 7 of 1898;

[11] Report of the International Law Commission, Official Records of the General Assembly, Seventyfirst session, Supplement No. 10 (A/71/10), annex B.pp. 400-407;

[12] Šturma P.(2017). First report on succession of States in respect of State responsibility, p. 22;

[13] Succession of States in Matters of International Responsibility, JUSTITIA ET PACE 14th, Commission INSTITUT DE DROIT INTERNATIONAL Session de Tallinn, 28 August 2015, pp. 2-8;

[14] Šturma P.(2018). Second report on succession of States in respect of State responsibility, pp. 21-39;

[15] Šturma P.(2018). Second report on succession of States in respect of State responsibility, pp. 39-51;

[16] Šturma P.(2019). Third report on succession of States in respect of State responsibility, pp. 11-25.

JUDICIAL INDIGNITY IN MATTERS OF SUCCESSION IN THE CASE OF THE CRIME OF BLACKMAIL

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Abstract

The physical and mental freedom of a person is an important value in contemporary society and the real expression of the development and promotion of human rights. Freedom of thought and action means the ability to act according to one's own conscience in relation to social norms, and this requires protection against any illegal actions.

The inheritance is characterized by fair relations of appreciation, consideration and honour between those who participate in such civil relations. Succession indignity is an important component of the law of succession which aims to remove from the succession the heir found guilty of committing certain illegal acts. These facts considered by law to be serious can be assessed both in terms of civil circumstances, but also in terms of elements that define crimes. Among them, blackmail, which is essentially an act of human coercion, is a crime specific to legal relations born of social relations which have as their object the right to inheritance and the individual freedom to decide on situations of death.

Indignity operates both in the case of legal inheritance and in the case of testamentary inheritance when the „unworthy" person was gratified by will by the deceased.

***Keywords**: inheritance, indignity, crime, successor, will*

Introduction

Legal acts are subject to common rules relating to the freedom of the human person, of an essential nature and generally applicable to the conditions for the formation of the agreement of will and its unilateral manifestation in order to comply with the rules of social coexistence. Human existence means relations of reciprocity, various connections and interferences, rights and obligations assumed that correspond through concessions and compromises in the most varied forms. In this social dynamic, the legal operations are inherent and represent a manifestation of the freedom of each person to act and decide in relation to his will and interests.

Traditionally, civil liberty has been regarded by spiritual thought as a natural right to act on the basis of one's choice, without any prohibition or constraint, according to the laws and order that are in harmony with human nature [1]. Later, freedom was individualized as a legal value through the possibility of man to decide on his own life and his own social existence provided that it does not infringe the rights of other members of society.

Inheritance is the legal way of transferring the patrimonial rights and obligations that belonged to the deceased to his legal or testamentary heirs [2]. The assets of the inheritance consist of rights that form the succession patrimony, and the liabilities are represented by the obligations that the one who leaves the inheritance had.

Inheritance is legal in the situation when the law (art. 963-983 new Civil Code) establishes the manner in which the transmission of succession rights operates. This confers the quality of subject of the right of succession option to all persons who, according to the law [3], can inherit the goods that form the patrimony of the deceased, in this situation there is a general vocation to inherit [4].

The testamentary inheritance consists in the fact that the deceased (*de cuius*) establishes through a will the persons and the way of transmitting the succession rights.

The succession indignity (legal or judicial) is a sanction applied to the legal or testamentary successor, as a result of the commission by him of serious deeds, expressly provided by law, which targets either the deceased or another of his successors.

SECTION I
LEGAL INDIGNITY

I.1 Notion

Judicial indignity is a loss of the right to inherit and intervenes in both legal and testamentary inheritance. This applies only to the express and limiting facts provided by law.

In accordance with the provisions of art. 959 paragraph (1) Civil Code may be declared unworthy to inherit:

a) The person criminally convicted for intentionally committing against the person who leaves the legacy serious acts of violence, physical or moral, or, as the case may be, acts that resulted in the death of the victim.

b) The person who, in bad faith, hid, altered, destroyed or falsified the will of the deceased.

c) The person who, through intent or violence, prevented the person who leaves the inheritance from drawing up, amending or revoking the will.

Judicial indignity is ascertained by the court, at the request of any successor, within one year from the date of opening the inheritance.

I.2 Conditions

The perpetrator can be any person with a succession vocation who committed the acts expressly and limitingly provided by art. 959 para. (1) letter a) of the Civil Code and against which a final criminal court decision has been handed down to convict or a person who in bad faith or through malice or violence has committed malicious acts likely to affect testamentary dispositions.

The acts must be committed intentionally regardless of the form of guilt characterized by the fact that the result is intended to be pursued or only its production is accepted (direct and indirect intent).

The criminal participation of the perpetrator can be as author / co-author, accomplice and instigator because the provisions regarding the indignity do not make any differentiation in this respect.

The injured party is always the one who leaves any legal or testamentary inheritance.

In the hypothesis mentioned in art. 959 paragraph (1) letter a) of the Civil Code, which includes both legal and testamentary inheritance, there must be serious acts of violence, physical or moral, or, as the case may be, acts that resulted in the death of the victim.

Serious acts of violence, homicide, fatal blows, bodily injury resulting in infirmity, serious and permanent cosmetic injury, abortion, traumatic injuries requiring more than 90 days' healing, torture, rape, were considered serious acts of violence. illegal deprivation of liberty. Serious acts of moral violence included blackmail, perjury, or slanderous reporting that is highly dangerous.

Regarding the conditions from art. 959 paragraph (1) letters b) and c) Civil Code does not refer to the deed / deeds to meet the constitutive elements of a crime although the hypothesis is not excluded, being only sufficient the existence of deeds committed in bad faith, by will or violence, which refers to the distortion of testamentary dispositions. Even if no express reference is made to any crime, the terms concealment, alteration, destruction or falsification are likely to also constitute criminal acts.

The strict references in art. 959 paragraph (1) letter c) of the Civil Code on violence as a way of affecting the freedom of will and coercion, physical or moral, also require a brief presentation of the testamentary inheritance in order to examine the constitutive elements of the crime. blackmail.

SECTION II
THE NOTION, THE LEGAL CHARACTERISTICS AND THE CONTENT OF THE WILL

II.1. The notion and elements of freedom of will

The will is a unilateral, personal and revocable act by which a person, called testator, disposes in one of the forms shown by law, for the time when he will no longer be alive (art. 1034 new Civil Code).

The content of this text of civil law refers without any reservation to the manifestation of the free will of the testator by using the terms referring to the fact that it disposes i.e., „decides" or „chooses firmly" (in the sense of legal logic) unilaterally, personally and revocably.

In these circumstances, the expression of the legal will is a fundamental element in the existence of a will through the unequivocal manifestation of the „principle of freedom of civil legal acts (also called the principle of autonomy of will) and the principle of real will (also called the principle of internal will)" [5].

Freedom of will is consecrated to art. 12 and art. 14 Civil Code which states that anyone may freely dispose of his property (unless the law expressly provides otherwise), the rights and obligations to be exercised in good faith, in accordance with public policy and morals. Consequently, for the purpose of expressing his freedom of will and a valid consent to the existence of a will, its author has full freedom to determine, as he considers it, its content, the manner of the act and the manner of revocation.

The expression of a valid consent is the expression of the principle of the real will of the testator and represents the externalization of the decision to conclude the legal act. Consent must come from a person of discernment, be expressed with the intent to produce legal effects, be externalized and not be altered by a defect in consent that affects the free and conscious nature of the will (violence, error, malice, lesion).

II.2. The legal characteristics of the will

The unilateral nature results from the fact that it represents the will of the testator regarding what will happen to his patrimony or part of it, after his death. It is noted that the legatee cannot influence this manifestation of will, as he only has the possibility to accept or renounce (subsequently) the inheritance.

A will is a personal legal act which means that any person who has the capacity to test is free for the cause of death to dispose of his property as he wishes.

The solemnity is the result of the fact that the will can be concluded only in the forms provided by law, respectively holographic, authentic or privileged will (art. 1040-1050 Civil Code).

The will is a legal act for the cause of death because its effects occur only after the death of the testator.

The revocability of the will is a character that results directly from the testator's freedom of will and real will. The revocation of the will constitutes a right that cannot be waived and can be exercised directly or indirectly (revocation itself, modification, conclusion of a new act).

II.3. The content of the will

According to art. 1035 Civil Code, the will contains provisions regarding the succession patrimony (universal or universal laws), the goods that are part of the succession patrimony (private laws) and the designation of the legatee (the person in whose favour the will operates).

SECTION III
CRIMINAL OFFENSES WITH REGARD TO JUDICIAL DIGNITY

III.1. Legal notion and content

According to the provisions of art. 207 paragraphs (1), (2) and (3) of the Criminal Code, blackmail is a crime against the freedom of the person and is subject to the following regulations:

Paragraph (1) „Forcing a person to give, to do, not to do or to suffer something, in order to unjustly gain a non-patrimonial benefit, for himself or for another, is punishable by imprisonment from one to five years".

Paragraph (2) „The same penalty shall be punished for threatening to disclose a real or imaginary act, compromising the threatened person or a member of his family, for the purpose provided in paragraph (1)".

This qualification represents the type of blackmail in assimilated form.

(3) „If the acts provided for in paragraphs (1) and (2) have been committed for the purpose of unfairly acquiring a property benefit, for oneself or for another, the penalty shall be imprisonment from 2 to 7 years".

The provision contained in this text of the law represents the blackmail in aggravated form by the circumstance of the aim pursued, respectively the acquisition of a patrimonial benefit.

Consequently, in the case where typical acts are committed according to each of the three paragraphs against the same passive subject, only one offense is retained in natural

unity or in continuous form. In the absence of such circumstances, there are distinct offenses of blackmail in the simple, assimilated or aggravated form.

The characteristic of this crime consists in affecting the person's freedom to make decisions and to manifest himself according to his own and his real will in order to obtain an unjust benefit of a non-patrimonial or patrimonial benefit.

III.2. The object of the crime

The main legal object consists of the social relations regarding the mental freedom of the person who needs to be protected against the facts likely to restrict the possibility of the subject of blackmail to will and dispose of his actions [6].

There is also a secondary legal object because the offense indirectly infringes other values protected by criminal law concerning the physical integrity of the person (when the coercion is carried out through physical violence), property relations or other rights or interests, non-patrimonial, of the person" [7].

The secondary legal object is the one to which the judicial indignity refers directly through the provisions of art. 959 paragraph (1) letters a) and c) Civil Code because the social values expressly protected are those that concern serious acts of violence, physical or moral, acts that resulted in the death of the victim, as well as acts committed by violence which prevented the heir from drawing up, amending or revoking a will. If the coercion is carried out by physical violence, the secondary material object is represented by the person's body when the coercion is carried out by physical violence and by the transfer, transfer of a good or a right if the injured person's property is affected.

III.3. Subjects of the crime

Unlike the classic case of the crime of blackmail in which the active subject can be any person [8], in the particular situation of judicial indignity it is strictly and precisely individualized. An active subject can only be the one who has the quality of successor (according to the norms of succession law) and who, correlatively, is a person convicted criminally or who committed the deeds expressly provided by art. 959 paragraph (1) letters a) and c) Civil Code.

There is also a special feature regarding the circumstance of the passive subject of the crime as this must necessarily be a person who leaves a legal or testamentary inheritance.

III.4. The objective side

In the case of succession indignity as a result of committing the crime of blackmail, the objective side consists in a serious act of physical or moral violence against the heir or by acts of violence likely to prevent the preparation, modification or revocation of a will.

The coercion may be of a physical nature (violence) or of a moral nature (threat), the provisions relating to judicial indignity having an alternative content [9]. Physical coercion can be exerted, directly, by the physical energy of the active subject or by the movement, by him, of another energy of the same nature, capable of defeating the physical resistance of the injured person. Psychic coercion (of a moral nature) is exercised by the perpetrator performing an act that inspires the passive subject to fear that in the future she or another person close to her will endure an evil of any kind. [10]

Even if in the provisions of art. 207 of the Criminal Code regarding blackmail does not show the concrete ways of enforcing the coercion (respectively violent or threatening), „all

actions that result in a person's determination to give, to do, not to do or to suffer something, committed for the purpose of unfairly acquiring a non-patrimonial or patrimonial benefit, for oneself or for another, regardless of the actions or inactions by which the coercion is enforced „[11].

The crime of blackmail under the aspect of moral coercion is incident to the provisions of art. 959 paragraph (1) letter a) of the Civil Code regarding the indignity of the judiciary, but it has an independent character and only enters into competition with the offenses of serious bodily injury, robbery, deprivation of liberty corresponding to possible deeds to which the same refers text of law.

The objective side of the crime is complemented by the fact that the coercive action aims at determining the injured person to follow a certain conduct in the sense of giving, doing, not doing or suffering something. This aspect overlaps with the provisions of art. 959 para. (1) letter c) of the Civil Code, according to which the indignity of succession operates against the person who by violence prevented the one who leaves the inheritance to draw up, modify or revoke a will because these deeds represent the elements of conduct regarding the actions to do or not to do something. As a result, the crime of blackmail is specific to judicial indignity in all cases where by coercion, the person leaving the inheritance has been determined to do or not to do or to suffer something in connection with any action to prevent the preparation, modification or revocation of a will as a personal legal act. The situation is similar in the case of threats to disclose a compromise deed, given that inheritance rights are generally specific to kinship and family relationships.

The coercive action in the forms provided by law for the crime of blackmail can be carried out by the same means that attract judicial indignity, both for one's own benefit and for the benefit of another person (in this case the judicial indignity being related to the beneficiary).

The unjust use is of a patrimonial nature (art. 207 para. (3) of the Criminal Code) in the cases referred to in the provisions of art. 959 paragraph (1) letter c) Civil Code because the will has as object the goods of the person who disposes of them for the cause of death.

The immediate consequence is the state of danger in terms of moral freedom (affected by an act of coercion), and the causal link is the consequence of the coercive action.

III.4.1. Contradictory elements

It should be noted that the text of art. 959 paragraph (1) letter c) of the Civil Code refers strictly to an action to prevent, so that an act of determination, in its positive sense of the activity to be performed, does not fall under the elements that attract judicial indignity. In that regard, it appears that there is no correlation between coercion in order to obtain an unfair property benefit under the constituent elements of the blackmail offense and the effects of judicial indignity. The latter does not operate civilly if the action of the perpetrator falls within the scope of determining, facilitating, provoking and impelling the person who leaves the inheritance to draw up, modify or revoke a will.

The aspect has strictly only a determination of a civil nature and the provisions of art. 959 paragraph (1) letter c) of the Civil Code operates in the formula shown strictly in the cases that examine from a succession aspect the judicial indignity.

In the case of the existence of the constitutive elements of the blackmail offense and of a court decision of conviction, the provisions of the Code of Criminal Procedure regarding

the annulment of documents and the restoration of the factual situation regardless of the actions or inactions of the active subject become incidental.

III.5. The subjective side

Theory and legal practice have mostly expressed the opinion that the crime of blackmail is committed in the form of a direct intention qualified by the purpose pursued by the perpetrator of unjustly acquiring a non-patrimonial or patrimonial benefit for himself for another.

However, there is also an opinion in the doctrine that the crime of blackmail can be committed with both direct and indirect intent [12].

III.6. Forms of crime

The crime of blackmail is consumed when the state of danger is created. It is irrelevant whether or not the passive subject satisfied the perpetrator's claims or whether he achieved the intended purpose. An important condition of the subjective side is the goal pursued by the perpetrator, namely to obtain an unfair benefit.

In relation to the aspects regarding the indignity, it is sufficient to prove the acts of physical or moral violence, as well as the actions of prevention committed by the perpetrator in order to obtain the intended benefit.

The crime of blackmail is sanctioned only in the consumed form, and the attempt, although possible, is not incriminated.

The variants of the blackmail crime relate only to the judicial indignity provided by art. 959 paragraph (1) letter a) first sentence and letter c) Civil Code. The concealment, alteration, destruction or falsification of a will referred to in art. 959 paragraph (1) letter b) Civil Code represents references to other crimes (destruction, theft, forgery).

III.7. Procedural issues

The effects of judicial indignity resulting from the commission of the crime of blackmail cannot be removed, according to the provisions of art. 961 paragraph (2) Civil Code in case under the aspect of criminal liability the rehabilitation, the amnesty intervened after the conviction, the prescription of the execution of the criminal punishment or the pardon intervened.

Conclusions

In the case of the crime of blackmail, the perpetrator is encouraged to obtain a benefit that he considers he can obtain from a succession debate. However, his intervention takes place through acts of physical or moral violence, as well as through actions that are likely to lead by non-respect of mental freedom to the distortion of the effects of a correct inheritance.

The crime of blackmail in the succession procedure correlated to the cases of judicial indignity has particularities both from the point of view of the criminal action and of the civil action. Not in all cases the acts of physical or moral violence result in the finding of the constitutive elements of the blackmail crime. There are also situations in which these acts have a certain criminal character, and the resolution of the conflict follows only the way of resolving the provisions in criminal matters. In the matter of testamentary inheritance, there are specific features of favouring blackmail offenses, these being highlighted by the age,

personality and intellectual capacity of the victim. In this respect, the doctrine and the judicial practice in both civil and criminal matters are meant to make a concrete distinction between the facts that represent elements of the crime of blackmail and those that have the strictly legal nature of some defects of consent.

Bibliography

[1] Zacharias Ursinus's commentary on the harsh Heidelberg Catechism. About the free will of man, translation, https://www.amazon.com

[2] Art. 953 Civil Code „The inheritance is the transmission of the patrimony of a deceased natural person to one or more persons in existence."

[3] Art. 963 para. (1) Civil Code „The inheritance belongs, in the order and according to the rules established in this title, to the surviving spouse and relatives of the deceased, namely his descendants, ascendants and collaterals, as the case may be."

[4] Fr. Deak, R. Popescu, Treaty of Succession Law, Vol. III, Transmission and sharing of inheritance, 3rd ed., Updated and completed, Universul Juridic Publishing House, Bucharest, 2014, pg. 20.

[5] G. Boroi, Civil Law. The general part. Second edition, revised and added, ALL BECK Publishing House, Bucharest, 1999, pp. 159-160

Gh. Beleiu, Romanian Civil Law. Introduction to civil law. Revised and added edition, Șansa Publishing House, Bucharest, 1995, pp. 131-132.

[6] Alexandru Boroi, Criminal law. The special part. Edition 4, C.H. Beck Publishing House, Bucharest, 2019, pg. 132.

[7] Valerian Cioclei, Criminal Law. Special Part I. C.H. Publishing House Beck, Bucharest, 2016, pg. 139.

[8] Alexandru Boroi, *op. cit.*, pp. 132.

[9] Valerian Cioclei, *op. cit.*, pp. 139.

[10] Alexandru Boroi, *op. cit.*, pp. 132.

[11] Decision of the Constitutional Court no. 689/2017 published in the Official Gazette, Part I, No. 99 of February 19, 2018.

[12] Valerian Cioclei, *op. cit.* p. 141.

FORENSIC METHODS OF IDENTIFYING COUNTERFEIT OR FORGED LEGACIES

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Abstract
The paper, after a brief introduction about liberality, what a legacy is and how fraudulent interference with legacies is carried out, focuses on the seven types of examinations of legacies, in particular the holograph will – the easiest to fraud: Examination of documents altered by erasures, falsely dated or undated, whose contents have been altered by additions, documents forged by forgery of handwriting or signature, crossed paths, documents damaged by tearing or burning, and reconstruction of handwriting by impression by pressing.
Keywords: *will, forgery, forensics, forensic methods, forgery detection, forgery of wills, holographic will expertise*

Introduction

According to the provisions of Article 984 of the Romanian Civil Code, a liberality is a legal act by which a person disposes of all or part of his property free of charge to another person. Liberalities between living persons (*inter vivos*) are known as donations and, by comparison, legacies are gratuitous legal acts which take effect after the death of one of the parties (*mortis causa*). Article 986 of the Civil Code defines a legacy:

„Art. 986. – A legacy is a testamentary disposition by which the testator stipulates that, on his death, one or more legatees shall acquire his entire estate, a fraction thereof or certain specified property." [1]

The legacy is the main object of the testamentary disposition materialized by the will, by which the *de cuius* transfers, in part or in full, his estate, either by general wording or by indicating certain separate assets.

As a rule, a legacy is an expression of the testator's will to break the rules applicable to the devolution of legal succession by making detailed provisions as to how his or her property is to be transmitted *mortis causa*.

A legacy is a solemn, personal, unilateral, gratuitous act, the legal effects of which are subject to acceptance by the designated beneficiary.

Fraudulent manoeuvres are particularly prevalent in the case of holograph wills, as they are entirely handwritten and therefore at risk of being easily altered. Also, unlike authentic wills, which by law are in a single copy and kept in a secure and regulated environment, holograph wills can easily be hidden or destroyed if they have not been deposited in a secure place or if they are in a single copy. Another risk that may arise in the case of disposition by holographic bequest is that of provisions with the appearance of legality in form and substance, arising from insufficient knowledge of the law and the precarious security of keeping the document at home, thus exposing it to fraudulent action by potential heirs or other interested persons.

According to the provisions of Art. 304 et seq. Romanian Civil Procedure Code (C.proc.civ.) the burden of proof is on the persons who base their rights on the existence of the will. In the case of contesting the validity of the date of the legacy, the burden of proof is on the person making the accusation. [2]

Subject to the knowledge or intuition of the testator's will, depending on the patrimonial interests detected during his lifetime, the legal successors or other interested persons may intervene in order to alter the testator's will, including by suggestion or attention-getting, or other fraudulent manoeuvres with the appearance of legality. [3]

The aim is either to achieve a situation where the deceased's estate is passed on in its entirety in accordance with the rules of the legal devolution of inheritance, or where the estate, in the form of separate assets, is passed on individually, or even where the testator disposes of part or all of it against his will.

Fraudulent interference with the provisions of the instrument can be done by altering the content of the instrument or even by destroying part or all of it. Material forgery of the instrument can occur by altering the original instrument in certain respects, or by substituting a forgery in its entirety. [4] Intellectual forgery occurs by the intentional omission of facts or by the intentional attestation of untrue facts or circumstances.

The expertise of the legacies, in particular of the holograph will, is justified mainly for the purpose of revealing and fixing the structural changes made by the fraudulent actions on the material used for writing, judicial and forensic practice highlighting a number of peculiarities, namely:

a) Examination of documents altered by erasures
b) Examination of documents with false or undated dates
c) Examination of documents whose content has been altered by additions
d) Examination of forged documents by forgery of handwriting or signature
e) Examination of the routes crossed
f) Examination of documents damaged by tearing and burning
g) Re-printing of handwriting after printing by pressing

1.1 Examination of altered bindings by erasures

The purpose of this subtype of expertise is to reveal the pre-existing handwriting, by identifying on the script both where the erasure occurred and the original handwriting. The technique is based on exposure to ultraviolet and/or infrared light spectra [5], X-radiation or chemical iodine exposure, the principle of detection being the different characteristics of absorbing/reflecting radiation or discoloration in the presence of atmospheric air. The fading may be the consequence of a mechanical action on the script itself, or the interference of chemicals for washing, corroding or diminishing the colouring of the applied script. The application of an erasure can even be observed directly, with the backing paper changing in terms of discolouration/stains, loss of gloss, thinning of lines, fading, interference with adjacent graphics etc.

The re-envisioning of the original writing will be carried out depending on the previous determination of how the erasing operation was carried out, for each situation there is a particular method.

The expert can draw the following conclusions: impossibility (it cannot be established whether the legacy in dispute was forged), probability (the word... was probably written in

place of the erasure), certainly negative (the legacy in dispute was not forged by erasure), certainly positive (the legacy in dispute was forged by erasure).

1.2 Examination of false-dated or undated legacies

The purpose of this subtype of expertise is to detect the age of the backing paper and the material used for writing and to subsequently highlight any inadequacies with the date of the legacy. Examiners are provided with the general characteristics of the backing material in relation to the different stages of development of the paper industry. For example, straw paper manufactured until 1840 was used for wrapping, wood pulp paper was manufactured after 1856, and paper with today's physical and chemical characteristics (kraft) was manufactured after 1930. In order to determine the approximate period of time when the paper used for binding was made, the chemical composition of the filler and the dyes included in the technological process are analyzed, or a reactive method is used on the ash resulting from the incineration of a sample.

The characteristics of the material used for writing also consider the different stages of development of the dye, ink and writing instrument industry. In addition, ink is also analysed according to the degree of oxidation and acid diffusion in the cellulose layers. Another characteristic subject to analysis is the colour shade of the ink, which changes under the influence of time and environmental factors (physical-chemical agents, oxygen, light, humidity). [6] Other factors of analysis, with a higher degree of relativity, are the reaction speed of the ink in contact with different reagents and the degree of copyability.

Determination of anachronisms by text study, basically the content of the text is analyzed in mirror with the spatial-temporal reality indicated by the alleged date of the drawing up of the legacy, aiming to detect elements of inconsistency in relation to names, persons, objects, goods, names of institutions, streets, localities, geographical areas, administrative-territorial units, rules of spelling and grammar for that period etc. Another element that will be compared with other existing scripts is the analysis of the evolution of the legatee's handwriting throughout the different periods of his life, as it is known that handwriting has a temporal dynamic. The interpretation of the results towards the conclusion of probability is in direct proportion to the degree of accentuation of the constitutive transformations of the legatee's handwriting in the temporal dynamics. Thus, a writing that preserves its characteristics, gives results that are certainly negative or of impossibility.

1.3 Examination of legacies whose content has been altered by additions

The fraudulent manoeuvres mainly consist of handwritten additions ranging from the addition of letters, numbers, to the addition or insertion of words, phrases, sentences or sentences in the structure of the holographic binding. A very important element in the determination is the establishment of discontinuities in the logic and ideational sequence of the legacy. In addition to this, highlighting dimensional differences between graphemes, lines, spaces, position of graphemes in relation to the baseline, amplitude and pressure of strokes on the medium, differences between writing substances/instruments increase the degree of certainty of the misuse.

Forensic and forensic practice has highlighted the main genotypes of forgery by additions, namely:

a) modifying a word by adding a letter or group of letters at the end;

b) change the lines ended by adding to the beginning of the act;
c) change the lines ended by adding to the middle of the document;
d) modifying by interleaving between words;
e) modification by adding data, words, sentences or phrases in the free space between the text and the signature;
f) hatching/strikethrough of letters/numbers;
g) modification by adding digits at the beginning/end of digit groups;
h) modification by substituting whole pages, in this last case the specificity of the analysis is given by the fine observation of the changes in the particularities of written expression throughout the script, being known that each person presents uniqueness and causality in cognition, verbal ideation and written ideation.

1.4 Examination of forged legacies by forgery of handwriting or signature

The complexity of the writing process derives from the unique cognitive-ideal organisation of each individual. Writing is the result of skills formed during the educational process, it has a relative stability, any influence of new intervening conditions does not result in a radical transformation of the peculiarities of graphic and technical expression. Based on these considerations, forensics and forensic practice has rarely encountered situations in which complete counterfeiting of texts has been carried out, with counterfeiting of signatures being the most common, due to their small size and small volume and amplitude, with impressive results being obtained after repeated practice.

Signature copying methods:

a) Overlap/ transparency copying – the overlap of the forged document over the model signature, the main indication of forgery that the signature is copied by overlap is the total correspondence, the identical dimensions on the axes being a relevant factor. Other elements suggesting counterfeiting are: oscillating dynamism, lack of smoothness of the strokes, thickening of the graphics at the bottom – suggesting a delay in execution, fluctuating, reversed execution directions etc.

b) Pressing/pressure copying – this is done by pressing a sharp body over a genuine signature, after which the graphics are reconstructed on the backing paper by tracing the trace left.

The methodology used to investigate this type of counterfeiting uses examination of the back of the paper in a directed light stream, highlighting and fixing the areas of contrast, the procedures used are chromatic examinations – different absorption of light in variable wavelengths, infrared / ultraviolet radiation examination – highlighting especially the priorities of the execution of the graphics, microscopic examination – effective especially in polarized light, in carbon (pencil) executions, chromatographic examination – effective in the case of inks with different composition.

1.5 Examination of intersecting routes

The purpose of this subtype of expertise is to identify and analyse the non-conformities at the junction points in order to determine the order of deposition of the layers and, consequently, the writing of the disputed graphics.

The practice has revealed a number of unique characteristics, depending on the peculiarities of the writing instruments/substances, as follows:

a) Intersecting trails executed with ink: the ink of the second layer extravasates at the junction with the first layer, the boundaries of the secondary trail show a zone of sedimentation, decomposing the sediment of the primary trail;

b) Ink paths intersected with graphite pencil paths: the graphite path has a well-relieved continuity, there are no folds of the ink path, the order of deposition of the material can also be determined by erasing and subsequent detailed examination;

c) Intersecting paths executed with pen: the amount of pen paste left by the pen ball at the exit of the intersecting channel is more abundant due to opposition/rubbing by the edge of the primary channel; the secondary channel will interrupt the primary channel at the junction.

1.6 Examination of damaged ties by breaking or burning

Intentional or accidental destruction/damage of testamentary dispositions is a common practice of legal successors or other interested persons, when through negligence, lack of discernment or foresight of the testators, access to the holographic bequests is easy. If these circumstances are compounded by the fact that the holograph will was made in a single copy, the authentic testamentary disposition irretrievably disappears.

Forensic science has developed a methodology that aims primarily at reconstructing destroyed documents, using a series of dynamic reconstruction criteria:

a) the traceability criteria: the design of the tear edges, the shape/size of the torn pieces, the shape of the cut, stains and other substances deposited on the surface of the script, fold marks and directions, the direction of the rows, the existence of printed patterns etc.;

b) physico-chemical criteria: colour, thickness, mass, permeability in the infrared/ ultraviolet spectrum;

c) graphic criteria: type of handwriting, line characteristics, content of handwriting.

The order of the reconstruction operations is the sorting of fragments based on graphic and physico-chemical criteria, then the reconstruction of the whole by using graphic and routeological criteria simultaneously (starting from the fragments that have a linear edge).

1.6.1 The particularities of the technique of reconstructing burnt documents:

In such seemingly insurmountable situations, technical-scientific methods have been developed that allow partial recoveries, the main steps being:

a) reconditioning burnt paper by consolidation and increasing elasticity – by using in successive stages water and glycerin, or spraying mineral oils, boric acid, sodium hydroxide, formaldehyde, polymerized solutions, aiming at highlighting colour contrasts between the paper background and the graphic lines on the paper, pressure differences created by the writing instrument in the paper structure or even different permeability to polarized light fluxes/IR or UV spectra at different exposure angles[7];

b) exposure of the paper base to chemical reactions by treatment with:

i. hydrogen peroxide – the background remains light; the graphic paths darken;

ii. silver nitrate solution – the background becomes silvery grey; the graphic trails stand out in a light shade;

iii. chloral hydrate – the surface of the background is white; the graphic trails stand out in a darker shade.

c) paper calcination – burning between 2 plates of heat-resistant glass in a furnace at 300-400 gr. Celsius, the contrast between the graphical trails and the background is highlighted.

1.7 Examination of handwriting after pressure printing (identification of latent handwriting)

This method proves its usefulness when fraudulent forgery/counterfeiting of the ties have been superimposed on other substrates, which can be paper, cardboard, wood, plastic, rubber allowing the printing of writing grooves. The practical difficulty lies in the ability to intuit and identify where the writer was at the time of the intervention on the binding.

The forensic methods applicable to these areas are broad-spectrum respectively:

a) examination in a beam of light at the smallest possible angle of incidence, thus highlighting the shading of the pressure grooves, the advantage of this method being that it does not affect the surface under examination;

b) dusting the substrate with a mixture of graphite and carbon black, or with fluorescent pigment, the highlighting of the trails being generated by greater adhesion in the prominent areas and less in the graphic trails;

c) application of fluid alloy mouldings – with subsequent application of a layer of plaster and the relief of the graphic lines by pressing a paper surface;

d) application of typographic ink with a rubber roller – both on the obverse and the reverse of the document, highlighting the latent writing trails.

In all the above examinations, the conclusions drawn by the expert are the same, i.e. *impossibility, probability, definitely positive, definitely negative*, one excluding the others.

2 Conclusions

The expert report on a will is one of those cases in which the expert is obliged to take into account a careful contextualization of the will and the consequences of the legal framework on it, as it is not sufficient only to make a graphic and documentary analysis. Relatives' testimonies, medical reports, medical records and any other documents must be requested and made available to the expert.

When the forensic graphologist is called upon to verify the authenticity of a holographic will, he must follow a precise methodology.

It is therefore necessary:

1. observation of the document itself, regardless of the comparisons provided by the parties or available in the file and in the case documents, in order to assess the credibility, authenticity and spontaneity of the documents examined. This initial check is useful in order to establish in advance whether there may be elements of inhomogeneity and inconsistency that could lead to a forgery. It is necessary to observe the testamentary scheme in the interaction between its main graphic components (rhythm, pressure, fugitive gesture), but also in the signs that constitute the individual graphic elements of each writing hand. Observation of the document therefore includes the modality of the connections, the typical personalized gestures, the degree of modification and personalization of the calligraphic pattern, the upper and lower vectorial writing, as well as the relationships existing in the width of the letters, between letters and between words, the points of intersection of the graphemes, the formative movements of the letters, the stylistic aspects, layout on the page, graphic tension in relation to the rhythm and speed of writing, parasitic gestures, opening

gestures, ending gestures, emphasis, punctuation, dividing dashes, fleeting gestures, elements of pressure, possible misspellings, deviations in strokes, extra-graphic elements such as the vocabulary used by the deceased to write his last wish etc.

2. personal anamnesis of the testator, which includes the collection of all available medical certificates that can justify possible dysgraphia phenomena caused by various types of pathologies such as Parkinson's, Alzheimer's etc., or to assess the presence of particular graphic phenomena due to pathologies requiring periods of convalescence (e.g. after surgery or following accidents involving the upper limbs but also the eyes) or the presence of diseases that compromise the correct use of sight (the visual spatial element of orientation of letters on paper), limbs and in terms of motor skills and autonomy in knowing how to manage the act of drawing up the last will. It is advisable to collect as much clinical documentation as possible in order to carry out an in-depth analysis of the various graphic phenomena in relation to the genesis of the disorders and the time of occurrence, bearing in mind that handwriting can change even within a few minutes if there are disabling factors that can be justified by chronic pathologies or objective-subjective states that modify it (e.g. emotional states of hypotonia or hypertonia, mood swings, depression, agitation, anxiety etc.). The comparison of the testator's handwriting should be carried out in conjunction with the documentation provided and should take into account the fact that certain pathologies found in the handwriting of the will, even if not illustrated by medical certificates, may also appear suddenly. This is the case of anxiety states and mood swings.

3. observing the document in relation to point 1 to determine whether there may be phenomena that do not reveal homogeneity in the various graphic categories within the testamentary form such that the will is not credible. Note how the letters are constructed (formation movement, personalization of certain spellings such as „r", „t", „g", „f"). The inhomogeneity of the printing aspects is also very important for the credibility and consistency of the different graphic elements. It is clear that if there are different ways of distributing energy in the document, the suspicion of forgery could be justified. The pace and speed of writing are qualitative and substantial elements in determining, from the preliminary analysis, whether there could have been the intervention of different writing hands. In this way, we can already formulate an initial working hypothesis, which must be confirmed by comparing the testamentary document examined with the available comparative documents.

4. to make a comparison between the writings, in order to establish any similarities or differences of evidential value that would allow an objective conclusion by the experts as to the authenticity or apocryphal nature of the document to be verified. The comparative writings must be sufficient in number, homogeneous and contemporary with the date of the testamentary record under verification. In the absence of even one of these requirements, the attributive judgment must always be expressed in terms of probability and never in terms of technical certainty. Some graphologists argue that one cannot speak of probability in a graphological report because it refers only to statistical data.

5. the attributive judgment which concerns the three essential components of the holograph will, namely the date on which it was drawn up, the text of the last will and the signature. If even one of these elements is missing, the will is not holographic, and it is possible to invoke its legal ineffectiveness. The assessment must be made in terms of possibility, probability and technical certainty, depending on the results of the investigation.

Gennaro Pirone, drawing the lines of a correct expertise, invites us to look, after the appropriate documentary checks (instrumental examinations), for intrinsic signs of sincerity or falsity, which he groups as follows: Signs of sincerity: – The general impulse is spontaneous; – The execution movement is rapid; – The general characteristics are in harmony with those of the reference signatures; – The differences observed in a direct comparison with the comparison signatures can be attributed to a different psychological state or material conditions; – A partial overlap with some signatures of the apparent undersigned. Gennaro Pirone also points out signs of unreliability: – absence of spontaneous impulse; – slowness of execution movement; – lack of correspondence of general characteristics; – total absence of circumstantial pen markings; – cleverly disguised or difficult to justify retouching or retouching; – inexplicable variations in pressure; – suspicious inflections, deviations or flattening, especially in the tracing of curves; – illogical enlargement or strengthening of the signature as a whole; – complete equality with a comparative signature. [8]

References

[1] Noul Cod Civil, pe lege5.ro

[2] Baias, F., Chelaru, E., Constantinovici, R., Macovei, I. (2014). *Noul Cod Civil. Comentariu pe articole*, Ediția 2, Editura C.H. Beck, București, pp. 1148-1149

[3] Ionașcu, T., (2016). Nedemnitatea judiciară în *Analele Universității „Constantin Brâncuși" din Târgu Jiu,* nr. 1/2016, Editura Academica Brâncuși, Târgu Jiu, pp. 29-34

[4] Nickell, J. (1996). *Detecting forgery. Forensic investigation of Documents,* The University Press of Kentucky, p. 49

[5] Inbau, F.E., Moenssens, A.A., Vitullo, L.E. (1972). *Scientific Police Investigation*, Chapter on questioned documents, Chilton Book Co., New York, pp. 57-58

[6] Henry T.F., Rhodes. (1940). „The Oxidation of Ferrous Iron in Iron Gall Ink." *Chemistry and Industry* 59, pp. 143-45

[7] Khasrithong, N. Rchitaree. (2010). „Recovering written contents of a burnt paper by IR reflected photography", *Thai Journal of Physics Series*, 6, pp. 235-237

[8] Pirone, G., (1996). *Il falso in scritture*, CEDAM Editore, Padova, pp. 124-154

THE INHERITANCE RIGHTS OF THE CHILD BORN OF THE SUBSTITUTION MATERNITY IN THE EUROPEAN UNION

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Abstract

Substitution maternity is a current and a developing phenomenon and the inheritance rights of a child born from such a procedure are very complex. Taking into account the whole global perspective, no comparable moral or legal basis can be identified in this area. The creation of a common legal framework or the advancement of a large-scale international unification of substantive law or the rules on the recognition of the effects of foreign law does not seem to be an objective that can be achieved soon. In this context, the issue of inheritance rights of the child born from the substitution maternity is a very complex one. In dealing with the subject, we will analyze the European Regulation 650/2012, the decisions of the ECHR in this matter, national provision and we will seek to find solutions on the ways in which the rights of succession can be protected in such a situation.

Keywords*: surrogate; mater semper certa est; European Regulation 650/2012; inheritance rights; European Convention on the Legal Status of Children Born out of Marriage*

1. Substitution maternity

Substitution maternity brings to the fore an *uncharted* area of law where medical technologies are reconfigurate the concepts of mother, father and child. The surrogate-mother is the woman in whose uterus the embryo formed following fertilisation of an egg from herself (genetic surrogate) or from another woman (gestational surrogate) is transferred, and who gives birth to the child, and afther this the child it is given to the couple.[1] Because of the increasing differences between national legislation and the lack of competence of international organization to regulate this issue comprehensively, it is likely that at present there is not universal, but rather limited, cooperation between states with similar values and axiological approaches.[2]

All these aspects give rise to a whole complex of ethical, social and legal problems. Therefore, the new challenges of reproductive technology force us to think about the social values that need to be protected in relation to the birth of a child. The solutions will have to combine in a legal, balanced way, the new content given to the rights to life, bodily integrity, dignity and family, with the principles of traditional public morality.[3]

Many authors have opposed substitution maternity, citing the fact that the *mater semper cert est* principle becomes meaningless, with one child being able to have more than six parents.[4] Another controversial medical reason is *fetal microhymerism*, this concept translates into the fact that during pregnancy the placenta serves as a bridge between the fetus and the mother for the exchange of nutrients. and waste, but it is scientifically proven that fetal and maternal cells can pass through this bridge. As the mother's cells reach the fetus, a significantly larger number of fetal cells are transferred to the mother[5]. The result is that the mother carries in her body a small number of foreign cells belonging to the fetus.

Evidence suggests that these transplanted cells may remain in the mother's body for a long time, with the latest study showing that derived fetal cells were found in the mother's body up to 27 years after pregnancy.[6] *Fetal microchimerism* is controversial in substitution maternity due to maternity that it turns out that the carrier mother establishes cellular connections with the fetus, which contradicts the theory that she is a simple carrier who does not interact with the fetus during pregnancy.

The main legal instrument of surrogacy is the surrogate contract. This type of contract is invalid and has no legal effect in most countries of the world. However, requests for the introduction of such a legal solution in domestic law or for the recognition of the effects of foreign law and the registration of civil status documents have been noted as having an upward trend. Thus, the development of surrogacy causes a number of legal and ethical issues.[7]

At the level of the European Union, we can see that there is no legislative unit on the situation of surrogacy or the inheritance rights of children born in this way. The position of the countries regarding the surrogate procedure at European level is characterized as follows – the countries that have legalized the surrogate procedure: Croatia, the Netherlands, Great Britain, Greece, Ukraine etc.; countries that have banned: Austria, Estonia, Iceland, Serbia, Slovenia, Sweden, Turkey etc.; countries partially tolerating the procedure: Belgium, Luxembourg, Poland, Czech Republic; Non-tolerant or non-regulatory countries: France, Hungary, Ireland, Latvia, Lithuania, Malta, Monaco, Romania, San Marino, Bosnia and Herzegovina.

Romanian legislation does not contain express provisions regarding surrogacy. In the legal literature, however, it has been stated that, indirectly, the use of surrogacy is allowed. The statement is justified by the use of the term „surrogate mother" in a ministerial order[8], excluding from publicly funded in vitro fertilization program medically assisted human reproduction with surrogate mother.[9] However, the New Civil Code of Romania, in art. 441, paragraph (1), stipulates that „medically assisted human reproduction with a third donor does not determine any connection between the child and the donor".

The most important legal issue raised by the recognition of surrogacy is the establishment of the child's parentage to the real parents, but perhaps the most important of all is the inheritance rights of a child born of a surrogate mother, given that most laws recognize the inheritance rights of the conceived child. Does European Regulation 650/2012 cover such a situation at EU level? Or is there EU-wide legislation to cover this legislative gap? What are the solutions in such a case?

2. The inheritance rights of the child born from the surrogate mother at European Union level

The institution of heritage is described as an institution dominated by tradition and conservatism, but lately it has undergone important changes generated by the social reality of the moment. In addition to the development or change of conceptual approaches to family values, property rights, the free movement of European citizens and the creation of the European Union (EU), imposed the need for predictability and transparency of procedures, which led to the emergence of Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. [10].[11]

Succession laws favors „*a person's nuclear family, descendants and ascendants, and then... collateral bloodlines"*. A nuclear family includes father, mother and dependent children. „Prior to the introduction of reproductive technology, a presumption of paternity was applied when a child was born from a married woman and the presumption of motherhood was standard." However, in cases of surrogacy motherhood, it was necessary to rethink what makes a person a father or a mother. In a surrogate contract, for example, up to five different people may be involved in the process of giving birth to a child in this world: the sperm donor, the egg donor, the surrogate mother, the expected mother, and the expected father. If there are five people involved, there may be issues related to the child's inheritance. But, it could be potentially more problematic when none of the main people involved in the conception are willing to be the child's parents[.12]

If a person dies without a valid will, the laws of succession ab intestate, from each state determine to whom the property of the deceased will return. Laws of testamentary succession favor first the deceased's nuclear family, descendants and ascendants, and then follow the collateral bloodlines of the deceased. If the succession is *ab intestat*, the state authorities must set their objectives when deciding who has the rights to the deceased's succession.[13]

The novelty imposed by Regulation 650/2012 is the introduction of the European certificate of heir. By analyzing the text of the regulation, we can easily see that it does not contain provisions on the inheritance rights of the child born from the substitution maternity, so the latter legal reality still remaining in a shadow cone.

In the EU law, there is no single, official definition of the term child in treaties, legislation or case law. This definition can vary considerably in EU law, depending on the context of the regulation. For example, legislation governing the right of free movement of citizens of the Union and their family members defines children as „*direct descendants up to the age of 21 or dependent*", practically they are adopting a notion based on biological and economic relations, and not on the idea of minority.[14] This definition brings to the fore the issue of surrogacy motherhood, especially in the situations where the future intentional parents of the baby carried by the surrogate mother are not his biological parents.

Although it does not explicitly state the situation of inheritance rights of children born to a surrogate mother, the regulation may be linked to other European legislative instruments, such as the Charter of Fundamental Rights of the European Union, the Treaty of Lisbon, the adoption of the European Commission Communication. on the special place of children in the EU's external action and the EU Council Guidelines for the Promotion and Protection of the Rights of the Child, the European Convention on the Legal Status of Children Born out of Marriage[15]; European Convention on the Adoption of Children, revised in 2008[16].

Substitution maternity has a controversial issue: some states prohibit it, others allow it for philanthropic purposes (France) or others (some American states) impose the condition of concluding surrogate contracts, non-burdensome, in which the terms are clearly established according to law. If it is difficult to appreciate the legal nature and legitimacy of the contract between a couple and the surrogate mother, it is all the more difficult to believe in the gratuitousness of this gesture that touches the substance of the ethical principle of non-commercialization of the human body.[17]

The legality of the surrogate contract between the intended parents and the surrogate mother is not currently governed by EU law. The surrogate contract includes issues related

to the eligibility, adequacy and capacity of both the potential parent (s) and the surrogate mother, as well as the consent for arrangements, its formal and essential validity, but its applicability will depend on national law. of the EU Member State.[18]

To the extent that a substitution maternity agreement is contractual in nature, it is important to note from the outset that Regulation (EC) No. 593/2008 on the law applicable to contractual obligations contracts (Rome I). Pursuant to Article 1.2. of Rome I, contractual obligations involving the status or legal capacity of natural persons and contractual obligations arising out of family relationships (Article 1.2.b) are excluded from the scope of the instrument. Therefore, any EU court, whether a national court or one of the EU courts, must now apply its own rules to assess the validity and enforceability of a surrogate agreement involving a conflict of laws[19].[20]

From a practical point of view, we may be faced with some legal problems when the child's future parents of intent lives in an EU Member State where surrogacy is not recognized. If they die before the baby is born! How can the child become the beneficiary of the inheritance of the parents from the surrogate contract? If the child's father is also the biological one, even if there is no express regulation, we can implement the provisions of Article 9[21] of the European Convention on the Legal Status of Children Born out of Marriage!, and this can come to the succession of the father but not of the mother of intention! The text of the law does not cover the situation of the mother of intent because theoretically his natural mother is the surrogate mother, the one who gave him life! At the same time, he can succeed the surrogate mother! How can we correct this legal abnormality? The surrogate mother, if she does not relinquish her parental rights after birth, remains the mother of the child, in accordance with the *mater semper certa est* principle.

In most cases involving the recognition of the parentage of the child born of the surrogate mother, a unitary decision was observed regarding the recognition of the parentage to the father when he is also the biological father of the child. east, and if the parents of intent are not the biological ones clearly not recognizing the parentage resulting from the surrogate contract.

At European level by *Mennesson v. France* and *Labassee v. France* decisions[22],it can be observed that the interpretation of the ECHR goes towards the recognition of the filiation towards the father when the father of intention is also the biological one but in the case of the mother of intention it remains a legislative vacuum. *Mennesson v. France*[23] concerns the refusal of the French authorities to register in the French birth registers children born in the USA, following a pregnancy agreement for another, on grounds of public policy. The court found a violation of art. 8 of the Convention in connection with the complaint concerning „respect for privacy". Regarding the principle of the best interests of the child, it has been stated that „the absence of recognition of a parentage link between the child born from one pregnancy to another" and the „mother of intent" has negative consequences on several issues concerning the right to privacy. guaranteed by art. 8 of the Convention [24]. As can be seen from the entire economy of the Advisory Opinion of 10 April 2019, the pivot of this case is the principle of the best interests of the child, which can validate a posteriori conventions absolutely prohibited by positive law.[25]. Furthermore, the Court also held that the child's inheritance rights are affected and also that the protection of the child is not sufficiently preserved in the event of separation of the „intentional" parents or in the event of a refusal to the mother's part to take responsibility for raising the child (paragraph 40 of the opinion). Consequently, the Court held that „the general and

absolute impossibility of obtaining recognition of the connection between a child born abroad from one pregnancy to another and the mother of intent is not compatible with the principle of the best interests of the child" (paragraph 41 of the Opinion).

The Timișoara Court of Appeal followed a similar interpretation in February 2014. The judges of the Timișoara Court of Appeal decided to recognize the parentage and the mother in addition to the father, and motivated the decision as follows: „Recourse to another procedure, as that of gestation for another, assumed by the parties in the process, although not regulated by law, expressly, however, cannot be considered an illegal procedure, as long as, in civil matters, what is not forbidden is allowed „[26]. The judgment also states that: 'the legal impossibility for the minor claimants to have their motherhood recognized as a biological mother – that is to say, their true genetic identity – would infringe, first and foremost, their right to privacy, guaranteed by Article 8 of the European Convention on Human Rights „.[27]

Another controversial example is that of the *Wheatleys family* in Ireland. The couple turned to a Ukraine-surrogate mother. After the birth of the child, he was brought to Ireland, but according to the legislation in force only the father of intention was recognized as the father of the child, the mother of intent being not recognized as a mother at the moment. The Whheatleys family, which owns a farm, raises the question of the child's successor rights, given the current Ireland legislation, which stipulates that a farmer can designate a favorite nephew or granddaughter to obtain an inheritance tax exemption. Surrogate mother, according to current tax structures, cannot have access to these benefits. The mother of intention also pointed out that if she would die and would like to leave a property of the son born through the surrogate procedure, he would have treated as a stranger in the eyes of Irish law, which is a major issue in terms of succession legislation in this State.[28]

The most controversial opinion on the succession rights of a child born in the substitute motherhood appears in Indian legislation. In accordance with the *Hindu law* on the succession from 1956, every child of the legitimately married wife is considered a legal heir to the husband. And the emphasis is not on the legitimacy of the child, but on the approval of the marriage. Thus, the child's surrogate mother will have the right to inherit both the goods of the surrogate mother and those of her husband at the time of death. Another raissed problem is that if a child born in the mother-surrogate can claim the property of adoptive parents? The answer is no, because the child is not born directly, but through the surrogate maternity process. In such cases, if the adoptive parents want to fully adopt the child and make him a heir to their family, a will must be prepared to specify the name of the child born from the substitution maternity ward and grant the right to claim the parents of the parents adoptives.[29]

Thus, regardless of the variety of situations, one thing is certain! If the father of intention is the biological one then we can speak of a protection of the succession rights of the child born from the mother-surrogate, being applicable the provisions regarding the rights of the conceived child (institution provided by most European laws). From the perspective of her intention, other legal ways for the child recognition among which we mention the adoption remain. At the same time, we draw attention to the fact that the parents of intention if they want to ensure the succession rights of the child born from the substitution maternity, they can conclude a will or they may provide within it to ensure the transmission of the successor heritage or may conclude legal acts as donations or contracts. through which they can transmit parts of the child's heritage, but these actions cannot cover

other legislative vacuums, such as the situation in which the child is born by the surrogate mother, and the parents of intention are not biological parents, the substitution maternity is not recognized. goods from his parents and the child dies. In this situation, the mother-surrogate becomes the heir with her relatives!

The fact that in the eyes of the law, the child born from the substitution maternity is considered the child -rugat child until the quality of parent is transferred to the couple (either by a parental order or by an adoption order). Until then, the child belongs to the category of beneficiary of the successor rights of the surrogate mother and has the right to inherit from her wealth if she would died in the time until the child's affiliation is established.[30]

Practically solutions

Regarding the way in which we should manage the situation of the succession rights of a child born from the substitution maternity, three situations will be distinguished: the situation when the intentional parents are also the biological ones of the child; the situation when the father is not the biological one but the mother does; and the last situation of parents who do not have a jus sangvini connection. Depending on these situations at EU level but also on Member States that do not recognize or partially recognize the surrogate procedure, there are several solutions:

[17] The *adoption* made by the parents of intent – is the one that covers all 3 situations provided that this is done with full effects, and the child will come to the parents' succession naturally.

[18] *Adoption* made by a relative of intentional parents in the event that both / or one of them dies before the child is born. So long as the child can come by inheritance representation provided there are no other heirs or acceptors. There is also the fact that in this situation only one of the parents can come as an heir and he will be part of a more distant class of heirs!

[19] The *will* – is another way to protect the inheritance rights of the child born to the surrogate mother which again applies to all 3 situations. Also included here can be linked, donations etc.

[20] Acts of transfer of assets may again be a way of covering inheritance rights but are conditioned by the birth of the child and other legislative regulations.

From the analysis of these hypotheses it can be clearly seen that a concrete regulation of the succession rights of the child born to the surrogate mother is necessary in order to avoid situations of legislative vacuum. At the same time, we note that European Regulation 650/2012 did not provide for such a situation at EU level. There is no specific regulation in the field at national level either. The inheritance rights of the child born from the surrogacy motherhood do not strictly concern the connection with the parents of intention but also with their family! There is a situation where the parents and the child live in a state where the surrogate is regulated and allowed, but their relatives live in another state that does not recognize the procedure. The situation may arise in which the child born of the surrogate mother cannot come by inheritance representation to the grandparents' inheritance because the state where the succession was opened does not recognize the surrogate and the right of the latter!

The solution to this problem could come from Texan law. The provisions of the Texan Code regarding the will in sections 201.051 and 201.052 regarding the right of the child to inherit have drastically changed the rights of children born through maternity as a

substitution based on a surrogate contract. These changes provide for the recognition of the inheritance rights of a child born of a surrogate mother based on a valid gestational agreement, this situation avoids disputes in cases where the parents do not have a will, but are the testamentary parents in a valid gestational agreement. But it does not cover the situation of an invalid management agreement. It would be incorrect for a child to be considered the child of parents intended under a validated gestational agreement, but who are denied the right to inherit under Texan laws on ab intestato succession. Even after the 2013 amendments to sections 201.051 and 201.052 of the Texas Code, the inheritance rights of a child born under an invalid gestational agreement are still unclear. The State of Texas recognizes only valid gestational surrogate contracts and not invalid ones.[31]

3. Conclusion

Although Texan law on testamentary succession seeks to adapt to the new trend in surrogate contracts, it has not fully addressed every issue that may arise. Under current law, if a potential father has not adopted the surrogate child, or has no biological connection with the resulting child, it is difficult for that child to inherit from the intentional father unless there is a valid gestational agreement. The only loophole exists when the father intends to marry the surrogate mother and he has consented to assisted reproduction. But if he is not married to the expected mother or if there is no evidence that he has consented, the child is unlikely to have the right to inherit.[32]

As we can see, the recognition of the valid gestational agreement by the laws of the states can cover at least some of the issues raised by the inheritance rights of children born in surrogacy, but this is not an answer for all possible situations, but at least it is a step towards the normalization of this issue.

What we must keep in mind is that the issue of inheritance rights of the surrogate child can certainly be covered by the will, which has the role of clarifying and ensuring the proper inclusion of the child with other possible heirs of the parents of intent. The will also guarantees that, in the event of something unexpected, the child will be insured and financially supported. At the same time, it will be supported by executors / trustees and guardians in a solid and protective legal framework.

Although the relevant European legislation does not cover this legislative gap, the decisions of the courts recognizing the parentage resulting from the surrogacy procedure both for the father of the intention, when he is both biological and for the mother of intention (so as can be seen in the decision of the Timișoara Court of Appeal and in the Menessonne case) the aim is to protect the principle of the best interests of the child, and at the same time through the protection conferred by Article 8 of the European Convention on Human Rights. through such a procedure and their rights, whether we are talking about rights of descent, inheritance rights, the right to nationality etc.

In conclusion, the procedures for establishing or recognizing a parentage link between children born to another and intentional parents vary from state to state and the status of the child's inheritance rights is uncertain. The only option at the moment remains the adoption of the child until a legislative framework is created for this situation. We will have to follow the way in which the European legislation will be articulated, but also the decisions that will follow in this field. Given that many states do not recognize or do not have a procedure on the legal effects of surrogacy, the uncertainty regarding the inheritance rights of a child born to a surrogate mother is still uncertain.

Bibliografie

[1] Huidu A.(2010). *Reproducerea umana medical asistată*. Editura Lumen, p. 395.

[2] Mostowik P. (2019). Fundamental legal problems of surrogate motherhood. Global perspective. Instytut Wymiaru Sprawiedliwosci, Warszawa, ISBN 978-83-66344-06-8, p. 33.

[3] Huidu A., *op. cit.*, pp. 14-16.

[4] *Ibidem*, p. 395-396.

[5] Fetal Microchimerism – Harvard Science Review (consulted on 25.03.2022).

[6] *Idem*.

[7] Mostowik P., *op. cit.*, pp. 33-34.

[8] Partea IV 3.3. Subprogramul de fertilizare in vitro și embriotransfer, lit. C, punctul 3 din anexa la Ordinul ministrului sănătăţii nr. 377/201, publicat în M. Of. nr. 24 din 10 ianuarie 2018.

[9] Ungureanu C.T.(2019). Contractul Internațional de externalizare a maternității. Revista Universul Juridic,RSJ NR. 1/2019, Vol.34, p. 15.

[10] Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[11] Procedura dezbaterii moștenirii cu elemente de extraneitate. Considerații referitoare la competența şi legea aplicabilă | Revista Universul Juridic (consulted on 1.03.2022).

[12] Solis L.(2015). The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child. Tex. A&M L. Rev.417, p. 430.

[13] Shapo S. H. (1997). Matters of Life and Death: Inheritance Consequences of Reproductive Technologies. Hofstra Law Review: Vol. 25: Iss. 4, Article 3, p. 1094.

[14] Manual de drept european privind drepturile copilului (2016). Luxemburg: Oficiul de Publicații al UE, p. 18.

[15] Adopted in Strasbourg on 15 October 1975. It entered into force on 11 August 1978. Romania acceded to the Convention by Law no. 101 of September 16, 1992.

[16] The European Convention on the Adoption of Children (CETS No 058) of 26 April 1968 was revised by the Council of Europe on 27 November 2008.

[17] Ciucă A.(2020). Interesul copilului nenăscut vs. dreptul la indentitate al persoanei. Interesul copilului nenăscut vs. dreptul la identitate al persoanei | Universul Juridic (consultat la data de 04.04.2022).

[18] A Comparative Study on the Regime of Surrogacy in EU Member States.(2013).Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament, p. 147.

[19] *Ibidem*, p. 148.

[20] Also, in the case of a non-contractual obligation deriving from an international surrogate contract (for example, a claim for enrichment without just cause), it is important to note the inapplicability of Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations („Rome II"). According to Article 1.2.a of Rome II, non-contractual obligations arising out of family relationships are excluded from the scope.

[21] Art. 9 provides – The rights of a child born out of wedlock to the succession of his father and mother and members of their families are the same as if they had been born during the marriage.

[22] ECHR Case Labassee v. France, application no. 65941/11. See para.79. „... Given the importance of biological parentage as an element of individual identity..., it cannot be said that it is in the best interests of a child to be deprived of such a legal link when the biological reality of that link has been established... „.

[23] Case ECHR, *Mennesson c. Franța*, nr. 65192/11, 26 iunie 2014.

[24] Paragraph 40 of the Opinion of April 10, 2019 of the ECHR.

[25] Oprescu M-A, Oprescu M. M.,(2019). Reflecții asupra Avizului consultativ al Curții Europene a Drepturilor Omului din data de 10 aprilie 2019. Revista Universul Juridic, pp. 30-33.

[26] The Timișoara Court of Appeal also held that „the principle mater semper certa est, pater incertus, enshrined in the current Civil Code (art. 408) must be amended in relation to the progress of medicine in the field of medically assisted human reproduction techniques.

[27] Situatia din Romania. Mama surogat. (amicidilazzaro.it) (consulted on 4.04.2022).

[28] Children born through surrogacy disenfranchised on their inheritance 07 July 2021 Free (farmersjournal.ie) (consulted on 04.04.2022).

[29] Heir? Or No Heir? The Inheritance Rights Of A Surrogate Child | Wrytin (consulted on 05.04.2022).

[30] Succession, Inheritance and Surrogacy: The Issues (allanjanes.com) (consulted on 5.04.2022).

[31] Solis L.(2015). The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child. Tex. A&M L. Rev.417, pp. 430-433.

[32] *Ibidem*, p. 435.

THE SUCCESSION OF STATES TO INTERNATIONAL ORGANIZATIONS UNDER PUBLIC INTERNATIONAL LAW

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Abstract

Diplomacy is a permanent negotiation, probing, a way of convenience in relations with the accrediting state or between states with a diversified development[1].

It is the task of diplomats to best represent the mutual interests of the state they represent and of the state to which they are sent, which requires careful and constant information in order to act in accordance with them. From this perspective, participants in international legal relations have a decisive role to play in implementing the basic principles of diplomacy.

In order to participate in international legal relations, it is necessary to be a subject of international law, which implies the ability to be the holder of international rights and obligations.

A state acquires legal personality from the moment the constituent elements are assembled, provided that most of the consequences of the existence of its personality are subject to recognition in order to take effect from the date fixed by it.

The conventional commitment to create a state in fact eliminates the need for recognition, but in this case the state does not exist until the date when its elements are assembled.

The expression of the international legal personality is made in the context of the existence of international relations, of relations based on equality and in accordance with the international legal norms. International law is a system of legal rules of coordination, proper to a horizontally organized society. The international personality substantiates the position of the state within the international community. A State shall cease to exist from the date on which one of its constituent elements disappears and, as a result, its status as an international legal person is affected[2]*. Also, a state ceases to be an international person in the event of a merger between two states or the annexation, following a war, the division of a state into several states or the separation from a state of parts that are annexed to the states neighbor.*

The changes that take place in the leadership of a state, of the dynasty, of the way of organizing the state or of its territory, do not affect the legal personality of the respective state. Among the changes affecting states as international legal entities are: the merger between two states[3]*, the partial loss of independence.*

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[1] I. Stoian, E. Dragne, M. Stoian, International Trade. Techniques and Procedures, Vol. II, Caraiman Publishing House, Bucharest, 1997, page 26.

[2] For example, if several states form a federal state, they transfer part of their sovereignty to the federal state and become part of the federal state accordingly.

[3] For example Federal Republic of Germany – Democratic Republic of Germany – 1989.

The international doctrine[4] prevails from the point of view according to which in order for an entity to have a state-type legal personality, it is necessary to meet four elements:

- the existence of a determined territory;

- a permanent population (organized and with a considerable number of members);

- a relatively stable government;

- the ability to enter into relations with other states.

Keywords: *international legal personality, state, international organizations, succession of states, diplomacy, dismemberment, status of the individual, other international entities*

1. Introductory notions

Succession is the legal institution of international law through which, in the face of radical social and political changes, a state manifests its sovereign right, adapting pre-existing legal relations in order to promote new relations between states[5].Succession is also a field of development of cooperation with the equal participation of all the states of the world based on the fundamental principles of contemporary international law.

Succession is a field of exercising national sovereignty, the right of the people to decide their own destiny. This characteristic of succession also results from the provisions of the 1978 and 1983 Vienna Conventions on the Succession of States to Treaties and, respectively, property, archives and state debt. Thus, according to the 1978 Convention, the succession of new states is exercised on the basis of their free consent, regarding the taking over (or rejection) of pre-existing treaties (art. 8-10, 16 etc.), provided that each state's sovereignty over the natural wealth of its territory (art. 13). The free sovereign option of the successor state is also exercised in the conditions in which its succession would be provided in a treaty concluded by the predecessor state (art. 10)[6].

The succession of states is also defined in international law as „the replacement of one state with another in terms of responsibility for the international relations of a territory."[7] It is generally accepted that the succession of states occurs when a territorial change takes place. In this sense, the territorial change is seen as a condition for triggering a phenomenon of state succession, given that a fundamental change in the system of government is not likely to affect the rights, obligations and international responsibility of states. Thus, in the situation of a fundamental change of the form of government, which does not affect in any way the situation of borders, we can not talk about the succession of states, but about a continuity of rights and obligations, an identity of legal personality, due to the fact that fundamental rights of the state: the territory, the population, and even the sovereignty (what changes being the way it is exercised and not its holder) remain constant.

General rules of international law relating to the succession of States, codified in the 1978 Vienna Convention on the Succession of States to Treaties (in force since 6 November 1996) and in the 1983 Vienna Convention on the Succession of States to Property, Archives

[4] Adrian Năstase, Bogdan Aurescu, C. Jura, Public International Law, CH Publishing House. Beck, Bucharest, 2006, page 66.

[5] Geamănu Grigore, Public International Law. Treaty, vol. I, Didactic and Pedagogical Publishing House, Bucharest, 1982, page 28.

[6] Diana Olar, The Succession of States to International Treaties, in Studies in Romanian Law no. 3-4 / 2001, page 121 et seq.

[7] Anca Filipovici, Legal-historical aspects of the succession of states in international law, Lumen Scientific Publishing House, Bucharest, 2010, page 15.

and debt (did not meet the required number of ratifications to enter into force), are based on two essential criteria: the object of the succession and the nature of the territorial change (factual register). If there is convergence in both doctrinal and positive law regarding the object of succession, establishing distinct bodies of rules for the succession of states to treaties and international organizations (relations between the successor state and the international order), to goods, archives and debts (the relations between the successor state and the predecessor state) and for the relations between the successor state and the citizens, the distinctions that operate according to the criterion of the nature of the territorial changes involve certain debates.

From this point of view, the doctrine refers to the transfer of territories, the reunification of several states in the form of merger or absorption, dismemberment and secession. Particular attention will be paid to the latest forms of territorial change and to the theoretical and practical consequences of specific distinctions made in situations of dismemberment of a state.

In this context, it is necessary to specify from the beginning the distinction that is made in the doctrine between the successor state and the successor state. Thus, if in the hypothesis of fundamental changes in the form of government the continuity of the legal personality is obvious, in the hypothesis of the detachment of a territory / territories from the predecessor state, two possibilities appear, at a theoretical level:

a) one of the states resulting from the dismemberment process to continue the legal personality of the predecessor state, the other entities having the quality of successor states or

b) non-existence of a successor state – a situation in which all the states resulting from the dismemberment process have the quality of successor state. It is generally accepted that in the case of succession there are fundamental changes in the legal status and content of the rights and obligations of the entities concerned, while continuity implies the maintenance of legal personality and rights and obligations, except for factual changes of no fundamental importance. Professor James Crawford makes the same distinction: „There is a fundamental difference between succession and continuity: that is, between cases in which 'the same' state continues to exist, one state replaces another in respect of a particular territory”[8].

The difficulty of determining the criteria for separating the „border” between succession and continuity has been constantly emphasized in the doctrine. The origin of this difficulty consists in the fact that both in the case of continuity and in the case of succession, there are changes in the fundamental elements of the state (territory, population, government). Thus, some authors consider that the succession of states inherently presupposes at least a „de facto continuity”[9]. Historically, international law has adopted solutions based on either succession or continuity in substantially similar situations.

2. The rules of international law concerning succession and the distinction „continuity – succession”

We must point out from the outset that the law of succession of states is considered a „special right”, as each situation of succession is different. This right may be embodied in

[8] James Crawford, A. Pellet & S. Olleson, (eds) The Law of International Responsibility (Oxford University Press, 2010).

[9] Titus Corlățean, The Succession of States in International Law, Universul Juridic Publishing House, Bucharest, 2012, p. 31.

an agreement between the successor States, or between them and the predecessor State. However, even in the absence of such an agreement, there are certain principles that are generally applicable to all situations of succession.

International law on the succession of states is crystallized in customary and conventional rules. The two conventions drafted by the International Law Commission (of which only the Vienna Convention of 1978 on the Succession of States to the Treaties entered into force) codify, on the one hand, existing rules but also create new conventional rules of international law. From this perspective, it is necessary to establish the principles governing the law of succession of States, and the rules of the two Conventions which are recognized as customary. It will also be necessary to highlight the relationship between the provisions of the two Conventions and the distinction to be made between „succession" and „continuity".

2.1. Principles applicable to the succession of states

One of the recognized principles to be applied in the case of the succession of states is the sovereignty of the successor state. Thus, the sovereignty of the successor state does not come from the sovereignty of the predecessor state, but from the meeting of the characteristics characteristic of a state and from international law. Therefore, there is no transfer of sovereignty, but a substitution of sovereignty. Thus, in the case of a succession of states, we are in the presence of the „end of one sovereignty" and the „creation of another sovereignty." It is generally accepted that the successor state has its own legal personality, exercising the full powers over the territory as a sovereign and independent state.

However, in terms of the theory of law, the notion of succession may appear incompatible with that of sovereignty. Thus, it would seem impossible for the „new sovereignty", that of the successor state, to be encumbered by some legal obligations of the predecessor state. Thus, an absolute application of the principle of sovereignty – which involves the removal of the legal order of the predecessor and the introduction of a new legal order – would be likely to create a „tabula rasa", a legal vacuum in the successor state. This solution would create great difficulties in practice, which is why it is accepted that this principle needs to be mitigated to a certain extent.

We must note, however, that the question of the application of the principle of sovereignty does not arise when we are in the situation of a successor state. The successor state is „identical" to the predecessor state (even if certain changes occur at the level of the fundamental elements of the state), the term continuity being in fact a legal fiction. Therefore, in the situation of a continuity of states, we will also be in the presence of a continuity of sovereignty.

Due to the difficulties involved in applying the principle of sovereignty, the doctrine proposed its completion with the principle of coherence. As stated above, the new state asserts its own sovereignty in international law. But it is no less true that the new subject of international law will be obliged to observe the customary rules of international law, including those relating to the succession of States. Thus, C. Wilfred Jenks stated that „It is generally accepted that a new state is obliged to respect the existing rules of customary international law. But a new state will be considered free from any international obligation of a conventional nature."[10] Thus, the rules of customary law are those that impose on the

[10] C. Wilfred Jenks, European Journal of International Law, Volume 31, Issue, 2020, page 541.

successor state certain rights and obligations that are not those of the predecessor state, but have a content identical to them. However, it is necessary to specify that this is not a succession to customary norms, these being rules resulting from the international practice of states, with general applicability to the subjects of international law.

Thus, the successor state will take over certain rights and obligations of the predecessor state in two ways: either on the basis of a succession agreement concluded with the predecessor state, or on the basis of customary law.

Although some authors have credited the idea of a „universal succession", meaning taking over all the rights and obligations of the predecessor state, such an approach would deny the very essence of the sovereignty of the successor state.

A third principle of the law of state succession would be the principle of reality. Accordingly, it is necessary to identify a balance between the flat application of the principle of sovereignty, achieving a „tabula rasa" regarding the rights and obligations of the successor state and taking over all the rights and obligations of the predecessor state, a balance that would correspond to the interest of the state, successor and legitimate purposes resulting from the general customary practice of the international society.

Thus, despite the existing rupture at the level of legal personality and at the level of the sovereignty of the successor state in relation to the predecessor state, the international law imposes a certain continuity (in the sense of taking over some rights and obligations with the same content as those of the predecessor state). This takeover of rights and obligations should not be interpreted as an infringement of the sovereignty of the successor State, but as a necessity imposed by international law, as a consequence of the quality of the new member state of the international community.

2.2. Conventional and customary rules applicable to the succession of states

A first point to note is that the rules contained in the Vienna Convention on the Succession of States to Treaties and the Convention on the Succession of States to Assets, Archives and Debts are not universally applicable. First, only the 1978 Convention on the Succession of States to the Treaties entered into force on 6 November 1996, following the deposit of the Fifteenth Instrument of Ratification or Accession (it should be noted that at the time of the dismemberment of the U.R.S.S. and Yugoslavia, the convention was not yet binding).

Secondly, the rules contained in the two conventions are supplementary, applying only in the absence of an agreement between the successor states / between the successor states and the predecessor state. Thirdly, it should be noted that not all the rules contained in the two conventions codify existing customary rules, which is why they may be recognized as binding. Therefore, it will be necessary to examine those rules which are recognized as being customary.

With regard to the Vienna Convention on the Succession of States in the Treaties, it adopted three hypotheses according to the criterion of the nature of the territorial change: the succession to a part of the territory, the succession of newly independent states and the succession of unification and separation of states.

Summarizing the provisions of the 1978 Vienna Convention, we specify the following aspects of the rules on the succession of States to the Treaties:

- in the event of the transfer of a territory, the applicable rule is that of the modification of the territorial limits to which a treaty applies (Article 15);

- with regard to the emergence of a new independent state, born of the decolonization process, the principle adopted by the Convention is that of the new state's freedom to choose to maintain or terminate the treaties of the predecessor state (art. 16-30) – the successor state concluding agreements devolution with the predecessor state. We note that, in the case of closed bilateral or multilateral treaties, the consent of States Parties is required for the maintenance of that treaty, the mere will of the successor State, expressed in the return agreements, not to have effect against third parties.

- another hypothesis adopted by the Convention is that of the separation and dismemberment of a State, in which the principle of continuity was observed (art. 31-35): „the maintenance by the successor State of the treaties which bound the predecessor State in respect of the whole of its territory".

The interpretations that could be given to this idea would be twofold: on the one hand, it could be argued that the rule requires the transmission of treaties in all situations, including to the „successor state" without regard to its status as successor or successor; on the other hand, it could be argued that the provisions of the Convention apply only in succession situations – in which case the new state has another legal personality in international law. In the event of continuity, the maintenance of the treaties is a normal consequence of maintaining the existence of the state, and not an effect of the Convention. We consider that the correct interpretation would be second, due to the fact that the rules of the 1978 Vienna Convention have a supplementary character, and it could not be argued that in case of continuity of legal personality, the rule of treaty would have a supplementary character, its legal basis, being the very principle of pacta sunt servanda.

It is considered in doctrine that some of the rules of the 1978 Vienna Convention have become customary. Thus, it is considered customary to maintain the objective treaties, the relative effect of the return agreements, the absence of the effect of the unilateral regulation of the successor state – deriving from the very consensual nature of international law, the customary rule of the variability of the territorial limits of treaties in the case of a transfer of territories.

Regarding to the Vienna Convention on the Succession of States to Assets, Archives and Debts, only five States have given their consent to this document, with the minimum number of ratifications for entry into force being 15. As in the case of treaties, the rules on the succession to property, archives and debts are applicable according to the nature of the change.

It is noteworthy that it distinguishes between the separation of a territory and the dismemberment of a state, the first situation assuming the continuity of the legal personality of the predecessor state, and the second implying the quality of „successor" of all states resulting from the dismemberment process.

We briefly present the essence of the rules provided by the Convention, following to identify those provisions which are recognized as having a customary character:

- in the case of the transfer of a territory, the principle of territorial ownership in respect of assets (the successor State acquires the real estate located in the transferred territory and the furniture assigned to that territory) and the principle of equitable distribution in respect of debts are applicable;
- In the case of the creation of a new independent state, the applicable principles are territorial ownership over assets and full sovereignty (tabula rasa principle) over debts. With regard to property, the Convention adds the rule of transfer to the successor State of

property which belonged to that territory and became the property of the predecessor during the period of dependence and of those property to which the territory contributed;

- the unification of states presupposes the transfer in full of the goods to the successor state;

- with regard to the separation of a territory (secession) the applicable rules derive from the principle of territorial belonging (real estate and movable property assigned to the territory) the principle of equitable distribution (with regard to debts and other movable property) and the principle of continuity of the predecessor state (in terms of maintaining its ownership of property located outside the territory of the predecessor);

- in case of dismemberment of a state, the principles of territorial affiliation (real estate and movable property assigned to the territory) and the principle of equitable distribution (debts, real estate located outside the territory, as well as other movable property) are applied;

- It is noted that the difference in legal status between secession and dismemberment refers only to the status of real estate located outside the territory of the predecessor state.

An important part of the doctrine, however, recognizes the customary value of certain rules concerning the succession to property, archives and debts.

These rules would include: the transfer of real estate located in the territory concerned and of the furniture assigned to this territory, the equitable distribution of debts and goods located outside the territory, the customary rule of the transfer of localized debts.

2.3. The reflection in the conventional regulation of the distinction succession – continuity

Although the distinction between succession and continuity of legal personality is not explicitly mentioned, certain considerations can be made regarding its reflection in the regulation of the two conventions. Thus, some of the territorial changes governed by the two Conventions automatically presuppose the continuity of the legal personality of the predecessor State.

Thus, in the case of the transfer of territories and the establishment of a new independent state, it appears obvious that the predecessor state maintains its existence, the resulting subject of international law being „identical" to the predecessor state.

The hypothesis of unification is not regulated by the Conventions, in the sense that it may appear in the form of absorption – in which case the legal personality of one of the merging states continues (the case of Germany) – or merger – in which case the predecessor states cease to exist (the case of Yemen). In the case of the unification of states, this distinction is resolved by the Treaty by which the states consent to the unification of the territories, the problem thus obtaining a relatively simple solution.

The most sensitive issue is the lack of regulation of the distinction between secession and dismemberment. Although the Vienna Convention on the Succession of States to Assets, Archives and Debts lays down different rules for these two situations (as stated above, the only difference is in the regime of real estate located outside the territory), there is no regulation on whether a certain territorial change is a case of secession or dismemberment, especially if the states resulting from that territorial change do not agree on this: one of the „successor" states claims to be the successor to the legal personality of the predecessor, the other successor states not agreeing with this position.

The question has been raised, in the doctrine, whether a state resulting from a process of territorial modification (a „dismemberment" from which to result several states, one of which „claims" the quality of successor) may be a successor in some fields and a successor in other fields. Some authors believe that this „interpenetration" is possible: „identity or continuity can be accepted by the international community regarding certain specific issues while it can be denied in others. It is obvious, however, that the reduction of the concept of „identity" to that of „partial identity" gives rise to a complex of theoretical and practical problems." On the other hand, however, firm opinions were expressed in the sense of the impossibility of the coexistence of the quality of successor state with that of successor state. in this regard, in a letter to the Secretary-General of the United Nations On 7 February 1994, the Ambassador of Slovenia to Danilo Turk stated that: „A state cannot cease to exist for certain purposes and continue for others."

The second solution appears to be in accordance with the principle of sovereignty and the notion of succession provided for by the two Conventions and generally accepted by international law. The second solution appears to be in accordance with the principle of sovereignty and the notion of succession provided for by the two Conventions and generally accepted by international law. Due to the fact that „succession is the replacement of one state with another in terms of responsibility for the international relations of a territory" and given that the succession involves the cessation of the exercise of sovereignty of the predecessor state and the exercise of new sovereignty, the successor state would not appear „normal", that one state exercises its sovereignty in certain respects and another in other respects.

Summarizing a brief conclusion, we can say that the rules of international law do not establish criteria to determine whether a territorial change is a „dismemberment" or „secession", in the absence of an agreement between the parties. We consider that the practical importance of establishing this distinction is not limited to the legal status of immovable property located outside the territory of the predecessor (Articles 17, 30 and 40 of the 1983 Convention). The importance of this distinction is mainly determined by the establishment of an automatic continuity in terms of the rights and obligations arising from the international treaties to which the „predecessor" state was a party and in the field of participation in international organizations.

3. The legal consequences of affirming / refuting continuity

3.1. The issue of continuity of obligations contained in international treaties

With regard to multilateral treaties, there is no doubt that the successor state must not „become" a party to the multilateral treaties of the predecessor state, this quality being recognized by law. For example, such declarations were made at the Fourth Geneva Conventions of 1949 in the Field of the Law of War and the Additional Protocols (January 13, 1992), Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed in Washington on March 3, 1973 (same date) etc.

A special situation is represented by the multilateral conventions which have the quality of constitutive act of an international organization.

Undoubtedly, these treaties will terminate the relationship between the successor state and the third state, with the possibility of taking over certain rights and obligations by the successor state to whose territory the regulated situation refers, under the agreement of will between that successor state and the third state.

However, in the relationship between the successor State and the third State, the legal basis for the termination of these treaties could be identified, rather, in the application of the rule of Article 61 of the Vienna Convention on the Law of Treaties, the disappearance of the object of the treaty. in the rules of state succession.

As a brief conclusion regarding the maintenance of the rights and obligations of the treaties, it is necessary to emphasize the fact that it is characterized by universality and imperative. Thus, if the rules on the transmission of treaties by succession are of a supplementary nature and may be amended by agreement between the successor / successor States and the predecessor State, the maintenance of the rights and obligations of the successor State cannot be removed. Thus, the successor state will not be able to „select" unilaterally certain conventional provisions, being obliged to comply with all the rules of the bilateral and multilateral treaties by which the predecessor state was obliged.

In conclusion, the assertion of the status of „successor" state, on an equal footing with the other successor states, had as a consequence:

- the transmission of conventional rules based on the customary right of succession of states to treaties (and not the maintenance of the universality of rights and obligations);
- the need to join international organizations;
- the distribution of assets, archives and debts between successor states.

4. Conclusions

Recognition of a new state can be defined as the unilateral act by which one or more states agree, explicitly or implicitly, to consider a new political entity as a state and admit that it is subject to international law, so it has the capacity to acquire rights and to assume international obligations.

Recognition is the unilateral act by which a State ascertains the existence of facts which may have consequences for its rights and obligations and expressly states or implicitly accepts that its future international relations will be built in the light of those facts[11]. In a legal order based essentially on the will of the states, the institution of recognition is very important. It has applications in many fields, regarding extremely diverse facts such as: recognition of states, recognition of governments, belligerence, recognition of the status of permanent neutrality, recognition of an imperative norm etc.

Romanian specialized authors have generally spoken in favor of the idea of a considers the European Union as a sui generis form of association, close to the confederation of states, but does not meet the conditions of a federal state[12]

Within the European Union, there are competences which have been transferred to the Union, each Member State participating in their exercise, together with the other Member States of the European Union, competences shared between the Union and the Member States and national competences, which belong exclusively to the States.

There is no question of the succession of international law, because a state does not disappear and a new state does not appear, not being a predecessor state and a successor

[11] Jose Maria Ruda, Reconnaissance d'Etats et de Goberno, in International Law: Balance Sheet and Perspectives, Editor-in-Chief M.Bedjaoui, 1991, pp. 471 ff; Nguyen Quoc Dinh, A. Pellet, P. Daillier, Droit international public, 6 edition, Paris, 1999, page 550.

[12] Constanţa Călinoiu, Victor Duculescu, European International Law, Lumina Lex Publishing House, Bucharest, 2008, page 86.

state. In such a situation, the rule of variability of the territorial limits of the application of international treaties applies[13].

With regard to the consequences of establishing the status of successor state, the principle of maintaining the full rights and obligations resulting from international treaties – including participation in international organizations – was emphasized.

Therefore, objective and subjective criteria for determining the quality of the successor state and a „consolidation" of this quality in the matter of goods and debts, this is what the new cases offer in international law.

Bibliographical references

[1] The Romanian Constitution of 1991, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003;

[2] Law no. 590/2003 on treaties, published in the Official Gazette of Romania no. 23 of January 12, 2004;

[3] Victor Duculescu, (2000) The law of state succession. International treaties and issues of state succession, Veritas Publishing House, Târgu-Mureş;

[4] Titus Corlăţean, (2012) The Succession of States in International Law, Universul Juridic Publishing House, Bucharest;

[5] Ion M. Anghel, (1998) Subjects of international law, Lumina Lex Publishing House, Bucharest, 1998;

[6] I. Stoian, E. Dragne, M. Stoian, (1997) International trade. Techniques and procedures, vol. II, Caraiman Publishing House, Bucharest;

[7] Dominique Carreau, (2007) International Law, 9th ed., Editura A. Pedone, Paris;

[8] Dumitru Adrian Crăciunescu, (2002) Public International Law, Mirton Publishing House, Timişoara;

[9] Constanţa Călinoiu, Victor Duculescu, (2008) European International Law, Lumina Lex Publishing House, Bucharest;

[10] Ion Diaconu, (2010) Handbook of public international law, Lumina Lex Publishing House, Bucharest;

[11] Victor Duculescu, (2008) Legal protection of human rights, 3rd edition, revised and completed, Lumina Lex Publishing House, Bucharest;

[12] Nicolae Ecobescu, Victor Duculescu, (1995) The Law of Treaties, Continent 21 Publishing House, Bucharest;

[13] Nguyen Quoc Dinh, Patrick Daillier, Allain Pellet, (1999) International Public Law, 6th edition, Paris, LGDJ;

[14] Geamănu Grigore, (1982) Public international law. Treaty, vol. I, Didactic and pedagogical publishing house, Bucharest;

[15] Raluca Miga-Beşteliu, (1998) International law. Introduction to public international law, All Publishing House, Bucharest;

[16] Gheorghe Moca, (1999) Public International Law, ERA Publishing House, Bucharest;

[13]Ion Diaconu, Handbook of Public International Law, Lumina Lex Publishing House, Bucharest, 2010, page 427 et seq.

[17] Diana Olar, (2008) The succession of the states to the treaties in relation to the nature of the conventions and of the obligations deriving from them, Pro Universitaria Publishing House, Bucharest;

[18] Diana Olar, The Succession of States to International Treaties, in Studies in Romanian Law no. 3-4/2001;

[19] Adrian Năstase, Bogdan Aurescu, C. Jura, (2006) Public International Law, CH.Beck Publishing House, Bucharest;

[20] Nicolae Purdă and the team, (2008) Public international law, University Publishing House;

[21] George Sofronie, (1935) Public International Law, Cluj;

[22] Jure Vidman, (2009) Democracy and state creation international law, PhD thesis – University of Nottingham;

[23] James Craword, A. Pellet & S. Olleson, (eds) (2010), The Law of International Responsibility, Oxford University, Press;

[24] C. Wilfred Jenks, (2020) European Journal of International Law, volume 31, Issuse;

[25] Jose Maria Ruda, (1991) Recognition of States and Government, in International Law: Review and Perspectives, Editor-in-Chief M.Bedjaoui;

[26] Nguyen Quoc Dinh, A. Pellet, P. Daillier, Droit international public, 6 edition, Paris.

Section D

DEBARMENT FROM SUCCESSION. BRIEF EXPOSITION ON THE CRIMES THAT ATTRACT THE *DE JURE* DEBARMENT FROM SUCCESSION

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Abstract

The matter of successions involves a number of complex elements that are closely related to other legal institutions that come from including other branches of law.

The connection between the field of inheritances and criminal law derives from the importance of the conditions that the successor must meet in order to be able to inherit.

The de jure debarment is a civil law sanction that intervenes in the case of committing very serious crimes against the person and that due to the consequences produced attracts such an impact on the perpetrator.

The conditions that must be met in order for a crime to be confined to the sphere of those who attract the de jure debarment, refer to a series of objective as well as subjective criteria that are in turn closely related. Among these, the crimes of murder and aggravated murder are the most common, which attract such a civil law sanction on those who are found guilty of committing such acts against the deceased.

Keywords: *inheritance, debarment, crimes, murder*

1. Introduction

The family has been one of the most important factors in the history of mankind for the formation and development of the human personality and that is why, in all the laws of the contemporary world, it is protected by various moral or legal norms. In Romania, special attention is paid to the protection of the family and the social relations that are established between its members, on the one hand, and between them and the existing institutions in the state, on the other hand. [1].

Thus, given the importance of the family for society, the legislator considered it necessary to pay special attention to the legal framework by which family relationships are protected and thus the assets of its members. In this sense, we find provisions in the Constitution, the Civil Code, the Penal Code as well as in other laws provisions that regulate the manner of sanctioning those who harm persons from the perspective of criminal law. In order to complement them, where appropriate, certain special sanctions of a civil nature intervene, in order to complete their purpose.

Romanian legislation has a long history of criminalizing such acts of particular gravity, the texts of the law being adapted over the years according to new social realities, as well as the need to provide the judiciary with legal instruments to punish those guilty in accordance to the severity of the crimes committed.

In addition to the criminal punishment, as I have stated, in certain situations civil sanctions may be ordered, such as the debarment (unworthiness) of succession which represents the forfeiture of the heir, legal or testamentary, from the right to collect a certain

inheritance; including the right to collect the reserve to which he was entitled from this inheritance, because he was guilty of a serious act against either the one who leaves the inheritance or against a successor of his. [2]

According to Article 958 of the Civil Code „the *de jure* debarment from succession applies to:

a) the person convicted of a criminal offense with intent to kill the one who leaves the inheritance;

b) the person criminally convicted of committing before the opening of the inheritance, an offense with intent to kill another successor who, if the inheritance had been opened at the time of the act, would have removed or restricted the perpetrator's vocation to inherit.

If the conviction for the deeds mentioned in par. (1) is prevented by the death of the perpetrator, by amnesty or by prescription of criminal liability, the debarment operates if those facts have been established by a final civil court decision.

The *de jure* debarment can be established at any time, at the request of any interested person or ex officio by the court or by the notary public, on the basis of the court decision resulting in the debarment."[3]

In this study we have undertaken a detailed analysis of the offenses that have the ability to attract the sanction of the *de jure* debarment. The offenses identified as exponents for the imposition of such a sanction were analyzed both from the perspective of the conditions that must be met to attract the debarment, and from the perspective of criminal law, in order to understand the implications of committing them.

2. **The *de jure* debarment**

Considering that in society there are many cases of breaches of the rules established between people, on the one hand, and on the part of the competent institutions which must ensure a favorable climate for the life and work of the members of society, a series of legal norms have been established by which the values shown are protected. In the case of acts with a low degree of social danger, social cohabitation relations are protected by extra-criminal legal means, civil law, administrative law etc., against the more serious acts, these relations are also protected by means specific to criminal law. [4].

As is apparent from Article 958 of the Civil Code, a first condition relating to the *de jure* debarment refers to the need to convict a person of an offense with intent to kill the individual leaving the inheritance.

In the doctrine, it is shown that this civil sanction, in addition to the criminal one is justified by the idea that it would be unfair and contrary to good morals and public order for a person who commits serious acts to be called upon to inherit the person he killed or that he tried to kill. As decided by the Constitutional Court of Romania [5], „the perpetrator of a murder cannot claim the same legal status as other citizens, among which he self-excluded himself by his deed, so that the debarment instituted in respect of him does not contravene the provisions of Articles 16 and 20 of the Constitution. It would, moreover, be deeply immoral for the law to recognize the perpetrator of the crime of murder the right of inheritance over the estate of his own victim".[6]

Another case arising from Article 958 of the Civil Code which refers to the fact that there should be a person convicted of a criminal offense for committing, before the opening of the inheritance, an offense with intent to kill another successor who, if the inheritance had

been opened on the date of the deed, it would have removed or restricted the perpetrator's vocation to inheritance.

We will try not to deviate from the analysis of the topic proposed in this study, so we will further detail the offenses that may lead to the sanction of the *de jure* debarment, practical situations in which we may encounter such prohibitions, problems arising in judicial practice and those revealed in other analyzes, as well as possible legislative remedies.

3. **Offenses that attract the *de jure* debarment**

The crime of murder as provided for in Article 188 of the Penal Code is the killing of a person and a penalty of between 10 and 20 years in prison.

As can be seen, the text incriminating the murder is particularly concise and refers only to the murder of a person. This text is in conjunction with the provisions of Article 16 (6) of the Penal Code, according to which only an act committed intentionally in the absence of an express provision of guilt is considered an offense. It follows that Article 188 of the Penal Code refers to the act of a person who intentionally murders another person. The form of guilt required for the crime of murder also results if we refer to Article 192 of the Penal Code, where the legislator distinctly incriminated manslaughter. Guilt is demanded in the form of intent, in both ways, direct and indirect. [7]

Therefore, the most important condition is met in such a case, as the intention (direct or indirect) is the characteristic form of guilt characteristic of the crime of murder.

We consider that the legislator sought to sanction the perpetrator who deliberately proceeded to kill or attempt to kill the *de cuius* or a successor thereof, in which case it would be immoral to allow him to inherit his own victim.

Regarding the objective side, we consider that we should not highlight certain issues, as what is important is the socially dangerous result represented in this case by the death of the victim and the connection between the victim and the perpetrator, as a possible successor of the victim by the perpetrator.

Therefore, the crime of murder as provided for in Article 188 of the Penal Code is the typical form, the simple method of the act of murder. The crime of murder, in its typical form, can present numerous and varied factual modalities, determined by concrete circumstances in which it was committed (means used, place and time of the perpetrator, relations between perpetrator and victim, motive of the deed) [8].

The offense of aggravated murder involves, as a difference from the act of murder in the simple version, the commission of the criminal act in one of the conditions specifically listed in Article 189 of the Penal Code as follows: „Aggravated murder is murder committed under any of the following circumstances:

a) with premeditation;

b) for a material interest;

c) in order to avoid or to help another individual avoid criminal liability or the service of a sentence;

d) in order to facilitate or conceal the commission of another offense;

e) by an individual who committed other murders or attempted murders previously;

f) against two or more individuals;

g) against a pregnant woman;

h) with cruelty,’’

Practically, due to the circumstances listed above, the crime of murder always acquires an increased degree of social danger. Due to these aspects, they were incriminated in separate texts as aggravated variants, thus becoming independent crimes.[9].

From the above, we consider that it is clear that the crime of murder and aggravated murder, as provided for in the current Criminal Code in Article 188 and Article 189 respectively, entail the application of the civil provisions on the *de jure* debarment from succession, fulfilling exactly the conditions imposed by law both with respect to the objective side and to the subjective side.

The crime of murder or aggravated murder can be committed either in consummated form or remain in the attempted phase, it being important that the deed be committed on the heir or another successor who would have removed or restricted the perpetrator's vocation to inherit, if the inheritance had been opened on the date on which the deed was committed.

We note that the legislator attaches special importance to the passive subject of this crime, which is from the perspective of civil law a qualified one, and cannot be other than the person with whom the perpetrator has a blood relationship, either a testamentary link to be a successor or another person with whom he could enter into competition for the debate over his *de cuius* inheritance.

The blood or emotional connection that would justify a possible will makes such an act all the more dangerous, as it is necessary to sanction the perpetrator, including from a civil perspective, by applying the *de jure* debarment.

In addition, it is necessary to have a final judgment convicting the perpetrator for committing the crime of murder (aggravated murder) or attempting to commit one of these crimes. The reason for the final decision is that until then, the possible successor benefits from the presumption of innocence and thus cannot be subject to a criminal penalty, namely the civil sanction of the *de jure* debarment.

A possible hypothesis in which the perpetrator can still have the quality of successor even if he threatened the life of the *de cuius* is the removal of the effects of the *de jure* debarment by means of a will or a notarial deed, as provided for in Article 961 of the Civil Code. Thus, the pardon of the one who leaves the inheritance is equivalent to a lack of effects for the *de jure* debarment, the person in question being able to inherit from the deceased.

Along with the crimes described above, we can also include the act of „Killing upon request by the victim" provided for in Article 190 of the Penal Code and consisting of „Killing committed upon explicit serious, conscious and repeated request by a victim suffering from an incurable disease or from a serious impairment, attested medically, which causes permanent and unbearable suffering".

The legal object is identical to that of the crimes analyzed above, being about the right to life of the person, the social relations whose normal development implies respect for human life, its protection. Specific to this attenuated variant of murder is the fact that the right to life is protected even in situations where a certain person wants to give up his right, in exceptional conditions, where he is affected by an incurable disease or a serious illness that causes him suffering which is hard to bear.[10]

On the subjective side, the crime of killing at the request of the victim is committed with direct or indirect intent. [11] because the nature of this crime presupposes that the perpetrator fulfills the victim's wish in the sense of pursuing the production of the socially dangerous result, their death. Therefore, the most important condition (the subjective one) is

fulfilled, so that, if an act will fit in the pattern provided in Article 190 of the Penal Code, it will attract the sanction of the *de jure* debarment on the perpetrator.

Another offense that falls into this category of those who can attract the *de jure* debarment is the killing of the newborn by the mother under Article 200 of the Penal Code which states that, „Killing of a newly-born baby immediately after birth, but no later than 24 hours, committed by a mother who is in a state of mental disorder shall be punishable by no less than 1 and no more than 5 years of imprisonment".

By incriminating the killing of the newborn, his life is protected, the social relations that require respect for life from the beginning. [12]

From our point of view, including in the case of this crime, as in the case of the others, the conditions provided by law are met, respectively those inserted in Article 958 Civil Code, as it is about committing an intentional act that results in the death of the newborn child. Therefore, as in the case of the crime of murder at the request of the victim, it is a murder, even if it is treated more gently given the state of mental disorder that the mother is going through due to the birth at the time the deed is committed. This special circumstance in which the deed is committed is not, in our opinion, capable of leading to the removal of the provisions establishing the rules regarding the *de jure* debarment being valid the reasoning set out in the case of the crime analyzed above.

In addition, another act which presents a particular danger but which does not fall within the pattern provided by law for attracting the sanction of the *de jure* debarment is the determination or facilitation of suicide provided for in Article 191 of the Penal Code.

Such an act has an important peculiarity, in relation to the other crimes against life. This peculiarity consists in the fact that some activities are incriminated which only indirectly lead to the suppression of a person's life, more precisely to a self-suppression of life or to an attempt of this kind. [13]

The act of determining or facilitating suicide, in order to be punished, must be committed with direct or indirect intent, and it is therefore necessary for the perpetrator to provide that the victim, as a result of his activity, urging or facilitating, will commit suicide and to want or accept this result. The intention to determine or facilitate the suicide results from the character of the committed acts, from the concrete circumstances in which it was acted and the mental state in which the person who committed suicide or who tried to commit suicide was.[14]

Even if it is an atypical act, not *stricto sensu* an act of murder, we appreciate that the determination or facilitation of suicide is much more serious than killing at the request of the victim, which is considered to be a deed that attracts the *de jure* debarment, so especially in this case this sanction should take effect. It must also be borne in mind that the perpetrator seeks to produce his share of the inheritance faster than he normally would have received it by producing the consequence (the death of the heir).

In this context, other dangerous crimes such as manslaughter, battery and bodily harm causing death, robbery or piracy that resulted in the death of the victim, unlawful deprivation of liberty resulting in death of victim, rape resulting in death of victim, sexual assault resulting in death of victim, even if they result in the death of the injured person, they do not lead to the forfeiture of the perpetrator's right to a *de jure* inheritance, as they were committed either through fault or with intent (in this last situation, the death of the injured person being the most serious result that was not pursued by the perpetrator, but occurs through fault).

The subjective side is of particular importance, since as it results from the conditions that must be met in order to be attracted as a sanction the *de jure* debarment, the intention (direct or indirect) is necessary, any other form of guilt, even if the deed itself is particularly serious because of its content, could attract judicial debarment.

According to Article 959 of the Civil Code, after committing one of the above acts, the court will be able to assess whether the conditions provided by law are met and it is necessary to sanction the perpetrator with the debarment as a result of committing that crime against the person who leaves the inheritance.

4. **Conclusions**

The facts which give rise to the sanction of the *de jure* debarment are of particular complexity and must be carefully assessed for the correct application of the provisions governing the provisions of Article 958 et seq. of the Civil Code.

Life is of inestimable value, and the act of taking the life of a person or at least attempting to commit such an act must not go unpunished in any form, regardless of the reasons or circumstances underlying such an act, and in certain situations it is not justified to sanction the perpetrator from a criminal perspective, being necessary to take additional measures, such as the disposition of the *de jure* debarment against the perpetrator.

For these reasons, we consider that in the case of such crimes due to the dangerousness of the perpetrator, respectively his purpose to collect the inheritance prematurely, it is necessary to take such a measure.

In our view, the category of offenses that may lead to such a sanction should be reconsidered, as it currently exists as we have shown during this study, a number of discrepancies as to the facts which may lead to such a sanction, the correction of these provisions ensuring a uniform practical applicability and correct and realistic solutions.

In this regard, we consider that committing an act of determining or facilitating suicide should be sanctioned with the *de jure* debarment, due to the particular danger that such an act entails, similar to that in the case of murder in the classic version.

Bibliographical references

[1] Pascu, Ilie; Gorunescu, Mirela (2008), Drept penal. Partea specială (Criminal law. The special part), Hamangiu Publishing House, Bucharest, p. 604.

[2] Deak, Francisc; Popescu, Romeo (2013), Tratat de drept succesoral. Vol I. Moștenirea legală (Succession treatise. Vol I. Legal inheritance), Universul Juridic Publishing House, Bucharest, p. 95.

[3] The Civil Code, adopted by Law no. 287/2009, published in the Official Gazette. no. 511 of July 24, 2009.

[4] Pascu, Ilie; Buneci, Petre; Buneci, Bogdan (2020); Drept penal. Partea specială (Criminal law. The special part), Hamangiu Publishing House, Bucharest, p. 466.

[5] Decision no. 530 of November 13, 2005 of the Constitutional Court of Romania, published in the Official Gazette. no. 1040 of November 23, 2005.

[6] Deak, Francisc; Popescu, Romeo (2013), *op. cit.,* p. 98.

[7] Cioclei, Valerian (2019), Drept penal. Partea specială I. infracțiuni contra persoanei și infracțiuni contra patrimoniului (Criminal law. Special Part I. Crimes against the person and crimes against property), C.H. Beck Publishing House, Bucharest, p. 15.

[8] Boroi, Alexandru (2021); Drept penal. Partea generală (Criminal law. The general part), C.H. Beck Publishing House, Bucharest, 2021, p. 43.

[9] Boroi, Alexandru (2021), *op. cit.,* p. 43.

[10] Cioclei, Valerian (2019), *op. cit.,* p. 39.

[11] Udroiu, Mihail (2021), *Sinteze de drept penal. Partea specială. (Criminal law summaries. The special part) Vol I,* C.H. Beck Publishing House, Bucharest, p. 75.

[12] Cioclei, Valerian (2019), *op. cit.,* p. 99.

[13] Cioclei, Valerian (2019), *op. cit.,* p. 41.

[14] Boroi, Alexandru (2021), *op. cit.,* p. 63.

DISTRIBUTION OF ESTATE ASSETS. RULES OF PROCEDURE AND DISTINCTIVE FEATURES. CASE PRACTICE OF COURTS

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Abstract

The succession procedure benefits from an appropriate and unitary regulation by means of the provisions of the Romanian Civil Code (article 953 – article 1163 being the regulatory provisions dealing with inheritance) and of the Romanian Code of Civil Procedure (article 980 – article 996 being the provisions dealing with the procedure for legal division of property).

Much has been said about the division of the succession. If we take a look at the history of the Code, we could say that there would be no more (litigious) matters to surprise us. However, major topics such as the one covered in this material will always require a lot of consideration and analysis.

The case-law has often ruled on the fundamental notions of the succession procedure relative to the revealed facts and the arguments put forward in the actions brought before the national courts, but the definition or redefinition of some notions remains the subject of doctrinal and jurisprudential disputes.

The manner of application of the rules of law in question also depends on how such subjects are answered, where the scope is observed in the solutions of judicial and notarial practice.

Keywords: *distribution, division, judicial practice, decision, court, appeal, second appeal*

Section 1. Argument of the paper. Right to a final judgment within a reasonable time

This paper aims at summarising the decisions of the courts in the interpretation and application, in specific cases, of the provisions on inheritance.

The recent court decisions (first instance, appeal and second appeal courts), analysed hereinafter, bring the subject of distribution back to the table.

The jurisprudential guidelines (some of which are noteworthy) cause us to start thinking (again) about this old legal concept – inheritance and how it is divided.

Going through these decisions and having regard to the specifics of the criticism, I can say that the simple assertion of the capacity of party entitled to the succession results in the machinery of justice being set in motion.

Based on my own judgment, there is no pattern in this matter for all cases encountered in practice, but the practical solution may differ on a case-by-case-basis depending on the

requests made by the parties and the information they provide, where they themselves are often ignorant.

The structure of the topic and the manner of presentation mainly aims at showcasing the judicial practice decisions (maintaining contact with the practice has a considerable contribution, because no matter how much we know about the doctrinal opinions or the institutions of succession law it would be difficult to figure out what the problems are), given that the courts clarify the controversial issues.

The distribution of assets (when it comes under the control and power of the courts) seems to be a long process, perhaps unreasonably lengthy and the active role of the judge (that of peacemaker, expressly conferred by the provisions of article 983 of the Code of Civil Procedure, in addition to the one conferred by article 21 of the same Code, as a duty serving as fundamental principle of a civil proceeding) seems to have completely eluded them, since the parties are more often than not in open conflict (as a division based on agreement is a goal difficult to achieve).

The decisions of the courts (in the presentation) remain final as at 2021 for the cases where estate distributions have been initiated a long time before, with the notion of reasonable duration of the proceedings being deeply impacted[1].

Distributions of estate assets are, without a doubt, complex cases in relation to the issues at stake in the dispute (both factual and legal), with plurality of parties (co-participation in the proceedings as plaintiff or defendant), with ample evidence to be obtained and with the mark of unpredictability of the behaviour of the persons subject to legal proceedings.

The right to a final judgment within a reasonable allocated time[2] continues to indicate a deficiency in the functioning of the judiciary.

Section 2. Case-law issues

Having analysed the case-law it follows that both the procedural issues and the substantive law issues are representative for the topic being approached and they will be structured as such in the contents of the paper.

Court decisions remain, in essence, the acts that restore the rights protected and guaranteed by the law and the right to action must be exercised in good faith, according to the purpose for which it is recognised by law (article 13 of the Code of Civil Procedure).

The cited case-law has been chosen from the important and/or recent judgments and decisions (most final) of the Bucharest Court of Appeal – Third and Fourth Civil Divisions, published in the computerised system.

The legal subject addressed (in the case considered relevant) is summarised (by taking the decisive, determining considerations from the judgment) and followed by the ***statement***

[1] The Court (ECHR) has repeatedly reaffirmed the importance of administering justice without delays which might jeopardise its effectiveness and credibility (Scordino v. Italy (No. 1) (Grand Chamber), § 224). If the Court finds in a State the existence of a practice that is incompatible with Convention which results from the accumulation of breaches of the „reasonable time" requirement, this accumulation constitutes an „aggravating circumstance regarding a breach of article 6 § 1 [Bottazzi v. Italy (Grand Chamber), § 22; Scordino v. Italy (No. 1) (Grand Chamber), §. 225]

[2] I used the notion of „*reasonable time*" (as a measure of the duration of the proceedings) to the detriment of the notion of „*reasonable time limit*" in the spirit of the ECHR case-law (Vocaturo v. Italy, Cappello v. Italy) and of the definition of the procedural time limit – as mentioned in article 180, paragraph 1 of the Code of Civil Procedure – as the time set by law or court to take or not to take a procedural step.

of own opinions of the author of the paper (in addition to those put forward by courts or concurrent opinions) and may constitute a source of concrete examples, of rules of (succession) law serving as a basis for a court decision.

The opposition between the notion of „theoretical law" or „abstract" and the notion of „living law" or „concrete" is not new"[3].

2.1 Subsection. Case-law subjects – in procedural terms

2.1.1. Subsection. Last domicile of the deceased. Motion to dismiss because of lack of international jurisdiction. Exclusive jurisdiction set out in Regulation (EU) No. 650/2012

By its civil judgment no. 3474/3 April 2018 rendered by the District 2 Court of Bucharest in the case file no. 24995/300/2017 the court admitted the motion to dismiss because of the lack of international jurisdiction in the case regarding the plaintiff B.E.A. acting against the defendant I.C. and dismissed the request for succession following the death of I.E. as inadmissible.

The court held that the last domicile of the deceased was in Italy and not in Romania, according to the civil judgment no. 15278/19 December 2016 delivered by the District 2 Court of Bucharest whereby the death of the deceased – which occurred in 2008 in Italy – was declared, case in which the provisions of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession were applicable and as a result it was established that the Italian courts in whose territory the habitual residence of the deceased was located had jurisdiction to settle the case in matters of succession.

The court of first instance correctly indicated that in the matter of debating the successions the last actual domicile was of interest, not the domicile appearing in the identity card or registered in the death certificate.

The determination of the last domicile of the deceased with the power of *res judicata* as being in Italy causes Regulation (EU) No. 650/2012 to be applicable, therefore it was established that the Italian courts in whose territory the habitual residence of the deceased was located had jurisdiction to settle the case in matters of succession.

Such jurisdiction is exclusive and cannot be attached to the alternative jurisdiction relied on by the appellant, which concerns only the situation in which the deceased's last domicile was located in the country.

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[3] Marin Voicu, university professor, PhD, honorary member of the Academy of Scientists, President of the Department of International Law and Comparative Law of the Academy of Legal studies, former High Court of Cassation and Justice judge, former ECHR judge, said in the article „Unele considerații privind aplicarea doctrinei „DREPTULUI VIU" în jurisprudența Curții Constituționale a României": „Having researched the constitutional doctrine and case-law, I have found that there is little concern for the study and application of the doctrine of „living law", the most revealing paper I have identified being „La doctrine du droit vivant" by Caterina Severino, published by „Economica-Press Universitaires D'Aix Marseille" Publishing House, 2003, in the collection „Droit Public Positif", with a „Foreword" by **Louis Favoreu,** a reputable constitutionalist, and a Preface by Alessandro Pizzarusso, a professor with the University of Pisa**. 2.1.** The insight in the preface is illustrative: „*Legal experts are aware of the characteristics of their activity, consisting in operating on two levels: that of setting up rules, general and abstract trends and that of applying them to concrete cases."*

It is therefore irrelevant whether the immovable property in the estate was situated in the country or even in a Member State other than the State in which the last residence of the deceased was found to have been located, since the jurisdiction established by Regulation No. 650/2012 is exclusive[4].

(civil decision no. 757 A/11 May 2021 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 11120/299/2018)

Author's note:

According to article 28 of the Code of Civil Procedure, „(1) The provisions of the procedural law apply to all lawsuits that are heard by the Romanian courts, subject to legal provisions to the contrary. (2) In the case of proceedings having a cross-border element, the determination of the applicable procedural law is made according to the rules contained in book VII".

However, the subject of the last domicile of the deceased in matters of inheritance is also a procedural one (according to article 118 of the Code of Civil Procedure) and a substantive one as well (according to article 954, paragraph 2 of the Civil Code – *The inheritance shall be opened at the last domicile of the deceased. The proof of the last domicile shall be made by means of the death certificate or, as the case may be, the final court decision declaring the death*).

According to the death certificate, the last domicile was in Bucharest, District 2, which, in the analysis of the courts, would have enabled the applicability of the regulation set out in article 1081, paragraph 1, point 6 of the Code of Civil Procedure regarding the preferential jurisdiction of the Romanian courts which are competent to also hear the disputes in which the last domicile of the deceased is in Romania, while the exclusive jurisdiction for the immovable properties left by the deceased abroad is reserved.

The court applies the Romanian procedural law, subject to express provisions to the contrary (expression of the law of the forum referred to in article 1088 of the Code of Civil Procedure).

The matter up for discussion was not only the general jurisdiction referred to in article 4 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012, but, why not, also the subsidiary jurisdiction (referred to in article 10) or *forum necessitatis* (referred to in article 11), in the spirit of the Regulation relied on in recitals (24) and (26) of the substantiation of the act[5].

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[4] Decision no. 52/18 June 2018 of the High Court of Cassation and Justice – Panel for Rulings on Matters of Law regarding the interpretation and application of the provisions of article 27 of the Code of Civil Procedure, published in the Official Gazette. no. 609/17 July 2018;

[5]

24) In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

26) Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law.

2.1.2. Subsection. Lack of options expressed by the parties in the attribution of assets. Court's disregard of the principle of availability. Judgment ruled plus petita

For a *plus petita* case to be applicable, it should be noted that the court did not rule out a claim made by the party, nor did it fail to settle a head of claim, but, admitting the request, granted more than was requested.

In relation to the correct interpretation of the notion of „request" or „claim brought before the court", in the case at hand the arguments invoked by the appellant could not be accepted in the sense that the court of first instance ruled *plus petita*.

Even in the absence of the options expressed by the parties, in a proceeding such as the one in question, the manner in which the distribution was actually carried out, namely by forming and attributing plots of land, was the exclusive attribute of the court, as long as there was no transaction between the parties in this respect and there was no categorical refusal of any of the parties to attribute the immovable property to them, so as to be able to talk about the applicability of the provisions of article 990 of the Code of Civil Procedure on the sale of the asset (through the bailiff or based on agreement).

The fact that the defendant did not expressly request the attribution of the immovable property in kind does not constitute an impediment to the attribution of the asset in kind to the same, as long as the method of carrying out the actual distribution, by forming and attributing lots, is the exclusive attribute of the court.

Moreover, the lack of a living space relied upon by the appellant cannot be the only ground for attributing in kind the entire immovable property subject to distribution to them or for attributing a lot in their possession, since the court has the obligation to take into account the criteria provided by article 987 of the Code of Civil Procedure.

(decision no. 577/25 April 2018 of the Giurgiu Tribunal against the civil judgment no. 706/24 April 2017 of the Bolintin Vale Court; decision no. 195/16 June 2019 ruled that the second appeal against the civil decision no. 577/25 April 2018 of the Bucharest Court of Appeal – Third Civil Division rendered in the case file no. 1351/192/2015 was time-barred)

Author's note

The options expressed by the parties in the attribution of assets are the first criterion and in the view of the legislator of the Code of Civil Procedure (the agreement of the parties being one of the criteria of the distribution of estate assets – listed first in article 988 of the Code of Civil Procedure, particular application of the principles set out in article 3, paragraph 2, paragraph 3 – last part, article 21 and article 983, paragraph 2 of the Code of Civil Procedure).

The options of the parties in the distribution specifically entail requests for attribution of assets from the estate and may be formulated also after the admission in principle.

The „option" is not a request (counterclaim) in its nature since it is not a procedural means by which the defendant formulates own claims against the plaintiff.

The attribution option means a justified preference given to a certain asset, pursuing only the operation of „division into lots" of the asset.

2.1.3. Subsection. Failure to make a claim for succession by way of counterclaim. Interest in filing the appeal

Given that the appellant-defendant did not bring a claim before the court of first instance as part of their counterclaim translated into the opening of the succession and the

establishment of the capacity of heirs of the parties, it results that the request to partially change the judgment fails to deliver any practical use, since the court of first instance did not dismiss any head of claim in the counterclaim, where the ruling was aimed only at the writ of summons.

Regarding the ground for appeal with respect to the manner of settling the counterclaim, the tribunal found that the syllogism exhibited by the first instance in the considerations of the appealed judgment was pertinent and valid, given that the counterclaim dealt solely with the summary of donations, with the inherent effect of this institution of succession law, namely the rendering of the asset making up the object of the gift as part of the distributable estate.

Concerning the ground for appeal with respect to the establishment of the capacity of heirs of the appellants-plaintiffs, the court rejected it on the basis that the court of first instance had not dealt, as part of determining or decisive considerations, with the legal issues of the opening of the succession, of the capacity of heirs of the parties and of the estate, so that the succession rights of the appellant-respondent were not harmed in any way.

(civil decision no. 1332 A/13 May 2019 delivered by the Bucharest Tribunal – Third Civil Division in the case file no. 2441/299/2017*, final by decision no. 387 R/16 July 2020 of the Bucharest Court of Appeal – Fourth Civil Division)

2.1.4. Subsection. Lack of a deadline for owelty payments. Nullity of the decision of the first instance

According to article 633, paragraph 1 of the Code of Civil Procedure, the following are enforceable decisions: 1. the decisions delivered in appeal, unless otherwise provided by law;

It is noted that in the absence of a deadline for owelty payments set by the decision of the first instance, the obligation of the parties to make the owelty payments becomes due on the date when the decision of the first instance becomes enforceable, namely on the date when the appeal decision is delivered.

Thus, the lack of a deadline for owelty payments does not lead to the nullity of the decision of the first instance.

(civil decision no. 1564 A/27 July 2020 delivered by the Bucharest Tribunal – Fifth Civil Division in the case file no. 46976/299/2016, final by decision in second appeal no. 253/18 March 2022 of the Bucharest Court of Appeal)

2.1.5. Subsection. Amount of the owelty payments. Criticism brought directly in the second appeal. Request for a new expert's report

The court of cassation found that the reason related to the amount of the owelty to which the plaintiff was obliged was unfounded, where the owelty resulted from the examination before the court of first instance of the scientific evidence which consisted in the technical expert's report, with respect to which the appellant did not object, while also failing to request the examination of the evidence consisting of the valuation expert's report in the appeal phase, but requested a new expert's report directly in the second appeal, which is inadmissible.

Also, the mere dissatisfaction of the party with the amount of money set as owelty is not sufficient, the appellant being obliged to support their second appeal on at least one of the grounds provided by law.

(decision in second appeal no. 1355 R/3 September 2013 of the Bucharest Court of Appeal – Fourth Civil Division)

2.1.6. Subsection. Request for revocation of fraudulent renunciation of the deceased's estate. Motion to dismiss because of the prescription period of the substantive right to action regarding the formulation of the request

The court of first instance correctly held the applicability of the provisions of article 1122, paragraph 1 of the Civil Code according to which *„the creditors of the party entitled to the succession who renounced the inheritance in their fraud may request the court to revoke the renunciation with respect to them, but only within 3 months from the date on which they became aware of the renunciation".*

The tribunal was of the same opinion as the court of first instance in the sense that the 3-month time limit of the action did not run from the date of publication in the National Notarial Register of Succession Options (R.N.N.E.O.S.) but from the date of becoming aware of the renunciation.

Unlike the general rule established by the previous regulation, according to which the prescription period began to run from the date on which the right to action arose, the 2009 Civil Code establishes a rule that is significantly different from this one.

According to article 2523 of the New Civil Code, the extinctive prescription begins to run from the date when the holder of the right to action became aware or, according to the circumstances, should have become aware of its arising.

The tribunal noted that this rule established two alternative moments from which the prescription period could begin to run, namely, a subjective, principal moment, consisting of the date on which the holder became aware of the arising of the right to action, and an objective, subsidiary moment, consisting of the date on which, depending on the circumstances, the holder should have become aware of the arising of their right of action.

Whenever a special rule, enacted for a particular situation, does not apply, the general rule mentioned above will apply.

In the second appeal, the Court proceeded to the analysis starting from the aforementioned legal provisions, establishing the prescription period of 3 months, the starting point of which being the date on which the creditors became aware of the existence of the renunciation.

Giving effect to these theoretical considerations, the Court finds that the date of registration of the renunciation by the appellant is deemed to be the objective moment when the prescription period starts to run, which, however, is not enshrined in the special provisions of article 1122 of the Civil Code, which establishes exclusively a subjective moment from which the prescription period begins to run, namely when the creditor actually becomes aware of the renunciation of the inheritance.

Consequently, in this legislative context, the Court considers that the purpose of registering the succession option acts in the special register, that of ensuring their enforceability against third parties, is not likely to lead to another conclusion in the pending

case different from the clear provisions of article 1122 of the Civil Code, which constitutes the special applicable rule.

(civil decision no. 32/14 January 2020 delivered by the Bucharest Court of Appeal – Third Division for civil matters and matters involving minor children and families in the case file no. 11775/4/2017 (2162/2019)

2.1.7. Subsection. Preliminary verification of succession records. Submission in appeal of proofs regarding the verification of the succession records

First of all, the failure to meet the requirement to carry out the preliminary procedure regarding the verification of the succession records, referred to in article 109, paragraph 4 of the Code of Civil Procedure, did not result in the rejection of the request as premature.

In the second appeal, the Court held that the legal rule stipulating the obligation of the appellants-plaintiffs to go through the preliminary procedure regarding the verification of the succession records was established in order to eliminate the risk of re-examining, before the court, matters which have previously been debated as part of the succession procedure conducted by a notary.

In this case, by obtaining the two notarial proofs referred to, the purpose pursued by the legal rule was achieved, as long as the result of the investigations of the succession records was the one already shown, namely the non-existence of succession settlement procedures or acts of succession options or testaments regarding the succession of the two deceased.

Even where the appellants-plaintiffs provided proof of such investigation only in the appeal, so after the court of first instance found that the preliminary procedure regarding the succession records had not been complied with, the Court held that the solution of continuing the proceedings within the trial that had already been initiated – which had as its sole basis the reason for establishing the provisions of article 109, paragraph 4 of the Code of Civil Procedure, complied with at the time in the case in question – was consistent with the need that the right of access to court of the appellants plaintiffs was not impacted in any way by the unreasonable report resulting from the restrictive application of a legal rule, even when the purpose of its establishment had been achieved.

(civil decision no. 906/29 November 2016 delivered by the Bucharest Court of Appeal – Third Division for civil matters and for matters involving minor children and families in the case file no. 10970/303/2014 (1745/2016 quashed decision no. 932/A/24 March 2015 rendered by the Bucharest Tribunal – Fifth Civil Division and referred the case back to the same court)

2.1.8. Subsection. Admissibility of the second appeal. Exclusion of the right to second appeal (article 483, paragraph 2 of the Code of Civil Procedure, article XVIII, paragraph 2 of Law no. 2/2013 in conjunction with article 94, point 1, letter j) and article 995, paragraph 3, sentence I of the Code of Civil Procedure). Judgment on a request for legal division of property is subject only to appeal

According to the provisions of article XVIII, paragraph (2) of Law no. 2/2013 regarding some measures for the relief of the courts, as well as for the preparation of the implementation of Law no. 134/2010 regarding the Code of Civil Procedure, in the proceedings initiated during the period between the date of entry into force of this law and 31 December 2018 (time limit thus extended by Government Emergency Ordinance no. 95/2016), the decisions rendered as to the requests provided in article 94, point 1, letters a) – i) of Law no. 134/2010 regarding the Code of Civil Procedure, republished […] are not subject to second appeals.

In this regard, article 995, paragraph 3, sentence I of the Code of Civil Procedure stipulates that „the distribution decision is subject only to appeal."

There are many recent rulings of the courts of appeal that have ruled the inadmissibility of second appeals [1].

Author's note

In my opinion, the solution of the legislator of the Code after 15 February 2013, in accordance with the provisions of article 3 of Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Code of Civil Procedure, for requests for legal division of property, regardless of value, falling within the scope of article 94, letter j) of the Code of Civil Procedure, seems deeply unfair.

The fact that the parties had at their disposal a trial on the merits before the court of first instance and a retrial on the merits, both *de facto* and *de jure*, in the appeal, does not support the decision of the legislator at least in terms of compliance with jurisdiction degrees.

It is true that the dual degree of jurisdiction **[2]**, the basic principle of the judicial and jurisdictional organisation, which ensures the hearing of the cases successively by two courts (first instance and judicial review exercised by way of appeal or, where the appeal is removed, by way of second appeal) is observed.

However, the legal division procedure has had a long history of applying three degrees of jurisdiction, not necessarily as a guarantee of the quality of the act of justice (4), but of the review (solely as to legality) of the court of second appeal.

Similarly, *mutatis mutandis*, application can be made of the reasoning of the Constitutional Court in the Court Decision no. 369 of 30 May 2017 regarding the effects that are produced with respect to the court decisions rendered after publication in the Official Gazette of Romania, in disputes assessable in monetary terms of up to Lei 1,000,000 inclusive, started after the publication of the decision (20 July 2017) in relation to which the regime of remedies was established (5), precisely due to the re-evaluation of the protection standard provided by article 16, paragraph (1) and article 21, paragraph (3) of the Constitution, in the sense of reducing the margin of appreciation of the legislator in the field of extraordinary remedies and increasing the guarantees accompanying the free access to justice where extraordinary remedies constitute an aspect of free access to justice – Decision no. 462 of 17 September 2014, paragraph 27- (6).

2.1.9. Subsection. Completing the evidence examined in the appeal

Article 479, paragraph 2 of the Code of Civil Procedure allows the completion in the appeal of the examined evidence and the examination of the new evidence proposed under the conditions of article 478, paragraph 2 of the Code of Civil Procedure; however, this evidence – new or additional – must concern matters which the party could not have foreseen in relation to the reasoning of the court of first instance and should not be evidence which was not proposed through the negligence of the party[6]

(civil judgment no. 4336 A/18 December 2017 delivered by the Bucharest Tribunal – Fifth Civil Division in the case file no. 371/303/2015)

[6] The tribunal held that, since there was no omission of the first instance regarding the examination of the forensic evidence, that evidence appeared to be useless in the appeal having regard to the way in which the plaintiffs assisted by the lawyer understood to support their claim.

2.1.10. Subsection. Motion to dismiss because of the lack of standing as plaintiff as opposed to the capacity of accepting heir of the deceased

The court held that in the case of requests having as subject matter a succession settlement procedure, which involves establishing the heirs, the estate and the shares due to the heirs, only a person who meets the conditions to be the heir of the deceased may have standing to sue and, as such, is the holder of a share of the inherited assets.

In order for a person to succeed to the inheritance of another, in addition to the requirements of having the capacity to succeed and not be unworthy to inherit, the former also needs to met the requirement of being called to inherit, namely to have entitlement to succession, under the law or a testament.

Finding that the applicant did not have the capacity of accepting heir of the deceased, the court of first instance admitted the motion to dismiss because of the lack of standing to sue of the plaintiff invoked *ex officio* by the court and dismissed the action filed by the same as being brought by a person without legal standing to sue.

In the appeal, the tribunal found that the point of view put forward by the appellant-plaintiff regarding the motion to dismiss because of the prescription period of the right of succession option relied on by the defendants was erroneous, in fact, following the examination of evidence, it resulted that the appellant had not carried out acts of acceptance of the inheritance within the legal time limit for expressing options, and this situation gave the first instance the right to invoke *ex officio* the motion to dismiss because of the lack of standing to sue.

(civil decision no. 350 Appeal/5 May 2021 rendered by the Teleorman Tribunal – Civil Division in the case file no. 428/335/2019 which dismissed the appeal against the civil judgment no. 521 of 7 September 2020 delivered by the Videle Court; Bucharest Court of Appeal – Fourth Civil Division's decision no. 18 R/13 January 2022, final, annulled the second appeal against the decision in the appeal on grounds of non-payment of the stamp duty)

Author's note

In the opinion of the author of the paper, both courts of first instance made correct findings (regarding the absence of acts of tacit/express acceptance of the succession), but took an erroneous view regarding the lack of standing to sue that was mistaken for the unfoundedness of the action.

The action for recognition of the capacity of heir allows its initiator to submit to the court the claim according to which the same is an heir and to assert this capacity under the conditions of article 36 of the Code of Civil Procedure; however, in stating the reasons for their action the plaintiff invoked their status of daughter of the deceased, which would imply the entitlement to legal succession as a descendant of the first degree.

If recognised claims had been established (where the plaintiff had brought before the court the claim that the plaintiff was also an heir), the analysis of the merits of the request would have followed.

The conclusion of the courts of first instance: *the legal standing to sue is justified by proving* the performance of acts of acceptance of the inheritance within the legal time limit for expressing the option *in the claim of being considered heir relied on against the defendants heirs*, is erroneous and does not distinguish between the main legal notions

regarding the conditions for exercising the civil action: the legal standing to sue, the interest and the object of the claim.

The dispute would have received a new conclusion following the judicial evaluation, on the merits, by the court.

2.1.11. Subsection. Motion to dismiss because of the lack of standing as defendant of the Municipality of Bucharest, through the mayor general, regarding the main action having as subject mater the capacity of the plaintiff as sole heir. The „absence" of a defendant in the proceedings

In the case at hand, by bringing the action to the court, the plaintiff relies on their concrete entitlement to inherit the deceased's estate, which means that the capacity of heir of the Municipality of Bucharest, which has already been established by the vacant succession certificate, is challenged. Under these circumstances, the territorial administrative unit justified the standing as defendant, because it was a party to the legal proceedings brought to the court and its interests opposed those of the plaintiff, thus having standing as defendant in the dispute.

In the justification of its ruling, as a last issue, the Court also took into consideration the assurance of the right of access to justice, recognised by article 6 of the ECHR and article 21 of the Romanian Constitution, as a right that must be effective, and not illusory.

However, to consider that, in the case of the death of the former owner from whom a vacant inheritance remained, the person who claims to be the sole heir is unable to assert their right [approach recognised by the Civil Code], caused by the „absence of a defendant", is an interpretation that would seriously affect the right in question and would also constitute an unjustified refusal of the court to settle the case, called in accordance with the 1864 Civil Code „denial of justice" (article 3) and sanctioned as such

(decision no. 770/4 October 2021 rendered by the Bucharest Court of Appeal – Third Division for civil matters and for matters involving minor children and families in the case file no. 16359/299/2018)

Legal practice and literature, including the ECHR practice (see Maihous v. The Czech Republic and Faimblat v. Romania) have consistently held that the State must provide legal remedies and effective means by which the parties can exercise their rights under the law. Referring to the case of Lahous v. The Czech Republic and Faimblat v. Romania, the Bucharest Court of Appeal upheld in its civil decision no. 43/R of 13 January 2010 delivered in the case file no. xxxxx/299/2006 that: „If it were found that the two defendants summoned to the court, in the case at hand the State through the Ministry of Finance and the Municipality of Bucharest, had no standing to be sued the result would be the plaintiff's deprivation of an effective legal means of declaring their ownership against the State".

2.1.12. Subsection. Hearing of the appeal within the limits of the grounds stated in the request for appeal and within the limits of the *grounds stated by the appellant* in support of the grounds for appeal

According to article 477, paragraph 1, article 479 of the Code of Civil Procedure, the principle of availability that governs civil proceedings is also fully applicable to appeals, reason for which the analysis of the legality and validity of the judgment rendered by the first instance is made only by reference to the criticism relied on in the appeal request.

The generic challenge of other aspects or statements that are not reasoned in fact or in law does not entitle the appeal court to analyse them.

The allegations that were not concretely argued by the appellant cannot be held, and neither the first instance nor the appeal court have the possibility or the right – having regard to the principle of availability enshrined by article 9 and article 22 of the Code of Civil Procedure – to make an analysis in a large void only because one of the parties used words such as „nullity", „abusive" or that „there is numerous evidence and clear indications that the amounts stated on the utility expense lists do not represent certain amounts, legally calculated by the plaintiff-defendant, but to a large extent are artificially, illegally and abusively increased"

(opinion expressed in the decision no. 3879 A/28 November 2019 delivered by the Bucharest Tribunal – Fourth Civil Division in the case file no. 56300/300/2015)

Author's note

The court's decision is nothing more than a transposition (at the appeal stage) of the sanction regarding the failure to state the grounds (which is to be found in the second appeal in article 489, paragraph 2 of the Code of Civil Procedure).

The legal requirement for the elaboration on the grounds of second appeal involves the determination of the specific errors imputed to the court and their classification as falling under grounds of illegality, restrictively provided by article 488 of the Civil Code, since, according to the law, not every dissatisfaction of the party can lead to the quashing of a decision[7].

The analysis of the legality and validity of the judgment delivered by the first instance is made only by reference to the criticism invoked in the appeal request.

The appeal procedure does not feature the sanction of nullity for failing to state the grounds for the remedy due to the devolutive effect of the appeal, specific to this remedy, which allows the transfer of the case and the right to hear it, in principle in full, in all respects of fact and law, a second full examination or hearing of the case being possible.

2.1.13. Subsection. Assertion of the capacity of sole heir. Burden of proof imposed by the court provided that such capacity is not disputed by the opponent

In one case, referring to the possibility of there being another party entitled to the succession of the same class, namely another descendant, the tribunal held that this could not constitute grounds for dismissing the writ of summons, as long as the evidence examined did not point out any indication in this respect and the respondent's capacity of sole heir was not disputed.

Imposing on the plaintiff the burden of proving a negative fact – that the deceased had no other heirs in the first class of heirs and in the first degree of kinship – as the first instance found, is, in the tribunal's view, an excessive burden of proof in relation not only to

[7] The Court holds that the second appeal is an extraordinary remedy, not an exceptional remedy. The qualification of this remedy as extraordinary is not attached to the typologies of decisions that may be subject to it, but only concerns the grounds for which it can be exercised. Therefore, the determination of the judgments subject to second appeal must take into account the nature of this procedural remedy, and not other artificially created criteria which exclude numerous persons from this procedural remedy, without having an objective and rational justification. Moreover, the fact that a trial goes through two devolutive procedural stages (trial in the first instance and appeal) does not automatically mean that there is an *eo ipso* lack of possibility to exercise the remedy of the second appeal (recital 26)

the evidence already examined, but also to the general impossibility of proving a negative fact, it being known that in such a situation the burden of proof is reversed, the interested party having the possibility to prove the opposite positive fact.

Having regard to the negative evidentiary thesis imposed by the first instance the circumstance that article 358 of the Code of Civil Procedure was not applied appears to be irrelevant, all the more so as, by the statement of defence, the defendant did not dispute their capacity as the sole heir of the deceased (decision delivered by the Bucharest Tribunal – Fifth Civil Division no. 2045 A/12 June 2018 in the case file no. 28101/299/2016*, final by decision no. 433 R/4 June 2021 delivered by the Bucharest Court of Appeal – Fourth Civil Division, in second appeal).

Author's note

I would like to also add to the considerations relied on by the appeal court that, in such a case, the burden of proof (as set out in article 249 of the Code of Civil Procedure) or the obligation to prove one's claims (established by the provisions of article 10 of the Code of Civil Procedure) is limited, both procedural texts implicitly referring to the obligation to prove positive facts.

However, the burden of proof to the contrary lies with the party disputing an allegation, namely the defendant, and the plaintiff cannot be required to provide proof as to a negative fact; and the proof of the negative fact is made by proving the opposite positive fact.

The provisions of article 255, paragraphs 1 and 2 of the Code of Civil Procedure (evidence must be admissible according to the law; *if a certain fact is undisputed*, the court will be able to rule, taking into account the circumstances of the case, that it is no longer necessary to prove it) may be addressed as well, since they are procedural texts applicable to the matter subject to analysis.

Subsection 2.2. Jurisprudential examination – in terms of substantive law

2.2.1. Subsection. Breach of the principle of the division in kind of the assets that make up the distributable estate. Notion of „serious grounds" referred to in article 673^{10} of the Old Code of Civil Procedure. Court expert's assessment.

In one case, the appellant pointed out that the courts ignored the obvious factual situation resulting from the title deed itself and adopted strictly subjective considerations of the expert in the sense that there was an inconvenient division in kind of the distributable estate, thus rendering the principle stated in article 673^{5}, paragraph 2 of the Old Code of Civil Procedure devoid of content.

The court of second appeal shows that article 673^{5}, paragraph 2 of the Code of Civil Procedure regulates the principle of division in kind, but this principle is applicable if the immovable property is conveniently divisible and does not result in a significant decrease in its value.

Article 673^{10} of the Code of Civil Procedure is applied in case the asset is not conveniently divisible and in case the value of the divisible asset decreases by dividing the asset.

Article 673^{10} of the Code of Civil Procedure does not regulate conditions which the parties must meet and in relation to which the court should decide how to attribute the asset.

Regarding article 673^{5}, it does not regulate either the conditions for the parties in relation to which the courts should decide how to attribute the assets subject to distribution.

The applicability to the case in question of article 673^{10}, paragraphs 1 and 4 of the Code of Civil Procedure was held, as according to these provisions, upon the request of one of the parties, account being taken of the circumstances of the case and for serious grounds, the court may attribute the asset directly by decision on the merits.

The category of serious grounds can also cover those upheld by the appeal court by maintaining those held by the court of first instance, more precisely the special connection with the assets of the distributable estate coming from a succession of steps taken by the plaintiffs to regain ownership and the material means that were not removed by evidence to the contrary.

The (allegedly subjective) assessment of the court expert on the impossibility of division in kind may be accepted if no evidence is examined to the contrary; on the other hand, the expert evidence is admitted into court if during the judicial review the hearing reports by which the evidence is approved and subsequently examined meet the conditions of legality.

(civil decision no. 1299 R/26 June 2013 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 3152/330/2010*, irrevocable)

2.2.2. Subsection. Agreement regarding the establishment of the real market value (arm's length value) of the assets that make up the estate as opposed to the value determined by the expert

The view taken was that the judicial practice and the points of view expressed in the literature are constant in the sense that the court cannot censor the consistent agreement of the parties regarding the establishment of the real market value of the assets that make up the estate.

The courts did not accept the criticism regarding the lack of criteria according to which the expert should have determined the value, because it did not fall within the provisions of article 969 of the Civil Code and article 673^{10}, paragraph 2 of the Old Code of Civil Procedure; on the other hand, objections to the expert report could be made only at the first court date after taking note of the expert report.

(civil decision no. 1299 R/26 June 2013 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 3152/330/2010*, irrevocable)

2.2.3. Subsection. Owners' Association's standing as plaintiff in formulating the request for legal division of property. Reliance on its capacity as creditor of the heir – defendant in the forced execution procedure. Motion to dismiss because of the prescription of the substantive right to action

The proceeding subject to analysis was filed with the District 2 Court of Bucharest on 29 June 2018 under no. 14125/300/2018 given the debts in relation to the utility expenses shares disputed by the defendant and the Owners' Association.

In essence, the court of first instance showed that the plaintiff as creditor of the defendant in the forced execution procedure had standing to sue, since the action filed did not concern a strictly personal right; the provisions of article 974 of the 1864 Civil Code, according to which the creditors can execute all the rights and actions of their debtor, except the ones that are exclusively personal, were fully complied with in the action requesting the settlement of the succession, especially since the case did not concern any subject of any liability of the estate in event of acceptance.

Regarding the motion to dismiss because of the prescription period of the substantive right to action, it is unfounded, where the forced execution is carried out on the basis of enforceable titles consisting in civil judgments, without the possibility of relying in the succession settlement and the distribution of assets on the prescription of the substantive right to action for the amounts ascertained by the court decisions, since this would violate their *res judicata* authority.

On the other hand, the prescription of the right to obtain execution cannot be invoked in this procedure either, the appellant-defendant having other procedural levers in this regard.

(considerations set out in the civil decision no. 2536 A/20 October 2020 delivered by the Bucharest Tribunal – Fourth Civil Division in the case file no. 14125/300/2018, not final, not appealed)

Author's note

I would like to add the following:

Although not stated, the procedural levers referred to by the appeal court are those provided by means of the challenge to the execution (article 711 and following of the Code of Civil Procedure), this being the specific procedural means of forced execution that ensures the legality of the forced execution.

According to article 711, paragraph 4 of the Code of Civil Procedure, the division of common property assets into shares or joint ownership may be decided upon the request of the interested party and as part of the hearing of the challenge to the execution.

It should be noted, however, that the Owners' Association, acting in its capacity of creditor, cannot initiate a challenge to the execution by requesting the distribution of property, it can only intervene by way of counterclaim in a challenge to the execution brought by the debtor, the challenge to the execution being inadmissible.

In such a case, the creditor association in the case concerned correctly filed an action under common law**.**

2.2.4. Subsection. High Court of Cassation and Justice decision no. 12/2015. Forced entry of all co-owners into the proceeding. Application of article 78 and following of the Code of Civil Procedure

According to the considerations of the High Court of Cassation and Justice decision no. 12/2015, in the event that the plaintiff omitted to summon to court all the co-owners, the court should have raised the question of their forced entry into the proceeding, according to article 78 and following of the Code of Civil Procedure.

By the writ of summons filed with the District 1 Court of Bucharest on 28 June 2016, the plaintiff sued only G.O.N. as defendant, thus determining the limits of the trial in terms of the framework as to the standing as defendant.

In the second appeal, the plaintiff invokes as ground for quashing the provisions of article 488, point 5 of the Code of Civil Procedure, considering that the High Court of Cassation and Justice decision no. 12/2015 relied on by the appeal court itself in the considerations of the court decision under appeal was violated.

The Court takes the view that the civil proceeding relates to private interests, and the active role of the judge cannot violate the principle of availability, the object and limits of

the proceeding being established by the requests and defences of the parties (article 9, paragraph 2 of the Code of Civil Procedure).

It cannot be considered that, by failing to raise for the parties' discussion *ex officio* the necessity of introducing the co-owners of the immovable property in the case, the court violated the rules of procedure, the non-observance of which entails the sanction of nullity. Such calling into question can be initiated by the court only when the proceeding brought to the court requires it, and the judge considers that the case cannot be solved without the participation of the third party. However, in order to rule on the case, as determined by the plaintiff, in applying the principle of availability, it was not necessary for the court to apply the provisions of article 78, as it was able to settle the case by applying the mandatory decision no. 12/2015 delivered by the High Court of Cassation and Justice.

It is also noted that, having regard to the provisions of article 78, paragraph 3 of the Code of Civil Procedure, according to which the entry into the case will be ordered, by means of a hearing report, until the end of the investigation of the trial before the first instance, the appeal court did not even have the possibility to proceed with such an introduction, given the exceeding of the legal time limit (the disregard of article 78 of the Code of Civil Procedure was invoked for the first time in the second appeal and the subject matter of the second appeal was the decision rendered in the appeal).

(civil decision no. 433 R/4 June 2021 in second appeal delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 28101/299/2016*)

2.2.5. Subsection. Motion to dismiss because of the failure to comply with the preliminary procedure. Proof issued by the notary public regarding the verification of the succession records provided by the Civil Code. Proof of compliance with the procedure obtained after the delivery of the first instance's judgment and submitted directly in the appeal

Article 193, paragraph 3 of the Code of Civil Procedure refers to the proof issued by the notary public under the conditions of article 106, indent 1 of the Regulation for the implementation of the Law on public notaries and notarial activity adopted by the Order of the Minister of Justice no. 710/C/1995. According to article 106, indent 1 of the Regulation for the implementation of the Law on notaries public and notarial activity, the notary public will issue, upon the request of any interested person, within 3 business days from the request, a proof regarding the result of verification of the Register of the succession procedures of the Chamber of Public Notaries, provided in article 44, and the unique registers of the National Union of Notaries Public, provided in article 56, indent 1, paragraph 1, letters a-c, namely: National Notarial Register of Succession Records (RNNES), where succession cases with respect to Romanian citizens, foreigners or stateless persons, having their last domicile abroad and leaving immovable property in Romania are recorded at the expense of the heirs; National Notarial Register of Gifts (RNNEL), where all deeds of donation, testamentary dispositions, their revocation, as well as the withdrawal of their revocation are recorded at the expense of the parties; National Notarial Register of Succession Options (RNNEOS), where all notarial deeds regarding the acceptance or the renunciation of the inheritance respectively are recorded at the expense of the parties.

The imposition on the plaintiff of the obligation provided in article 193, paragraph 3 of the Code of Civil Procedure aims at avoiding the risk of the court delivering a decision to

rule on the same issues as those found by the notary public, in the assumption that the succession procedure was previously initiated before the latter, with the issuance of a certificate of succession or, as the case may be, of capacity of heir.

The proof of the fulfilment of the preliminary procedure, obtained after the delivery of the judgment of the first instance and filed directly in the appeal, cannot lead to the annulment of the judgment of the first instance, as the fulfilment of the preliminary procedure, representing a condition for the action, must be proved together with the summons, not in the appeal, since there is no submission of new evidence to prove the claims brought before the court, therefore, similarly to the payment of the stamp duty or the proof as to the capacity of representative, the proof of fulfilment of this condition for the exercise of the action had to be made before the court ruled on the motion to dismiss because of inadmissibility.

(decision no. 73 A/19 January 2021 delivered by the Bucharest Tribunal – Fourth Civil Division in the case file no. 20948/303/2018)

2.2.6. Subsection. Costs in legal distributions of property. Solution of fully offsetting the costs solely on the basis of the dual capacity of the parties to the estate distribution proceeding

According to articles 451-453 paragraph 3 of the Code of Civil Procedure, the court will establish the extent to which each of the parties may be ordered to pay the costs and, if applicable, may offset the costs, and according to article 1155, paragraph 1 of the Civil Code, the debts and duties of the inheritance are borne by the parties according to their shares of the inheritance.

The costs must be borne by both parties, since the division benefits both parties and, on the other hand, the costs must be calculated according to the share on the estate corresponding to the parties (decision no. 1355 R/3 September 2013 of the Bucharest Court of Appeal – Fourth Civil Division)

As regards the way in which the costs representing the lawyer's fee are to be offset, there is criticism relating to the unfoundedness of the decision delivered in the appeal, so that they escape the review of the second appeal court.

In the case of the estate distribution, the fact that each party has a dual capacity of plaintiff and defendant does not, in all cases, lead to a full offset and the value of the admitted claims will be taken into account. Specifically, in the estate asset distribution, account should be taken of whether the parties have challenged their co-ownership shares, what those shares are, the content of the estate or even its value, and depending on these findings the request for costs[8] will also be handled.

(civil decision no. 197 R/8 March 2021 of the Bucharest Court of Appeal – Fourth Civil Division)

[8]For example, in terms of recovering the costs of the trial, the request for a refund of 50% of the stamp duty paid in the first instance and the appeal will not be approved, because, according to article 63, paragraph 2^1 of Law no. 192/2006, the court will not order the refund of the judicial stamp duty paid for bringing the matter before it if the settled dispute is related to a succession case for which the certificate of succession has not been issued; the matter at hand is a succession case, and the parties failed to provide proof that the certificate of succession had been issued.

Section 3. Case-law issues – in terms of substance of the right

3.1. Subsection. Mediation agreement

In a case filed with the Bucharest Tribunal – Third Civil Division, in the appeal, the litigants appeared before the appeal court requesting that note be taken of the agreement of the parties expressed in the Mediation Agreement dated 9 August 2019 and concluded at the Office of Mediator O.C.

The court found that the parties had amicably reached a mutually agreed solution to the dispute, as was clear from the mediation agreement, reason for which the appeal was admitted, the judgment of the first instance was annulled, and pursuant to articles 438 – 441 of the Code of Civil Procedure, the agreement of the parties was enshrined.

(civil decision no. 877/A/15 June 2020 delivered by the Bucharest Tribunal – Third Civil Division in the case file no. 17457/303/2017, final by dismissal of the second appeal as unfounded by the civil decision no. 685/8 September 2021 of the Bucharest Court of Appeal)

Note of the author of the paper

I would like to point out mainly that the mediation procedure could not be concurrent with the succession procedure carried out by the notary.

Mediation is a manner of resolving disputes amicably, with the help of a third party specialising as a mediator, in conditions of neutrality, impartiality, confidentiality and with the free consent of the parties (as defined in article 1, paragraph 1 of Law no. 192/2006), as opposed to the notarial succession procedure defined as a set of rules which are complex in nature and which must be met by the notary public.

The judge, the notary public, the lawyer, the bailiff advises the parties, or the party the same represents respectively to resort to an amicable settlement of the dispute or the conflict, through the mediation procedure, according to the special law (recommendation contained in article 2, paragraph 6 of Law no. 192/2006, which is, in fact, only a specific application of article 7, paragraph 2, article 21, paragraphs 1 and 2 of the Code of Civil Procedure, all the more so when the parties are able to dispose of the rights in question according to article 9, paragraph 3, final part of the Code of Civil Procedure).

The guarantees of the two procedures are different **[3]**, ultimately the beneficiaries of the two procedures being the ones who have their say, taking into account, of course, the advantages in question.

3.2. Subsection. Preparation of a power of attorney for the purpose of the succession settlement procedure – act of disposition. Enumeration contained in article 1110 of the Civil Code

The courts considered that the express acceptance of the deceased's succession operated through the power of attorney granted on 20 July 2015 to D. M. for the acceptance of the inheritance in question, the latter acquiring the capacity of legal heir.

In this respect, the court found that, in accordance with the provisions of article 1108, paragraph 2 of the Civil Code, the defendant M.F.P.N. had explicitly appropriated the capacity of heir of the deceased, without making proof of any reasons for the invalidity of what had been recorded in the power of attorney granted by the same on 20 July 2015,

before the expiry of time limit for expressing the succession option (civil judgment no. 8074/13 November 2019 rendered by the District 6 Court).

By its civil decision no. 1593/A/29 July 2020, the Bucharest Tribunal – Fifth Civil Division found that the act prepared by the defendant on 20 July 2015 was correctly given legal efficiency.

In order to have the value of a tacit acceptance of the succession, the act carried out by the party entitled to the succession must meet two conditions, namely the agreement of the party entitled to the succession to accept the inheritance should undoubtedly derive from it and their conduct should indirectly indicate their intention to accept the inheritance. In other words, the act performed by the party entitled to succession must involve, as a matter of necessity, the intention to accept the inheritance, without being able to receive another interpretation.

Contrary to the view taken by the appellant plaintiff, the mentions in the power of attorney granted by the defendant to the mother prove the tacit acceptance of the inheritance left by the late father. Moreover, the content of the document explicitly points out the intention of the party entitled to the succession to accept the inheritance, thus meeting the two aforementioned conditions.

The appellant plaintiff is erroneous to state that it was necessary to enter the declaration of acceptance in the notarial register, since the court of first instance did not consider the indication of the respondent's wish as an express acceptance of the succession, but as a tacit one, which does not require the completion of formalities in terms of registration and enforceability.

While it is true that this form of tacit acceptance is not found in the enumeration contained in article 1110 of the Civil Code, contrary to the appellant's allegation, it is only indicative, not restrictive by any means, and the preparation of the power of attorney for purposes of the deceased's succession settlement is an act of disposition.

The appeal court also held that the enumeration of the disposition acts in paragraph 1 was only indicative, not exhaustive. This aspect follows from the grammatical interpretation of these provisions, or from the wording „are such acts", rendering evident the intention of the legislator to provide only a few examples, without limiting them, and it also results from the teleological interpretation of the legal provision, where the intention of the legislator is to provide a certain legal framework for the judicial practice created on the basis of the provisions of the old civil code, but logically without being able to fully cover all the variants of disposition acts that can have the value of a tacit acceptance of a succession.

As regards the classification of the mentions in the power of attorney concerning the acceptance of the succession as representing an act of disposition, the Court considers that the appeal court correctly held that legal nature, because by explicitly expressing the intention to accept the succession, the respondent disposed of the right of succession option, in the sense of acquiring the succession rights.

Moreover, from the point of view of interest in the case in question, even if the indication of the wish to accept the succession covered in the power of attorney were not considered an act of disposition, it would still have the value of a tacit acceptance as an act of non-urgent administration act and commitment for the future. (Bucharest Court of Appeal – Third Division for civil matters and matters involving minor children and families – civil decision no. 644/28 June 2021).

3.3. Subsection. Relief from the effects of expiry of the time limit for acceptance of the succession. Heir located abroad

According to the provisions of article 2522 of the Civil Code, the relief from the effects of expiry of the time limit for acceptance of the succession can be obtained only for serious grounds.

However, the fact that the appellant went abroad, but still returned to the country on a regular basis, having the possibility to file proceedings, does not lead to the admission of their request, given that the father died on 30 January 2014 and the appellant stated that they found out about their father's demise in July 2018, when they called the mayor's office, although they met the father in actuality 13 years before, while keeping in touch only by telephone.

(civil decision no. 350 in the appeal/5 May 2021 delivered by the Teleorman Tribunal – Civil Division in the case file no. 428/335/2019

Author's note

The decision of the Teleorman Court is focused on the diligent attitude (in finding out the moment of death).

The property distribution procedure greatly diminishes the essence of this notion (diligence), otherwise quite present in the area of the law.

There should be a different level of protection surrounding the party entitled to succession (when they are „accused" of not knowing when the death occurred), given that a fair trial can only be determined by the circumstances of the particular case in question.

The presumption of ignorance can often be unjustly violated.

Usually, the references to the difficulties of communication with the deceased may justify a missed time limit for expression of the succession option, where the law reserves the power of discretion for the judge.

Whenever the law reserves the power of discretion for the judge or requires the same to consider all the circumstances of the case, the judge will take into account, among other things, the general principles of law, as well as the requirements of fairness and good faith (article 22, paragraph 7 of the Code of Civil Procedure).

It is worth reminding that the Convention (ECHR) does not guarantee theoretical and illusory rights, but concrete and effective rights; if treated superficially, the relief from the effects of expiry of the time limit for acceptance of the succession, with the intended effect of reactivating the option in matters of succession, tends to become an illusory right.

3.4. Subsection. Acquisition of the asset part of the estate against payment of the price in instalments. Right *in rem* of the deceased regarding the participation or claim

It has been held that the circumstance of acquiring an asset against payment of the price in instalments is not likely to change the date of acquisition of ownership, the transfer of the right to the buyer not being conditional on the payment of the price.

Any contribution of the deceased to the payment of the instalments relating to the loan granted could be capitalised on by invoking a claim.

In the case in question pending before the District 6 Court, the manner of formulating both the request initiating proceedings and the grounds for appeal pointed out that the appellant sought the ascertainment of a right *in rem* of the deceased regarding the participation in the loan repayment; however, considering that the appellant puts forward

the submission as to the payment of money as instalments, the only right that can be capitalised on in relation to such money is a right of claim.

(decision in the appeal no. 218 A/18 January 2016 delivered in the case file no. 1755/303/2014 by the Bucharest Tribunal – Fourth Civil Division, final by decision no. 349 R/15 June 2017 of the Bucharest Court of Appeal – Fourth Civil Division finding that the second appeal was time-barred)

Author's note

The case calls into question two rights (*in rem* vs. claim) different in nature. The court's opinion did not deviate from the traditional one

Rights *in rem*, limited by means of the Code in terms of number, refer to assets.

According to article 551 of the Civil Code, „The following are rights *in rem*: 1. the ownership; 2. the right of superficies; 3. the right of usufruct; 4. the right of usage; 5. the right of occupation; 6. the right of easement; 7. the right of administration; 8. the right of concession; 9. the right of use; 10. security rights; 11. other rights which the law recognises as such."

In the spirit of the topic of the discussion (legislative tradition/modern values), the legislator can regulate a new type of right *in rem* (faculty allowed by point 11 of article 551), and the right in dispute refers to an asset (part of the estate) acquired against payment of the price in instalments.

The right *in rem* – in such a situation – could arise as a result of the wish of a person.

Converting the price instalments (for an asset) into ownership (of that very asset) *in rem* would mean making use of an outdated practice.

This right of claim having real features of a right *in rem* is still unjustly „held" captive in the legal regime (brought about by its configuration – the payment of money as instalments) with the conclusion that the only right that can be capitalised on in relation to such money is a right of claim.

I am counting on a „modernisation" of concepts in the sense of shifting to the category of right *in rem*, an evolution that may be capable of an approach from a regulatory point of view.

3.5. Subsection. Inclusion of holdings in the estate. Qualification of the mention in the articles of incorporation – in the event of the death of one of the partners, all their holdings in the company will automatically revert to the other partner.

The courts of first instance included in the estate the holdings in the company C. 2000 S.R.L.; the articles of incorporation were submitted in the second appeal; according to the mentions in the articles, in the event of the death of one of the partners, all the holdings in the company were going to revert to the other partner by operation of law.

The court took the view that the mention in the articles of incorporation had the value of a bequest, which, in order to produce effects, had to meet the mandatory formal requirements set out by law for its validity. However, the document containing the said provision (an incomplete and unsigned version of the articles of incorporation of the company C. 2000 SRL) is neither a handwritten testament (which must be written in full, dated and signed by the testator), nor an authentic testament (authenticated by a notary public or by another person provided with public authority by the State, according to the law), nor a privileged testament.

In the second appeal, the Court considered that the ruling of the courts of first instance to include the holdings in the estate was correct.

(civil decision no. 761R/5 November 2021, final, delivered in the case file no. 28870/299/2017 by the Bucharest Court of Appeal – Fourth Civil Division

Author's note

I support such reasoning of the court.

A bequest is a testamentary disposition whereby the testator designates one or more persons who are going to acquire certain assets from the inheritance upon their death, free of charge.

The value of bequest (obviously in a particular manner according to the definition in article 1057 of the Civil Code) given to such a mention inserted in the articles of incorporation is not exempt from criticism.

First of all, the provisions of article 984, paragraph 2 of the Civil Code according to which „a gift is the legal act by which a person disposes of their assets free of charge, in whole or in part, in favour of another person. Gifts may only be made by donation or by bequest contained in a testament." are violated.

By linking the mandatory provision previously mentioned with the definition of the testament set out in article 1034 of the Code – the unilateral, personal and revocable act by which a person, called testator, disposes, in one of the forms required by law, for the time when they are no longer alive – we can say that the bequest should be the main testamentary disposition, which does not apply to the document represented by the articles of incorporation of a trading company.

Observing the legal regime of the articles of incorporation as set out in Title II, Chapter I, article 5 of Law 31/1990 regarding trading companies (articles concluded under private signature, signed by all shareholders or, in case of subscription by the public, by the founders, registered with the Trade Register Office) we are far from considering the mention in question as a bequest when the act ascertaining it is neither personal nor unilateral.

Secondly, to accept the interpretation in dispute means, in fact, to accept that such disposition may be made in case of death by any document, provided that there is a firm indication of wish by which one party seeks to procure a benefit for the other party, without obtaining any advantage in return and that the legatee is designated, which cannot be accepted.

The (formal) requirements of the civil law are violated.

3.6. Subsection. Request for inclusion of the alleged amount in the bank account in the estate. Release of the amount in cash and closing of the account prior to the date of death

The courts did not take the view that the estate included the amount held by the deceased in the account, released in cash to them, prior to the closing of the account, since no proof was provided in the case that the mentioned amount accrued to the deceased as at the date of death.

The allegation of the appellant-plaintiff that the amount was supposedly transferred by the deceased prior to their death to the defendant respondent was not substantiated, since the appellant's statement as to being present at the time of handing over the money was not

supported by any evidence examined in the case and according to article 249 of the Code of Civil Procedure, the burden of proof lied with the latter.

(decision in the appeal no. 271 A/28 January 2019 delivered by the Bucharest Tribunal – Fifth Civil Division in the case file no. 28428/300/2016, final; the decision no. 327 R/29 June 2020 of the Bucharest Court of Appeal – Fourth Civil Division dismissed the second appeal as inadmissible)

Author's note

It is necessary to specify that the evidence examined in the dispute could not be held in terms of the evidentiary assumptions in question (the fact of handing over the amount in dispute to the defendant and establishing the nature of the amount – own or joint asset).

It should be noted that the presumptions (in relation to the dates in the case and the purpose for which the amount of money was withdrawn), namely the consequences that the judge draws from a known fact to establish an unknown fact (article 327 of the Code of Civil Procedure), were not endorsed; on the other hand, the effects referred to can be legally classified as manual gift.

The proof of delivery of effects can be made, in principle, by any means of proof (being a matter of fact).

3.7. Subsection. Burial plot. Impossibility of dividing the right of concession of a burial plot

Regarding the division into lots, the courts took a unanimous view:

- The right of concession of burial plots is an undivided right *in rem*, the parties being in a situation of forced and perpetual co-ownership generated by the intended purpose of the assets, meant to serve the whole group of people making up the family.

For this reason, the head of claim for cessation of co-ownership of the burial plots making up the object of the concession act was rejected.

The court only approved the inclusion in the assets of the estate of the right *in rem* of use of the burial plots and rejected the request for attributing the benefit of the concession contract to the defendant-plaintiff, given that the attribution of the use to one of the heirs is the attribute of the owner of the burial plots, namely the city hall

(civil decision in the appeal no. 517/14 July 2021 of the Teleorman Tribunal – Civil Division in the case file no. 298/87/2018*)

- The impossibility of dividing the right of concession[9] of a burial plot results first of all from the inalienable nature of the public property right, which is also applicable to the concession right. It is true that a property distribution has a declaratory effect according to the philosophy of the old Civil Code – applicable in this respect according to article 66, paragraph 2 of Law no. 71/2011 – considering that the right has always belonged to the co-owner in whose lot the asset fell, but this remains indisputably a legal fiction, which can be understood and accepted only in terms of private property right, whose alienable nature is of the essence. It is undisputed, however, that by the declaratory effect of the division the

[9]Law no. 102/2014 regarding cemeteries, human crematoria and funeral services provides in article 18, paragraph (2) that „upon the expiration of the term of use of the burial plot, the concessionaire has the preemption right, and in case of death of the *concessionaire*, the legal heir or, as the case may be, testamentary heir has the preemption right (our emphasis)".

shares in the co-ownership right belonging to the co-owners to whom the asset is not attributed in kind, will be extinguished, thus giving rise to a property change, which is incompatible with the rule on inalienability of public property rights.

(civil decision no. 969A/22 March 2019 of the Bucharest Tribunal – Fourth Civil Division)

3.8. Subsection. Nullity of the certificate of succession by which a party entitled to succession was omitted from the notarial settlement of the succession. Lack of interest in the request for the nullity of the certificate of succession

The ruling of the first instance, with which the tribunal agreed, was essentially restricted to stating the following:

Beyond the irregularities of the notarial procedure, referred to by the appellant-plaintiff, the latter has no interest in requesting the annulment of the certificates of succession from which they claim to have been omitted, given that, even in the event that the court holds the nullity on the basis of procedural-notarial irregularities, the plaintiff could not be mentioned as the accepting heir in their contents.

The injury claimed by the plaintiff as being caused to them by the issuance of the two certificates of succession – injury consisting in their removal from their father's succession – would not be removed by the annulment of the two certificates, since the plaintiff failed to provide proof of their acceptance of the inheritance within the legal time limit set out by the law, therefore, the annulment would eventually be of no interest to the plaintiff having regard to the alleged injury.

(civil decision no. 4789 A/20 November 2018 rendered by the Ilfov Tribunal against the civil judgment no. 230/14 September 2017 of the Cornetu Court in the case file no. 14962/1748/2016)

The solution of the courts of first instance was varied in the second appeal (by the civil decision no. 689 R/3 October 2019 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 14962/1748/2016) as follows:

Mainly, the principle of availability was overturned by invoking *ex officio* the subject of non-acceptance of the succession, resulting in the nullity of the court's decision, according to article 488, paragraph 1, points 5 and 6 of the Code of Civil Procedure in conjunction with article 425, paragraph 1, letter b) of the Code of Civil Procedure

Regardless of the manner (wording) in which these heads of claim were formulated, it is the responsibility of the court hearing the case to correctly qualify the legal meaning of the procedural approach (article 9 and article 22 of the New Code of Civil Procedure), which is in actuality unitary and which constitutes, in fact, an action for petition for an inheritance, within the meaning of article 1130 of the New Civil Code, according to which the universal heir or the residuary heir can obtain, at any time, the recognition of their capacity of heir against any person who, claiming the title of heir as basis, possesses all or part of the assets of the estate.

The Court therefore holds that the party entitled to succession who has been fraudulently omitted from the notarial settlement of the succession – in this case, fraud is obvious, according to the above – or even by mistake has a legitimate interest in obtaining the annulment of the succession settlement in their absence, having procedural standing deriving from their mere capacity of party entitled to succession, without being required to prove beforehand the acceptance of the succession within the relevant time limit, which is a

matter of substance that needs to be debated in a succession procedure carried out in compliance with legal provisions.

By making an attempt at an analogy, the party who was not legally summoned in the proceedings may obtain the annulment of the judgment thus rendered without first having to prove that they are the holder of the alleged right and the same cannot be denied the capacity and interest to invoke the procedural injury suffered on grounds of not having substantiated the claims brought before the court on the merits. Despite its limitations, this analogy remains relevant, because the notarial succession procedure is nothing more than a non-contentious procedure, whose common law is also represented by the New Code of Civil Procedure (article 2 of this Code), more specifically by article 527 and following of the New Code of Civil Procedure on non-contentious judicial proceedings (common law for non-contentious non-judicial proceedings, just as contentious judicial proceedings are common law for jurisdictional non-judicial proceedings that are contentious in nature). When the law requires the summoning, it is mandatory – article 75 of Law no. 36/1995, in the form applicable to the case, and the law provides that after finding that they are legally notified, notaries public register the case and order the summoning of those who have entitlement to the inheritance, and if there is a testament, they also summon the legatees and the established executor of the testament.

Therefore, the summoning of the party entitled to succession is mandatory, subject to the sanction of nullity, a sanction that operates independently of the distinct and subsequent matter of the acceptance of the inheritance by the omitted party entitled to succession. The party entitled to succession has, thus, capacity and interest to request the annulment of the certificate of succession, including from the perspective of article 1130 of the New Civil Code, because the capacity of heir is not a condition for the exercise of the civil action, but the very substance of the claim submitted to the court. The capacity of heir only needs to be asserted, a condition met in this case, its existence or non-existence being a matter of substance (article 36 of the Code of Civil Procedure).

Author's note

According to my own judgment, the fact that the subject matter of the request is a petition for an inheritance is a matter relating to the cause of the writ of summons.

The right to qualify a request constitutes the right of the court to give a legal name to a request wrongly designated by the parties, but correctly substantiated in relation to the facts. Moreover, another feature of the provisions of article 152 Code of Civil Procedure assumes that only the party gave the wrong name to the request.

1. In this context it is necessary to mention the provisions of article 22, paragraph 5 of the Code of Civil Procedure, according to which the judge may not change the name or legal basis if the parties, by virtue of an express agreement on rights which, according to the law, they may have, established the legal qualification and the legal grounds with respect to which they agreed to limit debates.

The plaintiff's request indeed contained sufficient elements to enable the courts (hearing the substance of the case) to qualify it as being that provided in article 1130 of the New Civil Code, having regard to the contents of the request and intuiting the purpose pursued by the party by submitting it.

2. What the court of second appeal ruled, and did so correctly, is that we are dealing with a petition for an inheritance, an institution not regulated in the previous Civil Code, which finally finds a legislative sanction by means of articles 1130-1131 of the New Civil Code.

It should be emphasised that the court of second appeal made a number of notable assessments regarding the petition for the inheritance.

However, the subject matter of the plaintiff's action also concerned the annulment of notarial deeds, **where the petition for inheritance could be used as a preliminary issue** in an action for annulment, with which it is not confused, the latter having as subject matter the annulment of the certificates of succession after the plaintiff's capacity of heir and the extent of their right were established in the petition for inheritance.

A petition for inheritance is an action by which a person requests the court the recognition of their title as legal heir or legatee.

On the other hand, the action for annulment of the certificates of succession regulated by Law no. 36/1995 can be brought only by the *accepting heirs* whose rights were disregarded at the time of issuing the certificate of succession.

Issuing a certificate of succession in disregard of the rights of some of the persons who have accepted the inheritance is a violation of law which is always sanctioned with relative nullity, not absolute nullity, because the legal rule protects the interest of the heirs and not the public interest.

The appellant-plaintiff could bring the action for annulment of the certificate of succession within a prescription period of 3 years specific to the requests for annulment of legal acts (relative nullity) only if they had provided proof that they would have accepted the succession within the prescription period of the right to express succession option.

3. The ruling of the courts of first instance appears to be unfounded also in view of the fact that the issue of nullity applicable in the case was also called into question, where the case concerned the annulment of a certificate of succession which had been issued without summoning all legal heirs.

A subject matter of the writ of summons was also the ascertainment of the absolute nullity of the certificate of succession for failure to summon all the heirs of the deceased, which was a cause of absolute nullity if the failure to summon was due to the defendant's bad faith, or if the latter aimed at defrauding the rights or interests of the heirs by not declaring all the heirs.

And the reliance on a cause of absolute nullity results in the action not being subject to a prescription period.

Further personal opinions:

The plaintiff is a third party with regard to the request for annulment of the certificate of succession, since the same was not summoned in the notarial procedure and, in this case, may request the annulment of the certificate of succession.

The condition of the prior acceptance of the succession, within the time limit provided by the Civil Code, by the person taking action for the annulment of the certificate of succession is not necessary – obviously – for third parties.

When accepting the succession expressly or tacitly, but not participating in the succession settlement in the notarial procedure, as a third party – heir, the plaintiff may

request the court having jurisdiction to ascertain the nullity of the certificate of succession issued to another heir, the action in this situation not being subject to a prescription period.

It is also true that the identification of the persons who actually collect the deceased's inheritance is dependent on the institution of the prescription of the right of succession option.

4. Furthermore, during the stage of the investigation, the court of first instance performs procedural acts *ex officio* in order to prepare the debate of the trial on the merits, as required by article 237 of the Code of Civil Procedure.

In order to achieve this goal provided in article 237, paragraph (1), the court of first instance should have examined each claim and defence separately, on the basis of the writ of summons, the statement of defence, the response to the statement of defence and the explanations of the parties, if applicable (which the situation required in view of the testimony of the defendant being questioned) and should have ascertained which of the claims are acknowledged and which are challenged (obligations imposed on the court by points 3 and 4 of article 237 of the Code of Civil Procedure).

This is valid all the more so as the court carries out the investigation activity and debates the merits of the proceedings in compliance with all the principles and procedural guarantees, in order to give a legal and well-grounded settlement to such proceedings (article 211 of the Code of Civil Procedure).

If acknowledged claims are established (where the plaintiff's claim that the same was an heir as well was also submitted to the court), the analysis of the substance of the request follows.

3.9. Subsection. Vacant succession. Exclusive competence of the notary public

A vacant succession may be ascertained at any time, without time limit, whether by a notary or by a court (9)

The request for ascertaining a vacant succession is not the exclusive competence of the notary public.

In order to reach such conclusion, the provisions of article 110 of Law no. 36/1995 according to which „the party entitled to succession or another interested person may turn to the court directly in order to settle a succession" are held.

The special law does not identify any express provision that removes competence to ascertain the vacant succession from the scope of powers of the courts (as ruled by the Bucharest Tribunal – Fourth Civil Division in decision no. 2930 A/24 September 2019)

The ascertainment of the fact that a succession is vacant is usually made by having a certificate of vacant succession issued by the notary public from the place of opening the inheritance. In this respect, article 118, paragraph 1 of Law no. 36/1995 regarding notaries public and notarial activity, legal text in force as at the date of the present request for ascertaining the vacant succession, 11 April 2018 and consequently, applicable to the case, states that „(1) In the absence of legal or testamentary heirs, when the estate comprises assets, the notary public, notified under the conditions of article 103, ascertains that the succession is vacant and issues a certificate of vacant succession, in accordance with the law".

According to article 103, paragraph 1 of the same special regulatory act, „(1) The notarial succession procedure is opened upon the request of any interested person, as well as

of the secretary of the local council of the locality within whose territory the deceased's assets were located as at the date of opening the inheritance".

On the other hand, however, article 110 of the same law stipulates that „(1) The party entitled to succession or another interested person may turn to the court directly in order to settle a succession. (2) The provisions of article 193, paragraph (3) of the Code of Civil Procedure, republished, as amended, are applicable".

Article 193, paragraph (3) of the Code of Civil Procedure states that: „Upon turning to the court with respect to the succession settlement procedure, the plaintiff shall submit a proof issued by the notary public concerning the verification of the succession records referred to in the Civil Code. In this case, the failure to carry out the preliminary procedure shall be relied on by the court, *ex officio*, or by the defendant".

Therefore, from the rational, systematic and teleological interpretation of all these cited legal rules it results that, according to the current legislation in the matter, the party entitled to succession or other interested person may turn to the court directly for debating a succession, the notarial and judicial procedure being therefore alternative, not successive.

A vacant succession may be ascertained by means of judicial proceeding, provided there is an interest of the applicant, a contrary solution being prejudicial to the very substance of the claimed right and conflicting – in respect of the right of free access to justice – with the provisions of article 21 of the Romanian Constitution, but also of article 6 of the ECHR, provisions that are part of domestic law, having direct applicability, according to articles 11 and 20 of the Constitution (consideration found in the civil decision no. 222 R/16 February 2015 of the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 5380/303/2013)

3.10. Subsection. Vacant succession. Romanian State's standing as defendant of the

The second appeal court noted (in the civil decision no. 212 A/9 February 2021 delivered by the Bucharest Court of Appeal – Third Division for civil matters and matters involving minor children and families in the case file no. 7091/302/2018, appealed) that the appellant defendant the Romanian State relied on the fact that until 1991 (or at least 1989), when several permissive regulatory acts were elaborated, referred to by this party to the proceedings, a useful possession could not be relied on against it, since the socialist property was unattachable, indefeasible and inalienable.

In relation to this element, the Court noted that, according to the facts, it appeared that the disputed immovable property was owned by them until 1989, the year of death, therefore was owned by a private person and as a result was not socialist property.

Having regard to this state of affairs, it follows that the argument of the appellant the Romanian State is no longer supported, because in the reference period invoked by this party to the proceedings, the asset was a material object of the individual property right of a natural person and not of the public property right.

Author's note:

The standing of the Romanian State actually takes the form of the „care" not to lose any asset[10].

[10]According to the provisions of article 1137, paragraph (1) of the Civil Code „if no beneficiary to the succession has come forward within one year and 6 months from the opening of the inheritance, the notary, upon

In fact, it does not even have the right of succession option and cannot renounce the vacant succession.

3.11. Subsection. Vacant succession. Romanian Ministry of Finance's or Bucharest Regional General Directorate of Public Finance's standing as defendant

First of all, the capacity of representative of the Romanian State in the assumption of ascertaining the vacant succession is in question[11].

According to article 5, paragraph 8 of Government Decision no. 731/4 July 2007 regarding the approval of the Methodological rules for the implementation of Government Ordinance no. 14/2007 for the regulation of the manner and conditions of making use of the assets becoming State private property according to the law:

„In the successions to be declared vacant, the county or Bucharest regional general directorates of public finance represent the State as a subject of rights and obligations and are summoned by the notaries public in the succession procedure".

According to article 680 of the Old Civil Code, „in the absence of legal or testamentary heirs, the assets left by the deceased become the property of the State, which collects the vacant inheritance".

Therefore, the capacity of heir of the Romanian State and the one that confers standing as defendant is clearly established by the legal provisions referred to.

The provisions of article 5, paragraph 8 of Government Decision no. 731/2007 are interpreted in conjunction with paragraph 7 of the same regulatory act and refer only to the notarial procedure, not to the judicial one, to which the provisions of article 3, paragraph 1, point 81 of Government Decision no. 34/2009 are applicable, according to which the **Ministry of Public Finance represents the State as a subject of rights and obligations before the courts**.

(as ruled by the Bucharest Tribunal – Fourth Civil Division in the decision no. 2930 A/24 September 2019, final by dismissing the second appeal as inadmissible by means of the Bucharest Court of Appeal decision no. 813 R/14 December 2020)

Indeed, according to Government Decision no. 731 of 4 July 2007 on the approval of the Methodological rules for the implementation of Government Ordinance no. 14/2007 for the regulation of the manner and conditions of making use of the assets becoming State

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the request of any interested person, shall *formally summon* all the beneficiaries to the succession by means of notice published at the place of opening the inheritance, at the place where the immovable property part of estate is located, as well as in a widely circulated newspaper, at the expense of the inheritance, to appear at their office within a maximum of two months from the publication. If no beneficiary to the succession appears within the term set in the notice, the notary shall certain that the inheritance is vacant."

I reproduced the text of the Code to point out the imperative character of the legislator's rule.

[11] By its decision no. 2/2011, the High Court of Cassation and Justice held that the State had no standing as defendant except in the case in which a certificate of vacant succession has been issued on its behalf; the procedure for declaring the vacant succession did not differ, the only distinction being the holder of the right to collect vacant inheritances; the High Court of Cassation and Justice took into account the provisions of the Old Civil Code, but the decision remains valid in case of successions opened after the entry into force of the New Civil Code, the only difference being the holder of the right to collect vacant inheritances, which, according to the New Civil Code, is the commune, the city or, as the case may be, the municipality in whose territory the assets were located as at the date of opening of the inheritance.

private property: „In the successions to be declared vacant, the county or Bucharest general directorates of public finance represent the State as a subject of rights and obligations and are summoned by the notaries public in the succession procedure. Their representation in the succession procedure is done through the legal service (office) of the county or Bucharest general directorates of public finance".

But what is important is the fact that the defendant summoned to court is, in one form and in the other, the same, the Romanian State, the court taking into account the fact that the person summoned cannot be confused with the one representing the same.

Finding that in this proceeding the Romanian State represented by the Ministry of Public Finance has no standing as defendant only because the Romanian State had to be represented by a structure of the Ministry of Public Finance would be an excessive formality.

3.12. Subsection. Liability of the State for the payment of utility expenses shares according to Law no. 230/2007

By applying the provisions of article 58, paragraph 2 of Law no. 230/2007, cited above, the appeal court rightly held that the liability for the payment of utility expenses shares according to Law no. 230/2007 lied with the owner of the immovable property, even if it was used by persons other than the owner (tenants or tolerated persons), this being an obligation of a *propter rem* character established by law, where the legal relationship created between the owner and other persons in connection with the property could not be relied on against the owners' association, third party to this relationship.

The Romanian State was not aware of the deceased's death, becoming the owner of the apartment as a result of the vacant inheritance as ascertained by the court decision.

The provisions of article 46 of Law no. 230/2007 stipulate: „*All owners have the obligation to pay monthly, according to the expense payment list of the owners' association, in advance or based on the invoices issued by the suppliers, their share of the owners' association's expenses, including those related to the funds of the owners' association".*

As heir, the State acquires a property, a universality and will be bound by the debts and duties of the inheritance.

The State, as beneficiary to the succession, collects the inheritance *ope legis*, *from the date of its opening*, according to the general rules, so that the existence of the acquired right can be enshrined by court decision, and not necessarily in the notarial succession procedure regarded as being optional.

In this case, the provisions of article 680 of the 1864 Civil Code (in force as at the date of death of the deceased) are applicable, as they provide that the assets left by the deceased become the property of the State in the absence of legal or testamentary heirs.

Under these circumstances, the Romanian State through the General Directorate of Public Finance, as beneficiary to the succession, acquires all the rights and obligations of an heir under benefit of inventory, from the date of opening of the succession, regardless of the date on which the vacant succession is ascertained.

In such capacity, it has the obligations provided by article 46 of Law no. 230/2007.

(civil decision no. 752 R/22 October 2019 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 34901/300/2016)

3.13. Subsection. Romanian State, owner of the condominium apartment, wrongly regarded as member of the owners' association

The Court upholds the provisions of article 58 of Law no. 230/2007 according to which „*(1) The institutions of the local or central public administration or any other state-owned companies, which own apartments or spaces with an intended purpose other than housing in residential buildings, have the same rights and obligations as any other owner from the condominium and have the obligation to mandate natural or legal persons to collaborate with the owners' association."*, and „*(2) The legal relationships of the owner, established by mutual agreement with the tenant, regardless of the status of the dwelling, and the tenant's failure to perform the contractual obligations do not exempt the owner from their obligations to the owners' association provided in this law".*

Therefore, the obligation of the owner to pay the utility expenses shares relating to the dwelling owned is not conditional on the capacity of member of the owners' association, and the claims of the State in the sense that it is supposedly exempt from the rule of payment of the utility expenses shares as the owner of the apartment also cannot be accepted since such an exemption is not provided by law (as stated by the Bucharest Court of Appeal – Third Civil Division in the decision no. 388 R/15 April 2021 in the case file no. 34850/299/2018)

Author's note

The court decision is putting the State and the (private) owner on the same level (under the equality sign).

In my opinion, the decision is wrong when, in applying the text relied on as a legal basis (the provisions of article 58 of Law no. 230/2007) it regards the „institutions of the local or central public administration or any other state-owned companies which own apartments or spaces with an intended purpose other than housing in residential buildings" as the State.

The concept of State is par excellence a political concept[12]. The State is a unit of three elements: population, territory and political power.

However, without going into administrative matters, the public institutions referred to in the aforementioned text are functional structures which act under public authority and/or provide public services and which are financed from budgetary and/or own revenues, under the law on public finance; as a result, there cannot be equality (within the meaning defined) between these institutions and the State, the State being erroneously placed in the sphere of the legal relationship derived from Law 230/2007, and the equivalence (at the level of notion) does not exist.

[12] Article 1 of the Constitution defines the Romanian State. There is no definition of the State. The most commonly used definition is that of Max Weber, who describes the State as a mandatory political organisation with a centralised government that claims the monopoly of the legitimate use of physical force within a given territory. General categories of State institutions include administrative bureaucracies, legal systems and military or religious organisations. The Montevideo Convention on the Rights and Duties of States of 1933 provides that „[the State] as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government and (d) capacity to enter into relations with the other States" and that „the federal State shall constitute a sole person in the eyes of international law".

3.14. Subsection. Acts of tacit acceptance of the succession

The courts ruled:

- the acts of disposition on the immovable property may represent acts of acceptance (as long as only these may have an unequivocal character of disposing of the asset), not a hypothetical intention, not materialised in any way;

- the acts relied on as having the value of tacit acceptance, namely the initiation of notarial proceedings to settle the succession, the conclusion by the surviving wife of a pre-contract of sale-purchase regarding the apartment or the sale of inheritance rights, as long as they are carried out/concluded long after the expiration of the time limit for succession option, thus having no relevance, were removed by the court.

- as has been constantly pointed out in the literature, the payment of funeral expenses, the construction of a funeral monument, the payment of the concession fee for a burial plot, or the collection from the deceased's apartment of assets without special intrinsic value such as books and photographs, do not amount to a tacit acceptance of the inheritance, as long as these steps are performed in order to preserve and honour the memory of the deceased, without constituting unequivocal acts of appropriation or final administration of their wealth;

- in the case of the surviving wife, the performance of certain acts after the expiry of the time limit for expressing the succession option, such as the improvements to the apartment, cannot constitute acts of tacit acceptance of the inheritance

- the payment of the funeral expenses of the deceased, the payment of the expenses for the concession of the burial plot for a period of seven years, the payment of utility expenses, the occasional participation in the expenses of the other parent are not an act of acceptance of the succession.

(decision no. 2316 A/13 October 20202021 delivered by the Bucharest Tribunal – Third Civil Division in the case file no. 21966/299/2018)

- the acts of final administration and use of the inheritance asset have the value of tacit acceptance of the inheritance; also, in case of co-ownership, the court shows that there is no possibility to pay taxes and duties only in respect of the undivided share held, as they are to be paid for the entire apartment (decision no. 2880 a/18 November 2020 delivered by the Bucharest Tribunal – Fourth Civil Division in the case file no. 31064/301/2017);

- the possession of the immovable property is an indication of the wish to accept the succession following the death of Dumitrescu Ilinca, where each of these defendants and the plaintiff consider themselves owners of the asset they owned, without having a title to that asset;

- the behaviour specific to the true owner, understanding to use as such both the immovable property built personally and the land that served its use throughout its existence is a type of use that can be treated as act of tacit acceptance of succession, being exercised as owner; the recording of the agreement regarding the succession option in an authentic declaration, signed more than 1 year after the date of opening of the succession, has no legal relevance, the title of accepting heir having already been consolidated as at such date

(decision no. 2853 A/19 September 2019 delivered by the Bucharest Tribunal – Fourth Civil Division in the case file no. 15247/302/2016)

3.15. Subsection. Mandating a person to open the succession. Act of tacit acceptance of the succession

Granting a power of attorney to a third party does not fall under any of the assumptions set out in article 1110 of the New Civil Code. The judicial practice has held that granting a mandate to a person to open a succession is not an act of tacit acceptance of succession.

The courts examined the issue of the evidential value of a special power of attorney authenticated by the Romanian Embassy in London – Consular Division, whereby the plaintiff mandated a person to open the succession of the deceased in Romania, in the sense that it could be an act of tacit acceptance.

The difference between an *heir* and a *party entitled to succession* is essential in judging the aspect subject to examination. The definition of a party entitled to succession, in the sense of a person who meets the conditions provided by law in order to be able to inherit, but who has not yet exercised the right of succession option, set out in article 1100, paragraph (2) of the Civil Code, settles this difference.

The former carried out the succession procedure, expressed their option and obtained a certificate of succession attesting to the capacity of „heir", while the latter (the beneficiary to succession) has entitlement, but has not yet expressed their succession option and has not carried out the procedure to transfer the deceased's property by debating the inheritance.

Given that the legal text, the last paragraph of article 1108 of the Civil Code, speaks about an act that could be carried out only as an heir, having regard to the distinctions pointed out above, it was correctly assessed that the power of attorney cannot be regarded as an unequivocal act of acceptance of the successions, as long as the capacity of heir of the principal was not necessary for its preparation.

(decision no. 275R/5 April 2021 delivered by the Bucharest Court of Appeal – Fourth Civil Division in the case file no. 26821/303/2016)

Author's note

It would not have been wrong for the courts' analysis to have as starting point the notions of the right of representation.

Rights can be exercised in person or through a representative.

Article 1108, paragraph 2 of the Civil Code provides that „*Acceptance is express when the beneficiary to the succession explicitly acquires the title or capacity of heir through an authentic document or under private signature."*

The text imposes two (cumulative) conditions: the wish to expressly accept the inheritance must be indicated in writing, in authentic form or under private signature, and a power of attorney complies with this formal requirement; the contents of the document thus drawn up must show that the beneficiary to the succession has unequivocally acquired the capacity of heir.

It is true that strictly personal legal acts (*intuitu personae*) cannot be performed by an agent.

Why can't we consider the power of attorney (mandate with representation) as an act of acceptance of successions, as a unilateral legal act performed by a party entitled to the succession by which they consolidate their capacity of heir?

The object of such a power of attorney may be considered determined, possible and lawful.

The civil law allows acts with less authority (acts of conservation, supervision do not amount to an acceptance if from the circumstances in which they were performed it does not result that the party entitled to the succession has acquired the capacity of heir by means of such acts; the participation of the party entitled to the succession as defendant in the trial may constitute an act of tacit acceptance of the inheritance if the acquisition of the capacity of heir results from the procedural behaviour, although the fact of them being summoned to court is not the result of their own wish, as in the case of the power of attorney) to have the value of a tacit acceptance, within the meaning of article 1110 of the Civil Code.

However, when an act (having the force of a power of attorney) stipulates a certain wish (the subjective, volitional element – the intention to inherit – escaping doubt) it is not wrong to give such an effect to the wish incorporated in the mandate.

4. Conclusions

There was a need for expressing personal opinions, although the courts have delivered legal, judicious decisions that point out the conclusion that the action of legal distribution of estate assets is an effective remedy within the meaning of the provisions of article 13 of the ECHR.

On another note, I did not seek to provide solutions that are immune to a contrary argument.

The approach allows for a more natural placement of the institutions concerned in matters of succession, an easier reconciliation with some civil law institutions and also a simpler alignment with some of the principles governing the branch of succession law.

The cases are a confirmation of the fundamental role that the establishment of some theoretical solutions has from a practical point of view.

Decisions must take into account not only the relevant legal instruments, but also the non-legal notions and realities specific to the context of the dispute, such as, for example, social or economic considerations.

Although the national legislation does not recognise the settled case-law as a source of law, the Romanian legal doctrine points out its pivotal role in delivering unitary rulings.

Bibliography

[1] Civil Decision nr. 692 R/10.09.2021 of the Court of Appeal Bucharest – Third Division for civil, minors and family matters in case file no. 1290/303/2017;

Decision no. 518 R/21.09.2020 of the Court of Appeal Bucharest – Fourth Civil Division in case file no. 56300/300/2015; Decision no. 327R/29.06.2020 of the Court of Appeal Bucharest – Fourth Civil Division in case file no. 28428/300/2016, Decisions no. 831R/14.12.2020 and no. 435R/29.05.2019 of the Court of Appeal Bucharest – Fourth Civil Division in case files no. 573/300/2019 and no. 371/303/2015;

[2] Ioan Leș, Observaţii particulare privind aplicarea principiului celor două grade de jurisdicţie în procesul civil actual, Universul Juridic Premium nr. 9/septembrie 2020;

[3] Preamble to Directive 2008/52/CE of the European parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, published in the Official Journal of the European Union Series L No. 136 of 24 May 2008.

THE CONCEPT OF HABITUAL RESIDENCE, AS THE MAIN CONNECTING FACTOR IN RESOLVING CONFLICTS OF LAWS AND JURISDICTIONS IN MATTERS OF CROSS-BORDER SUCCESSION, ACCORDING TO EU REGULATION NO. 650/2012

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Abstract

By introducing the habitual residence of the deceased as a general connecting factor for the purpose of determining both international jurisdiction and applicable law, Regulation (EU) No 650/2012, aims to substantially simplify the settlement of cross-border successions in the Member States. The aim of this paper is to analyze the notion of habitual residence as a connecting factor in terms of succession, in relation to the objectives of the Regulation and the recent case law of the Court of Justice of the European Union. After a brief introduction of the regulation as a new tool in the field of judicial cooperation in civil matters, the paper focuses on the interpretation of the concept of habitual residence of the deceased under Regulation (EU) no. 650/2012, on the criteria for determining and evaluating the advantages of this notion, as the main connecting factor.

Kaywords: *cross-border succession, the habitual residence of the deceased since the date of death, autonomous interpretation, complex situations, subsidiary linking criteria, the uniqueness of the habitual residence*

[1] **Introduction on the purpose and adoption of Regulation (EU) no. 650/2012**

In the architecture of the European legal system, characterized by the diversity of rules on succession within the Member States, Regulation (EU) no. 650/2012 is one of the specific instruments adopted for the proper functioning of the internal market,in order to facilitate the removal of obstacles to the free movement of persons who often face difficulties in exercising their own rights in the context of a succession, with elements of foreignness. The establishment of uniform, predictable rules at Union level is currently one of the most effective and useful guarantees in ensuring the rights of heirs and legatees, of other persons close to the deceased, as well as of creditors of the estate.

Whereas, at least so far, the standardization of the rules of substantive law is neither possible nor perhaps fully desirable, the Commission of the European Union has focused its attention on the unification of conflict-of-law rules towards the establishment of uniform rules on jurisdiction, recognition and enforcement of judgments in matters of cross-border succession, as well as the recognition of specific legal acts, given that most successions are settled on a non-contentious basis. The same regulation, which seeks to remove existing administrative barriers, introduced the European Certificate of Succession, a document issued by the successor authority for use by heirs, legatees, executors or administrators of the estate to prove their status and/or rights and competences in another EU country. Once issued, the European Certificate of Succession is recognized in all Member States without the need for any special procedure.

Regulation (EU) no. 650/2012 shall apply to successions in respect of the assets of deceased persons. In determining the material scope, account must also be taken of matters which are excluded from Article 1 (1) and (3) of the Regulation.

Although the application of this European instrument is limited to cross-border successions, the regulation does not give us a definition of the concept of „*succession with foreign elements*". Recently asked to answer questions in Case C-80/19 [1], The Court of Justice of the European Union has ruled that the notion of a cross-border element requires a flexible assessment, so as to include any succession whose organization (by the author of the inheritance) or settlement (following his death) encounters obstacles due to the existence of links with several states. The habitual residence of the deceased at the time of death is the *common criterion* on the basis of which international jurisdiction and the connecting factor of the conflict-of-law rule are assigned. On the basis of this information, it must be assessed whether, due to the location of another element in a state other than that in which the deceased resided, the succession is purely national or cross-border. In order to determine whether a succession has extraneous elements and thus falls within the scope of Regulation (EU) No 650/2012, it is necessary to determine, first,the Member State of the deceased's habitual residence at the time of his or her death and, secondly, whether that residence may be fixed in another Member State; due to the location of another item relating to the succession in a Member State other than that of the deceased's last habitual residence. In order to determine this 'other element', elements such as the whereabouts of the deceased's assets, heirs, legatees or other close relatives, as well as his nationality etc. may be taken into account.

As regards personal scope, Regulation (EU) No 650/2012 applies to successions of persons having their habitual residence in the European Union at the time of death, as well as to persons having their habitual residence in a third country [2]. The provisions of Chapter IV on recognition, enforceability and enforcement shall apply only to judgments given in Member States.

The aplication domain *ratione materiae* of Regulation (EU) No 650/2012 is established by Article 1 (1) of this normative act. According to the text of the law, the regulation „ *shall apply to the successions of persons deceased*". The concept of succession is described in Article 3 (1) (a) of the Regulation, which states that the succession for the cause of death covers any form of transfer of property, rights and obligations for the cause of death; whether it is a voluntary act of transfer in the form of a death provision or a transfer in the form of a succession *ab intestat*. In the sense of the European normative act, the notion of succession is broader than in the domestic law of the States, since, as shown in recital (9) of the preamble, it includes in its scope „*all civil-law aspects of succession to the estate of a deceased person*". A number of legal issues, even if related to the matter of successions, are not included in the material scope of Regulation (EU) No 650/2012, either because of their special legal status reserved for other areas of law, or because succession matters cannot be qualified.

The role of Regulation (EU) No 650/2012 is to simplify succession procedures in order to ensure that beneficiaries have the right to enjoy, in another Member State, the rights which have been created or transferred to them by succession. Recital 7 in the preamble states that the proper functioning of the internal market must be facilitated by the removal of obstacles to the free movement of persons who are currently having difficulty exercising their rights in the context of a succession with foreign elements. In the European area of

justice, citizens must be able to organize their succession in advance. The rights of heirs and legatees, other close relatives of the deceased and creditors of the estate must be effectively guaranteed.

The scheme of the regulation can be characterized as follows: each succession shall be treated consistently in accordance with the applicable single law and by a single competent authority, the autonomy of the party in relation to the applicable law shall be respected, parallel proceedings and contradictory decisions shall be avoided, mutual recognition of authentic decisions and acts shall be ensured. [3].

2. Ordinary residence as the main connecting factor of Regulation (EU) no. 650/2021

The regulation uses the notion of „*habitual residence*" of the deceased at the time of death as a general connecting factor in determining the law applicable to international succession and jurisdiction. The preference of the European legislator in choosing the habitual residence as the main factor of location, to the detriment of other classically established criteria, such as nationality or domicile [4], finds its justification in the objectives of the European Union's legislative policy, aimed at promoting the integration of people into the Member State of destination and strengthening the free movement within the Union [5]. In terms of succession, the principle of habitual residence is considered the most appropriate, as it accurately reflects the deceased's close ties with a particular legal system, compared to the growing loss of ties with the original State of origin. An effective, predictable, easy-to-apply and sufficiently flexible connecting factor, the habitual residence makes it easier to establish the connection between the succession and the applicable law or the competent court of a particular State, argued that, in general, the country of habitual residence has the closest de facto ties to the succession as a whole [6]. Ordinary residence coincides better with the deceased's interests and often with the location of most of his or her property, in the context of the increasing mobility of citizens within the European Union. Such a connection is more conducive to integration in the Member States of habitual residence and avoids any discrimination against persons residing without holding the relevant nationality. It also prevents possible difficulties arising from multiple citizenship.

All the above reasons demonstrate that the choice of habitual residence as a general connecting factor in matters of succession is compatible with current trends at national, international and Union level. The only thing that could be disadvantageous is that the use of the habitual residence as a link requires the court to set higher standards in assessing the circumstances of each case, both in determining jurisdiction and in determining the applicable law.

3. Interpretation of the notion of habitual residence

Regarding the classification of „habitual residence" in the context of a cross-border succession, it is noted that although it is provided as a main link in determining the applicable law, Regulation (EU) No 650/2021 does not contain a definition of this notion nor does it provide clear criteria for determination, stressing instead that the habitual residence should demonstrate a „close and stable link" with a particular Member State [7]. The issue of habitual residence is quite complex, given that the concepts and concepts used in the regulation have an *autonomous qualification* which does not refer to each of the concepts used to designate the same legal phenomenon in national law. Otherwise, unity in

the application of the Regulation would be compromised and differences of opinion could arise between the authorities responsible for its application [8]. Therefore, the notion of 'habitual residence' is interpreted in the light of the specific objectives of Regulation (EU) No 650/2012 listed in recital (7) [9].

In the light of the Regulation, the determination of the habitual residence is made by the successor authority, on the basis of an overall assessment of the circumstances of the deceased's life during the years preceding his death and at the time of death, taking into account all relevant facts, in particular the duration and regularity of the deceased's presence in the State concerned, and the conditions and reasons for such presence. In order to be evaluated, it is necessary to administer all legally admissible relevant evidence. It should be noted, however, that in this case, the mere statements of the parties concerned by the succession, which are consistent and made before the authority responsible for the succession, are not sufficient to establish the habitual residence of the deceased [10]. Instead, the following are particularly useful in determining the intent of the deceased to establish lasting ties with a particular state are the concrete elements, such as: permanent relocation to that country, actual presence on the territory of the foreign state, acquisition of movable or immovable property in the country of the new residence from one's own income or attracted by loans contracted in that state, the existence of employment relationships in the state of residence, the development of a permanent professional activity in this state, enrollment in vocational training or language improvement courses, family reunification in this state, the conclusion of health insurance etc. All these facts, taken as a whole, are relevant to establishing the deceased's close connection with the state of his or her last habitual residence, or at least the person's intention, prior to death, to establish such lasting ties. Recital 23 in the preamble to the Regulation states that the habitual residence is thus established „*should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation*".

In assessing all the circumstances of the deceased's life during the years prior to his death and at the time of death, *stability* is essential, which is why, in a first stage, it is necessary to identify and collect all the facts relating in particular to the duration and regularity of the presence of the author of the inheritance in a state (objective factors). However, confirmation of stability cannot automatically lead to the definitive conclusion of the deceased's habitual residence, especially since, in the presence of increasing mobility of people, time spent in a Member State cannot in itself be a decisive criterion. In this context, elements such as the tax or matrimonial residence of the author of the inheritance, as specific elements of stability in a given state [11], by themselves, they are not sufficient to prove the habitual residence of the deceased, but must be analyzed in a broader, overall framework, in which other relevant elements are to be taken into account. For this purpose, in order to determine the habitual residence, it may also be necessary to assess the conditions and reasons for the presence of the author of the inheritance in a particular state (subjective factors). An analysis of the circumstances justifying this presence is likely to identify the usual place of management of his interests [12] and must be carried out on a case-by-case basis, in order to verify whether the circumstances relating to the person's family and social integration or his proximity to the place in question confirm the result indicated by the temporal element [13].

As it is a matter of fact, the establishment of the habitual residence of the deceased is sometimes liable to give rise to certain difficulties. In this respect, in the doctrine [14] it was

noted that European regulation would not be safe from criticism, as long as the competent authority had the task of conducting research to determine whether the deceased had a closer relationship with another state, in which case the law applicable to the succession should not be the law of the State in which the deceased had his habitual residence. The difficulty of establishing such a closer link could lead to controversy in the application of the Regulation, especially from an evidentiary point of view.

With regard to such „complex" situations, recital 24 of the Regulation exemplifies the particular situation in which the deceased left for professional or economic reasons to live and work in another state, sometimes for a long time, but maintained a close and stable relationship with the home state. In such a case, depending on the circumstances of the case, the authority in charge of the succession may consider that the deceased's habitual residence is in his State of origin, in which he was the center of interest of his family and carried out his social life. Recital 25 also mentions the situation in which the deceased moved to his or her state of habitual residence fairly recently before his or her death, and all the circumstances of the case indicate that he or she clearly had a closer relationship with another State, in which case the law applicable to the succession should be the law of the State with which the deceased had the closest connection and not the law of the State in which he had, at the date of death, his habitual residence. Difficulties in determining habitual residence may also arise when the deceased has lived alternately in more than one state or traveled from one state to another without having settled permanently in a particular state. In such a case, the fact that the deceased was a national of one of those States or that all of his principal assets were in one of those States could be a special factor in the overall assessment of all the de facto circumstances.

Even in the presence of such „complex" situations, Regulation (EU) No 650/2012 states that subsidiary criteria should not be used except when obviously, establishing the habitual residence of the deceased at the time of death proves to be extremely complicated. This requirement is emphasized in recital (25), which states that the use as a subsidiary link criterion of „the closest connection with a particular State" is prohibited, whenever it is difficult to establish the deceased's habitual residence at the time of death. Therefore, no matter how difficult the procedure may be, it is a priority to identify the deceased's habitual residence, which requires a common examination of the facts relating to the stable nature of the deceased's situation. This assessment is best placed to demonstrate whether the situation of the deceased is of a „complex" nature, which allows, exceptionally, the application of subsidiary linking criteria. [15].

In determining the habitual residence of the deceased, the assessment may be difficult, either due to a lack of information or due to doubts arising from the coexistence of contradictory elements which prevent the formation of a belief as to the place of the last habitual residence. Even in the absence of the possibility of obtaining additional elements of analysis, the succession cannot be analyzed leaving this problem open. In such a case, the dispute must be judged on the basis of the information in the file and, as a last resort, if the doubts on this point prove insurmountable, the second hypothesis described in recital (24) of the Regulation can be used, in which case the nationality of the deceased and the whereabouts of the principal estate will come to the fore in the overall assessment of all objective circumstances [16]. Based on this reasoning, the Court of Justice of the European Union has ruled that if the deceased is a national of a Member State and resides in another Member State at the time of his death, but has not severed ties with the first of those

Member States, in which the assets comprising his estate are located, while his successors reside in these two Member States, the last habitual residence of the deceased within the meaning of the Regulation, must be determined by the authority seised of the succession in only one of those Member States [17].

4. The uniqueness of the habitual residence

The habitual residence of the deceased since the date of death, as the „general connecting factor" which allows the determination of international jurisdiction and applicable law, may be unique, not multiple. The objectives pursued by Regulation (EU) No 650/2012, as set out in recital (37), argue in favor of the uniqueness of habitual residence, respectively ensuring predictability, legal certainty, avoiding contradictory results or the vocation of the applicable law to regulate the succession as a whole. Conversely, if it were accepted that a person could have his or her habitual residence in several States at the same time, the provisions of the Regulation would lose its usefulness. As the Court of Justice of the European Union points out, the location of the deceased's last habitual residence is carried out by the authority in charge of the succession, by means of an overall assessment of the circumstances of the case, „*in a single Member State"* [18]. An interpretation of the provisions of Regulation (EU) No 650/2012, according to which the habitual residence of the deceased at the time of his death could be established in several Member States, would lead to a fragmentation of the succession, and would be incompatible with the objectives of the Regulation [19]. Such a possibility would make a large part of the provisions of the normative text itself meaningless, which repeatedly refers to the habitual „residence", in the singular, and not in the plural. [20].

Conclusions

Following the new case law provided by the Court of Justice of the European Union, we can conclude that the assessment of habitual residence is subject to a complex assessment, both in terms of jurisdiction and applicable law. In determining the habitual residence, the authority in charge of the succession must first consider the duration and regularity of the presence of the author of the inheritance in a State and, only in the alternative, his nationality and/or property. The time factor (regular and prolonged presence), although indicating stability, cannot in itself be considered a decisive factor but must be accompanied by other relevant factors such as the family situation and the social integration of the deceased, proving the closeness to the state concerned. According to recital 24, the contexts that are usually included in the subsidiary assessment of the nationality and/or assets of the deceased are:(i) the scenario involving a professional choice which led to the expatriation of the person concerned, but without changing the location of „the center of interest of their family and […] social life"; and (ii) the one that implies the situation in which de cuius lived in several states, without having consolidated a stable connection with any of them.

Exceptionally, when none of the above can be useful in determining the habitual residence, the authority in charge of the succession should take into account the specific factors which indicate a situation falling within the notion of „the most obvious and closest connection". According to the regulation, a typical situation is when the deceased moved to the state of the new habitual residence quite recently before his death. However, the Court

has so far not identified any of the specific factors on the basis of which it is possible to establish the „obviously closest link" with a particular State.

References

[1] CJEU, Judgment of 16 July 2020, in Case C-80/19 – E.E., ECLI: EU: C: 2020: 569, not yet published in the General Repertory.

[2] According to Article 83 (1) of Regulation (EU) No 650/201, it shall apply to the successions of persons who died on or after 17 August 2015.

[3] Iveta Rohová, Klára Drličková, „Habitual residence as a single connecting factor under the succession regulation," source: http://ase-scoop.org/papers/IWLP-2015/9. Rohova.pdf (date accessed: 10 March 2022).

[4] „The duality of the classical principles of citizenship and domicile [32] has lost its breadth and given way to concepts adapted to the rhythm of cross-border privacy. If there has always been a real competition between citizenship and home, then – it can be seen, the „winner" is the habitual residence" – Călina Jugastru, „The Habitual Residence" in the context of the dissolution of the marriage with an element of foreignness", Universul Juridic, source: https://www.universuljuridic.ro/resedinta-obisnuita-in-contextul-desfacerii-casatoriei-cu-element-de-extraneitate (date accessed: 09 March 2022).

[5] See also Călina Jugastru, „The Habitual residence" in the context of the dissolution of the marriage with an element of foreignness", Universul Juridic, source: https://www.universuljuridic.ro/resedinta-obisnuita-in-contextul-desfacerii-casatoriei-cu-element-de-extraneitate (date accessed: 09 March 2022).

[6] Dutta, Anatol, Basedow, Jürgen, Cathrin Bauer, Gerrit M. Beckhaus, Duygu Damar, Matteo Fornasier, Christian Heinze, Jan D. Lüttringhaus, Dieter Martiny, Yuko Nishitani, Jürgen Samtleben, Julian Sanner, Liane Schmiedel, Christian Stempel, Andreas Stier, Johannes Weber, Frauke Katharina Wedemann, Sophie von Weizsäcker, Manfred Wenckstern, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Max Planck Private Law Research Paper nr. 10/2, p. 605, source https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594189, (date accessed: 09 March 2022).

[7] See CJEU, Judgment of 16 July 2020 in Case C-80/19 – E.E., ECLI: EU: C: 2020: 569, para. 38, not yet published in the General Repertory.

[8] CJEU, Opinion of Advocate General Manuel Campos Sánchez Bordona delivered on 26 March 2020 in Case C-80/19 – E.E., ECLI: EU: C: 2020: 230, para. 46.

[9] In that regard, the Opinion of Advocate General Manuel Campos Sánchez Bordona in Case C-80/19: „although the possibility of using the definition of 'habitual residence' used by other rules of Union law is not ruled out; that place, which demonstrates a close and stable link with a State, must be assessed in the light of the specific objectives of this Regulation (13), which are listed in recital 7 in its preamble." (parag. 47).

[10] CJEU, Opinion of Advocate General Manuel Campos Sánchez Bordona delivered on 26 March 2020 in Case C-80/19 – E.E., ECLI: EU: C: 2020: 230, para. 50.

[11] *Idem*, para. 52, section 14

[12] *Idem*, para. 53 section 15, where it is mentioned among the factors that should be taken into account when assessing the circumstances that justified the stability,

„(E)specially the activity – paid or unpaid – exercised by the deceased, the place where he performed it, its duration, the nature of the contract (if any), the existence or not of a permanent accommodation, the family and social context, the place where he received medical treatment, the administration responsible for his expenses, […], among other factors".

[13] *Idem*, para. 52-54

[14] Nicolae Ioana, Noutăți legislative aduse în materia succesiunilor de Regulamentul (UE) nr 650/2012 al Parlamentului European și al Consiliului din 4 iulie 2012 (Legislative developments in the field of succession to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012), in the Universul Juridic Premium Magazine no. 3/2016, source https://www.universuljuridic.ro/noutati-legislative-aduse-materia-succesiunilor-de-regulamentul-ue-nr-6502012-al-parlamentului-european-si-al-consiliului-din-4-iulie-2012, (date accessed: 16 november 2021).

[15] Opinion of Mr Advocate General Manuel Campos Sánchez Bordona in Case C-80/19 states: „ÎFinally, it should be noted that, as regards the determination of the applicable law, recital (25) at the end of the Regulation prohibits the use of the deceased's 'obviously closest connection' criterion as a subsidiary link, with a different legal order from the one of his last habitual residence, even if its establishment proves complicated (18). It is clear from the recital in the preamble, in my view, that there is no possibility of circumventing the identification of a habitual residence, no matter how difficult this approach may be." (para. 58)

[16] CJEU, Judgment of 16 July 2020, in Case C-80/19 – E.E., ECLI: EU: C: 2020: 569, para. 60 – 62, not yet published in the General Repertory.

[17] *Idem* para. 45

[18] *Idem*, para. 40

[19] See also CJEU, Judgment of 12 October 2017, in Case C 218/16 – Kubicka, EU: C: 2017: 755, para. 57, as well as the Judgment of 21 June 2018, in Case C-20/17 – Oberle, ECLI: EU: C: 2018: 485, para. 53-55, not yet published in the General Repertory.

[20] CJEU, Judgment of 16 July 2020, in Case C-80/19 – E.E., ECLI: EU: C: 2020: 569, para. 44, not yet published in the General Repertory.

REFLECTIONS ON THE RESPECT DUE TO THE DECEASED FROM THE PERSPECTIVE OF PERSONALITY RIGHTS

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Abstract
This study deals with the importance of respecting the fundamental values of the person after his/her death. The different opinions identified in the literature on the person's rights over his or her own body lead to different legal effects, which is why the legislation of personality rights in the current Civil Code is of great importance.
Keywords: *respect, dignity, personality rights, death*

1. Landmarks concerning the rights of the deceased

The protection of personality rights and freedoms was previously carried out under the auspices of the provisions of the Civil Code of 1864 and related legislation (e.g. Decree no. 31/1954, Law No 8/1996). Thus, the provisions of S. 998 et seq. Civil Code of 1864 allowed the courts to award compensation or monetary damages even for the removal of moral prejudice caused to the victim. It is well known that certain personal rights have always been recognised as belonging to the individual, such as honour, physical and mental integrity, reputation, image and dignity.

As presented in the specialist doctrine, the concept of the theory of personality rights comes from the German legal literature at the end of the 19th century, which considered it as a solution to be able to use the action in tort in order to condemn the harm done to the person. [1]

The current Civil Code enshrines in S. 58 under the marginal heading of „Personality rights" general provisions on the protection of certain rights of the person such as: „the right to life, to health, to physical and mental integrity, to dignity, to one's own image, to respect for private life and other such rights recognised by law". [2] If one of the rights belonging to the person is infringed, the damage caused to the victim must be removed by the means provided for by law, and the protection of personality rights may be achieved by pecuniary and/or non-pecuniary measures, depending on the case, so as to ensure compensation for the damage caused. The functions of the law will also be taken into account, i.e. the preventive-educational, reparatory and punitive functions.

With regard to the respect due to the deceased, the Civil Code has legislated in Book I., „About persons", Title II., „The natural person", section 4, „Respect due to the person after his/her death" (S. 78-81), provisions which provide for the protection of the rights of the deceased. Under the provisions of S.78, entitled „Respect due to the deceased", the memory and body of the person are protected by the legal confirmation of this right. The legislator's understanding of the significance of harming the deceased person's memory is reflected in S. 79 of the Civil Code, which requires the protection of the memory „under the same conditions as the image and reputation of the living person". In this sense, it is also necessary to correlate with the provisions of S. 79 and S. 72, which establish the right to the dignity of the person, but also with S. 73 of the Civil Code; the limitations of these rights are expressly regulated in S. 75 of the Civil Code in force.

With regard to the respect due to the body of the deceased, it should be borne in mind that it has been considered that the inanimate body, „although no longer a person, is 'imbued with the personality of the person who used to live'", an opinion with which we agree [3]. It has been considered that the respect due to the body of the deceased is achieved through several angles, namely: a courteous conduct towards the deceased, but also towards his/her funeral; the organisation of the funeral (S.80 NCC) but also from the point of view of the removal of human organs, tissues and cells, which must be carried out only in accordance with the law[4].

In this regard, the attention of the legal scholars was drawn to the debates that arose from the publication in the weekly P.M. of photographs of the remains of a former State President [5]. A complaint was brought against the editor of the weekly magazine by the wife of the deceased, acting both on her own behalf and as legal representative of the children. It was held that two photographs showing the deceased on his deathbed in a room in his home had been published in the weekly newspaper of January 25, 1996 (an issue which had appeared on the market since January 16, 1996). The above time frame is important in view of the fact that from the day of the death, i.e. January 8, 1996, until January 10, 1996, only family members were allowed access to the funeral room, and these photographs were taken during that period without the consent of the family and without the express will of the deceased having been expressly consented to during his lifetime. The deceased's wife vehemently objected to the publication of those photographs on the very day of the weekly's publication, filing a criminal complaint that very day. The heirs of the deceased claimed that their right to privacy had been infringed, and each of them therefore brought a civil action for damages of one French franc each, seeking the publication of an extract from the judgment of conviction in the next issue of the weekly and, failing that, the imposition of a fine of 5,000 French francs. [6] The action brought before the court by the President's wife was settled by the first instance by a criminal conviction of the manager of the weekly newspaper in the amount of FRF 100,000 and an order that he pay FRF 1 by way of non-material damages to each of the heirs who had brought an action before the court. [7] An appeal was lodged against the judgment, which was decided by the Paris Court of Appeal, which upheld the first court's decision on the civil aspect but, as regards the criminal aspect, the higher court increased the amount of the fine from FRF 100,000 to FRF 200,000. This decision was also appealed but the Court of Cassation upheld the decision of the Paris Court of Appeal. [8]

It was pointed out in the legal literature that failure to respect the body of the deceased also results in damage to the memory of the deceased, in the sense that the provisions of the Criminal Code concerning the offence of desecration of graves can also be taken into account" [9].

It follows from S. 80 of the New Civil Code that the respect due to the deceased must take into account the right of the person to determine the manner of his or her own funeral and to dispose of the body after death. It has been considered in the doctrine that the right to dispose of oneself (S.60NCC) in fact represents an extension of its content when it refers to events that will take place after the person's death, an opinion with which we agree [10].

With regard to the person's express choice of funeral arrangements, it is stated that he or she may, in a will, make arrangements as to the place of burial, express a choice as to whether or not to be cremated, as well as on the placement of ashes after cremation, arrangements as to the organisation of the funeral ceremony etc. [11].

Under S.80(1), persons who are incapacitated or have limited capacity may also make the aforementioned arrangements, but the consent of their parents or guardian is required where appropriate.

If the deceased person has not expressly opted for the arrangements provided for in S. 80(1), the legislator establishes an express order of persons in S. 80(2) who may determine the manner of the funeral and also with regard to the body of the deceased person. [12]

As regards the person's right to dispose of his/her body after death, it has been stated that in exercising this right „...the person may entrust his/her body to an institution of higher medical education, for the purpose of scientific research, or to a hospital establishment, with a view to the removal of cells, tissues or organs necessary for transplantation". [13]

Law no. 95/2006 provides in S. 147, (1), item 5 that „the natural person may give his/her consent to the removal to be carried out after death either by authentic deed or by registration in the National Register of organ, tissue and cell donors. „14] As it can be seen from the contents of the legal text, the consent of the individual can be given by an authentic act or by his or her registration in the National Register of Organ, Tissue and Cell Donors, and in the case of those who lack the capacity to act or those with limited capacity to act, the written consent of the parents or guardian is also mandatory in accordance with S. 80(1), 2nd sentence of the Civil Code.

In accordance with S. 80(2) of the Civil Code, the legislator establishes an order of persons who will decide on the manner of the funeral and also on the body of the deceased person after death if he/she has not decided in accordance with S. 80(1). Thus, according to the aforementioned provisions, these are: „...the will of the spouse, parents, descendants, collateral relatives up to and including the fourth degree, universal or universal legatees or the mayor of the commune, city, municipality or sector of Bucharest City in the territorial jurisdiction of which the death occurred. In all cases, the confessional affiliation of the deceased shall be taken into account".

The removal from deceased persons is carried out under the terms of Article 81 of the Civil Code for therapeutic or scientific purposes and under the conditions regulated by the legislator, it follows from the legal text that the written consent of the person during life is mandatory and in its absence, it is necessary the un vitiated, written and prior consent and intentionally granted in the following order established by the legislator as follows: „...by the surviving spouse, by parents, by descendants or, finally, by relatives in the collateral line up to and including the fourth degree."

In accordance with the provisions of S. 147(4) and (5) of Law no. 95 /2006 the removal is carried out under the following conditions: „4. the removal of organs, tissues and/or cells from deceased persons shall be carried out only with the written consent of at least one of the adult members of the family or relatives, in the following order: surviving spouse, parents, descendants, brother/sister, other relative in the collateral line up to and including the fourth degree, according to the model form approved by order of the Minister of Health*); 5. the removal may be carried out without the consent of the family members if, during his/her lifetime, the deceased person has already expressed his/her option in favour of donation, by a notarial deed of consent to the removal and registration in the National Register of Organ, Tissue and Cell Donors, according to the standard form approved by order of the Minister of Health*);...6. the removal may not be carried out in any form if, during his/her lifetime, the deceased person has already expressed his/her option against

donation, by a deed of refusal of donation. The deed of refusal of donation shall be presented by the relatives to the transplant coordinator".

The provisions of S. 17-19 of Law no. 104/2003 lay down the conditions under which hospital units may take over and use unclaimed cadavers for university anatomical services.

It has been indicated that there are special provisions for special operations involving the earthly remains of the deceased, so that for the purpose of taking biological samples from corpses for the purpose of genetic and digital fingerprinting, such as in the case of military personnel who died during armed forces operations, it is allowed to collect and store data for specific purposes. [15]

Coming back to the provisions of S. 60 New Civil Code, the right to dispose of oneself „legal literature regarding the relationship between the person and his/her body has held two opinions, one of which is expressed on the basis of the provisions of the French Civil Code stating that „... the person would thus have a right of ownership over his/her own body, with the correction that this right is distinguished from others by the fact that it relates «to an object attached to the person and is therefore non-transferable on account of death and imperfectly disposable"' [16] The consequence of this judgement would be that „Human things (les choses humaines) are appropriable without difficulty and can therefore be regarded as property»" [17].

In this respect, some French authors have pointed out that the death of a person cannot lead to the transformation of the human body into a free or marketable thing or over which other persons can exercise a right of ownership, and therefore, since there is no right of ownership over the body of the deceased person, it is not possible to dispose of any human remains because the sacredness of the human body transcends life and death. [18]

In another opinion it has been argued that „the living body is considered as part of the person, its biological substratum, and by defending it the subject of law is defended. 19] Other authors state that such an idea cannot be taken into account, which would mean that the body itself can be considered as an object, so that the related judgement that the person has rights over his/her body cannot be held, but that these are „personality rights", rights that also provide for „the right of the person to his/her physical integrity"[20].

The theoretical basis of the new Civil Code is the thought that „everyone is the master of his/her own body, but at the same time ensuring that it is protected even against harmful actions against him/herself that man would be willing to commit or accept"[21].

As far as we are concerned, we agree with the opinion adopted by the Romanian legislator that they represent personality rights, all the more so as a judgement according to which the human body can be regarded as an asset over which a property right can be exercised could only lead to a possible return to the view that was found in Roman law, a period in which the human body was considered an asset, which is why the property right was exercised by the persons entitled (spouse, heirs etc.) was carried out in accordance with the legal provisions of the time, which in our view would be a step backwards and a lack of appreciation of the deceased.

Given the conservative relationship between French and Romanian civil law, we turned our attention to the provisions of the French Civil Code, which states in S.16-1-1: respect is due to the human body even after death. One shall treat with respect, dignity and decency even the remains of deceased persons and the ashes of those whose bodies have been cremated. [22] As can be seen, the French civil legislator felt the need to extend the obligation to show respect to the remains of the deceased and to the ashes obtained by

cremation. The French legislator allows the judge, in accordance with the provisions of S. 16-2 of the French Civil Code, to order any measures that may lead to the prevention or stopping of any unlawful acts or any interference with the human body even after death. [23]

It has been pointed out in French literature that the courts have sanctioned cases in which the deceased was not treated with respect, so that heirs can ask the courts to take the necessary measures to compensate for the moral damage caused by not paying due respect to the deceased, in the sense that the French courts have held that the deceased's memory, image and dignity have been wrongfully infringed. For example, compensation for „defamation of the memory of the deceased" has been allowed where the deceased's figure has been exhibited in a museum in such a way that the family itself has been humiliated. [24]

On the basis of S.16-1-1 (2) of the French Civil Code, the courts have ruled that the remains of deceased persons should also be treated with respect, dignity and decency, so that an exhibition of corpses ignores these requirements in view of the commercial aims pursued by the exhibition. [25] The same courts have also ruled that an insurance contract guaranteeing the holding of an exhibition of human corpses deemed to be unlawful is null and void on grounds of unlawful cause. [26] These rulings by the French courts played a very important role at the time when exhibitions entitled „Human Body" were organised in Europe, where plastinated human bodies belonging to deceased persons were exhibited to the general public; the organisation of these types of exhibitions was challenged on several legal grounds in several countries. French courts have ruled [27] that a commercial exhibition of corpses ignores the respect, dignity and decency with which human bodies belonging to deceased persons should be treated.

In this context, the Romanian legislator's vision of legislating them as personality rights (S 60 NCC) is appreciable, taking into account the possible consequences that could have existed if the person had been considered to have a property right over his or her body. Moreover, in order to protect the human being, the Romanian legislator has legislated the right to dignity of the person in S. 72, being declared a fundamental, universal right in accordance with Article 1 of the Universal Declaration of Human Rights and Article 1 of the Charter of Fundamental Rights of the European Union [28] as well as the right to image (S. 73 NCC), the right to respect for private life (Sections 71 and 74 NCC) and Sections 252-256 NCC, „Protection of non-patrimonial rights".

The legalisation of the principle of the inviolability of the human body in S. 64 NCC and the prohibition of certain patrimonial acts (S. 66) – the principle of the non-patrimoniality of the human body [29] – prove to be extremely important in this context.

The possibility granted by the legislator to the person concerned to ask the court to prevent and stop any unlawful damage to the integrity of the human body and to order compensation for any material and moral damage suffered, under Sections 252-256, should not be neglected either. (S. 69 NCC).

In this context, we consider that the French civil legislator's orientation of clarifying the scope of the notion of respect due to the deceased within the meaning of indicating the obligation to grant respect, dignity and decency to the human body belonging to the deceased as well as to the human remains and ashes resulting from the cremation is welcome.

2. Conclusions

The regulation of personality rights in the current Civil Code is proving to be of particular importance, and in the circumstances outlined above, the development of society (and the evolution of bioethics) has shown that it is imperative that the rights and freedoms of the human being be protected as far as possible by comprehensive legal rules.

References

[1] Chelaru E., Rights of personality in the regulation of the new Civil Code, in Dreptul no. 10/2011, p. 3

[2] Civil Code section 58: „(1) Everyone has the right to life, health, physical and mental integrity, dignity, self-image, respect for privacy, and other such rights recognized by the law. (2) These rights are not transferable."

[3] See O. Ungureanu, C.Munteanu, Persons, p. 24 apud E. Chelaru in FL.A. Baias, E.Chelaru, R. Constantinovici, I.Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 99.

[4] E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, edition 2, C.H. Beck Publishing House, Bucharest, 2014, p. 99

[5] C. Jugastru, Compensation for non-pecuniary damage, Lumina Lex Publishing House, Bucharest, 2001, p. 167-170 apud C.Jugastru, Law of Persons. Law of Obligations, Hamangiu Publishing House, 2013, p. 84

[6] C. Jugastru, Law of Persons. Law of Obligations, Hamangiu Publishing House, 2013, p. 84

[7] Tribunal de grande instance Paris, judgment of January 13, 1997, note B.Beignier, in Recueil Dalloz no. 20/May 22, 1997, Jurisprudence, p. 255-258 apud C. Jugastru, Droit des personnes. Law of Obligations, Hamangiu Publishing House, 2013, p. 84

[8] C.A. Paris, judgment of July 2, 1997, note B.Beignier, in Recueil Dalloz no. 43/4 December 1997, Jurisprudence, p. 596-598 apud C. Jugastru, Law of Persons. Law of Obligations. Hamangiu Publishing House, 2013, p. 84

[9] E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 100

[10] See G.Cornu, Droit civil, p. 24 apud E.Chelaru in FL.A. Baias, E. Chelaru, R.Constantinovici, I.Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 100

[11] E. Chelaru in FL.A. Baias, E.Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 101

[12] Section.80 (2) Civil Code: „In the absence of an express choice of the deceased, the will of the spouse, parents, descendants, collateral relatives up to and including the fourth degree, residuary legatees by universal title or the order of the mayor of the commune, city, municipality or sector of the Bucharest municipality in the territorial jurisdiction of which the death occurred shall be respected in order. In all cases, the confessional affiliation of the deceased shall be taken into account."

[13] E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 101.

[14] E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 101

[15] J.C. Galloux, Droits et libertés corporels, in Recueil Dalloz, no. 10 of 14 March 2013, Ėtudes et commentaires, Panorama, p. 672-673 apud C.Jugastru, Law of Persons. Law of Obligations -sequences in the current Civil Code, Hamangiu Publishing House, 2013, p. 83

[16] see F. Zenati-Castaing, Th. Revet, Manuel p. 17 apud E. Chelaru in FL.A. Baias, E.Chelaru, R.Constantinovici, I.Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 73

[17] see F. Zenati-Castaing, Th.Revet, Manuel p. 239 apud E. Chelaru in FL.A. Baias, E.Chelaru, R.Constantinovici, I.Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 73

[18] Johanne CLOUET1 et Marième LACROIX2, De L'« être » vers l'« avoir été »: Muabilité du corps humain au moment du décès Johanne CLOUET1 et Marième LACROIX2 Lex Electronica, vol 15.2 (automne 2010) - site CANLII.ORG/FR/DOC TRINE/DOC/210 accessed on 18.04.2022

[19] see G. Cornu, Droit civil, p. 216 apud E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I.Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 73

[20] see Ph. Malarie, L. Aynés, Les personnes, p. 125-135 apud E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition 2, C.H. Beck Publishing House, Bucharest, 2014, p. 73

[21] E. Chelaru in FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei: „New Civil Code" commentary on articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 73-74

[22] Art. 16-1-1 Code Civil annoté, édition limitée 2020, éditions Dalloz, 2019, Paris, pag.153: „Le respect dû au corps humain ne cesse pas avec la mort. Les restes des personnes décédées, y compris les cendres de celles dont le corps a donné lieu à crémation, doivent être traités avec respect, dignité et décence."

[23] Art. 16-2 Code Civil annoté, édition limitée 2020, éditions Dalloz, 2019, Paris, pag.155: „Le juge peut prescrire toutes mesures propres à empêcher ou faire cesser une atteinte illicite au corpus humain ou des agissements illicites portant sur des éléments ou des produits de celui-ci, y compris après la mort."

[24] Johanne CLOUET1 et Marième LACROIX2, « De l'« être » vers l'« avoir été »: muabilité du corps humain au moment du décès», Johanne CLOUET1 et Marième LACROIX2 Lex Electronica, vol 15.2 (automne 2010)- site CANLII.ORG/FR/DOC TRINEDOC/210 accesed on 18.04.2022, p. 13

[25] Code Civil annoté, édition limitée 2020, éditions Dalloz, 2019, Paris, pag. 154

[26] Code Civil annoté, édition limitée 2020, éditions Dalloz, 2019, Paris, pag. 155: „Paris, 5 fevr.2013, JCP 2013, no. 195, obs. Byk; ibid.no. 411, note Loiseau, pourvoi rejeté par.civ.1re, 29 oct.2014, no. 13-19.729 P";

[27] France, Cour de cassation, Chambre civile 1, 29 octobre 2014, 13-19729 -site juricaf.org accessed on 18.04.2022; France, Cour de cassation, Chambre civile 1, September 16, 2010, 09-67456 -site juricaf.org accessed on 18.04.2022

[28] Article 1 of the Universal Declaration of Human Rights: „All human beings are born free and equal in dignity and rights"; Article 1 of the Charter of Fundamental Rights of the European Union: „Human dignity is inviolable. It must be respected and protected".

[29] see E. Chelaru, The rights of personality in the regulation of the New Civil Code in Revista Dreptul no. 10/2011

PROCEDURE FOR THE DISBANDING OF A DOCUMENT IN THE EVENT OF CLOSURE ORDERED BY FOLLOWING THE DEATH OF THE SUSPECT OR DEFENDANT

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Abstract

The procedure of confiscation or cancellation of documents is a legal operation of a criminal nature that has the role of restoring legality and removing possible harmful situations.

Due to the characteristics it has, at first glance it can be said that it represents a legal institution with features exclusively specific to the field of criminal law, but after a closer analysis, it can be seen that it has in its composition elements that have consequences including regarding the civil side. By the procedure established by art. 549[1] C. proc. C., in resolving the civil action in the criminal proceedings, the court may proceed to the abolition of a document, in the event that it is the result of committing an act of forgery.

The amendments made in this field by the legislator are a novelty element, since, unlike the old legislation, where the prosecutor could order the measure of special confiscation, and as regards the abolition of a document, the civil court was seized, currently, the judge of the preliminary chamber is notified for ordering both measures.

Even if the death of the suspect or defendant is ascertained, the judicial bodies still have the obligation to take the necessary steps to confiscate or abolish the documents related to possible crimes in order to protect the interests of individuals.

The link between that legal institution and the scope of the law of succession is very close, since the application of these provisions prevents the possibility of opening the way to an inheritance from the commission of a criminal act.

Keywords: *seizure of the document, cancellation of the registered, ranking*

1. Introduction

Often, the criminal proceedings are no longer settled by the court, as situations such as those described in art. 16 C. pr. civ. may arise, in which it is necessary to apply provisions that ensure the restoration of the previous situation and the prevention of possible damages.

Among these, a special place is held by the cases in which the closure of the file is ordered, since the death of the suspect or the defendant has occurred and the criminal proceedings are devoid of purpose. However, criminal proceedings are not without legal basis, as criminal activity exists in its materiality and it is necessary to remove all consequences it may have.

Such cases can be encountered in judicial practice in the matter of inheritances, since by using false documents, acts obtained through dolosive or unlawfully issued manipulations, malicious persons can resort to collecting the entire estate or a part of the estate, although they did not have this right.

In this respect, in order to prevent such situations, it is necessary to have a thorough knowledge of the procedure for the abolition of documents in the event of a solution to close the file as a result of the death of the suspect or defendant.

The procedure of confiscation or dissolution of a document in case of death of the suspect or defendant is regulated in Title IV – Special Procedures, Chapter IX – Procedure for confiscation or dissolution of a document in case of closure, art. 549^1 C. proc.C., being introduced by art. 102 paragraph 319 of Law no. 255/2013 [1].

The chapter introduced in the C.proc.C. meets the provisions of art. 315 para. (2) letter c) and d) C.proc.C., according to which „The order closing the file shall include (...) and provisions on: (...) c) the notification of the preliminary chamber judge with the proposal to take the security measure of the special confiscation; d) to refer the matter to the judge of the preliminary chamber with a proposal for the total or partial abolition of a document (..). [2]"

The abolition of a document in the event of closure of the file, ordered by the judge of the preliminary chamber, is a *special auxiliary procedure*, by which the competent court resolves the notification of the public prosecutor in this regard [3].

Notwithstanding the fact that the legal literature is perceived as an auxiliary legal institution, the abolition of a document has a number of particular characteristics, which stand out mainly because of its implications.

During the present study, we have detailed the importance it represents, highlighting including possible shortcomings of the current regulation, with references to the matter of successions, with which it has a close connection, especially due to the possible repercussions that the commission of criminal acts in this field may entail.

Even if, once the death of the suspect or defendant is established, it can be considered that, despite his involvement in the commission of an act provided for by the criminal law, he can no longer inherit, in the event of maintaining the documents deriving from the commission of the crime, persons close to him may benefit, who, as stated above, they open the way to the collection of an inheritance by taking advantage of the commission of a crime, which is neither just nor permitted by law.

We would like to take the view that the application of those provisions ensures the protection of both the general and the particular interests, since in the case of successions, the application of those provisions ensures greater protection for those who have a right to inherit and who may come to the inheritance. That *special auxiliary procedure* is of particular importance even in the event of the death of the suspect or defendant, who, in the absence of a finding of lack of merit, could attract to the estate successors who could not normally have that status.

2. The concept of documents

From the perspective of criminal procedural law, the concept of *documents* is used mainly in evidentiary matters, taking into account, in particular, the criminal legal consequences that it may have both in a particular sense and in a broad sense on social life. The document, once in the case-file, is part of the evidentiary material and in order to deprive it of legal effects, it is necessary to abolish it.

Given the theme of the study, we consider that it is necessary to clarify the notion from the perspective of civil law, since criminal procedural law tends to offer a particular meaning, which can distance itself, in principle, from the subject matter of civil law.

The doctrine states that a document means ’*the recording of data on legal acts and facts, with an appropriate means, on a given material medium*[4] ". Also in the legal literature, in a more comprehensive exposition it is stated that the document may „*regulate any patrimonial or non-patrimonial relations between natural or legal persons, of private or public law, except for those relations regulated by other branches of law* [5]”.

Therefore, in my opinion, in the light of the foregoing, by the concept of a document within the meaning of the special procedure provided for in Article 549[1], we will understand any material medium (*instrumentum probationis*) which may represent a legal act as a result of the expression of the manifestation of will carried out with the expression of the intention to produce legal consequences (*negotium iuris*).

In this category, given the link with the matter of successions, we may consider a possible will, a notarial declaration, a marriage certificate or other deed conferring a possible vocation of succession to the interested party.

As stated in the case-law[6]: „*the application under art. 549[1] C. proc. C. has as its object and purpose the total or partial abolition of a document in the sense of instrumentum probationes, not in the sense of negotium whose false character or was not disputed during the criminal investigation phase and which ended in a solution of non-referral to court.*

The subject-matter of the special procedure being expressly limited by the legislature to the annulment of the document, cannot be interpreted as meaning that the judge of the preliminary chamber may hear the application for annulment of an agreement. (...) And, in this respect, the cancellation of a document is differentiated from the action for relative or absolute nullity, the latter having the effect of abolishing the legal act and the subsequent acts concluded on its basis, according to art. 1254 Civ.C.

Although the legislator does not affect the scope of the notion of forged document, this category may include both forged documents in material terms (by altering the writing or subscription or by counterfeiting them) and documents forged intellectually (by attesting circumstances inappropriate to the truth or by knowingly failing to insert some data or circumstances), both official documents and private documents.”

We will try not to deviate from the analysis of the subject proposed to be analyzed in the present study, so that next we will detail the procedure for abolishing a document in the case of dismissal as a result of the death of the suspect or defendant, the practical situations in which we may encounter problems and possible legislative remedies.

3. The legal nature

Having regard to the provisions of art. 549[1] which regulates this institution as a special procedure involving a series of its own elements, we consider that a number of clarifications should be made regarding its legal nature.

Such a solution is to be promoted whenever there is an impediment to the initiation of criminal proceedings or its extinguishment, of those provided for in art. 16 C. pr. civ. Thus, the death of the suspect or defendant is expressly provided for in letter f) of the aforementioned legal text, and the special procedure will be carried out, since, as I indicated above, there is an interest in protecting both the general and the particular interests of certain persons.

Art. 549[1] formed the object of some solutions of the constitutional court, being seized several problems regarding the initial formulation, which gave rise to several problems of interpretation in the judicial practice.

In this respect, in a recent decision, the Constitutional Court had to make an assessment of the object and features of this procedure, holding that „*the special procedure regulated by art. 549[1] of the Code of Criminal Procedure concerns a task of the preliminary chamber judge in which he decides on the merits of the case, respectively orders the cancellation of a document or the special confiscation of certain assets* [7]". Being necessary also to clarify other issues that related to a comparative approach, the constitutional court pointed out that „*the legislator's option to assign to the preliminary chamber judge the power to decide on the special confiscation or the abolition of a document, a solution different from that regulated by the Code of Criminal Procedure of 1968, is not likely to violate the constitutional provisions as long as, in the context of this procedure, it is possible to take evidence, in open court, under adversarial and oral conditions, while respecting the constitutional and conventional guarantees relating to the right to a fair trial and the right of defence* [8]."

The Constitutional Court has provided a complete clarification, this being necessary in order to clarify the problems arising in the judicial practice, since, even if to some extent this procedure borrows from the provisions of the old Code, there are many novelty elements that have given rise to some aspects that have left room for interpretation.

We are contrary to the opinion expressed in a study dealing with this topic [9], in which it is stated that, without denying the preventive feature of the measure of the abolition of documents (as it may be, for example, in the case of forged documents by means of which no obligation is attested), which are effectively removed from the civil circuit, the measure of abolishing a document should be perceived, in principle, as a form of repair in kind of damage.

Therefore, from our point of view there is a content identity with the situation described in art. 25 para. (3) C. pr. civ., so that, from the point of view of the legal nature, there is no difference between them.

The abolition of documents in the case of closure ordered as a result of the death of the suspect or defendant will perform a function of reparation for the damage (if it occurred), but also a preventive and sanctioning function, being exercised ex officio by the prosecutor and subject to the control of the preliminary chamber judge to ensure the legality and impartiality of the decision.

4. Procedural aspects

4.1. Competence

The power to hear the application lies with the court which, according to the law, would have jurisdiction to hear the case at first instance, namely the judge of the preliminary chamber of that court.

According to the current Code of Criminal Procedure, the power to order the partial or total termination of a document no longer lies with the civil court, but with the preliminary chamber judge, according to the procedure established by art. 549[1] C.proc.C. [10].

The optics of the legislator differ from what we find in the old Code, through the current regulation being ensured a control by the criminal court, not by the civil one. The view of the legislator is logical, given that, although these are measures governed by civil law and which concern civil matters, those documents represent the material object or product of criminal offences.

4.2 The correlation between the procedure for the abolition of a document, provided for by art. 549[1] C. pr. civ. and the complaint against the closure solution ordered by the prosecutor

As stated in the doctrine[11], from the corroboration of the provisions of art. 549[1] with those of art. 340-341 C. pr. civ., the notification of the preliminary chamber judge in order to order the cancellation of a document may take place only after the resolution of the complaint against the solution of closure of the file or after the expiry of the term provided by law for lodging the complaint, otherwise the complaint may be rejected as prematurely introduced.

Thus, the application to the court takes place after the *expiry of the term* provided for in art. 339 para. (4) C. pr. civ., 20 days from the communication of the copy of the document by which the closure was ordered or 20 days from the date when the complaint had to be resolved, but not later than 20 days from the communication of the way of solving it or, as the case may be, after the pronouncement of the decision by which the complaint was rejected.

The view expressed is, in our opinion, fair. As long as the complaint against the non-prosecution solution ordered by the prosecutor is not resolved, there can be no question of creating a separate procedural framework in which to analyze the necessity of abolishing the document that was the subject of probation in the case in which the prescription of criminal liability occurred. That conclusion is all the more obvious in the event that, following the resolution of the complaint against the decision to close the file, it is upheld, with the consequence of the resumption of the criminal investigation or, as the case may be, of the commencement of the proceedings. In the situation set out, it would be obvious that the clarification of the case in all aspects, including from the perspective of the abolition of the forged document, could not be done by means of the special procedure provided for in art. 549[1] C. pr. civ.

4.3. Procedure for dealing with the complaint

It has been pointed out in the case-law [12] that, in the procedure provided for in art. 549[1] C. pr. civ., the court will consider a series of separate procedural rules, since it is a special procedure. Thus, even if such a referral is dealt with by the judge of the preliminary chamber, a solution on the merits of the case is to be ruled, the unlawful nature of that document being at issue, and the procedure will be a public one, in compliance with the conditions of orality, adversariality and defence of the parties.

Basically, we are dealing with a genuine judgment that is carried out by the preliminary chamber judge who is called upon to rule on the admission or rejection of the prosecutor's complaint on the basis of the evidence administered ex officio, at the request of the parties or other interested persons.

Taking into account the fact that the court seised is the criminal one, the case not having the nature of a civil action, even if the object of the complaint is the cancellation of a document, the procedural aspects which the court is called upon to decide pursuant to the provisions of art. 549[1] C. pr. civ. are not the subject of procedural issues which the court is called upon to decide on the basis of the provisions of art. 549[1] C. pr. pen. questions relating to the validity of the terms of a contract.

The judge of the preliminary chamber is to rule on the forgery of the document in question, not to ascertain whether the document meets the conditions of validity laid down by law in that regard.

This aspect represents the essence of the prosecutor's referral to the judge and the element that clearly differentiates this special procedure from the other actions that the person concerned may have at hand according to the rules established by the Civil Code.

However, in judicial practice, in criminal cases, the question of annulment of follow-up acts as a result of the abolition of the original act is also constantly raised. For example, in a criminal case[13], by decision, it was ordered the termination of the criminal proceedings against the defendant, following the intervention of the limitation of criminal liability, as well as the annulment of the will whose false character was established on the basis of the evidence administered during the criminal investigation. The prosecutor also requested the annulment of the sale-purchase contract by which the successor disposed of a part of the assets acquired as heir, a quality she acquired as a result of the debate on the testamentary succession. The court analyzed the prosecutor's request and held that from the principle of annulment of the subsequent act as a result of the annulment of the initial act there are also certain exceptions, one of them referring to the case of application of art. 901 Civil Code. The criminal investigation bodies did not carry out any checks on the good faith of the acquiring third party, which they did not even hear, in the context in which, according to art. 14 para. (2) Civ. C., good faith shall be presumed until proven otherwise.

On these premises, relating to the suitability of the procedure provided for in art. 549^1 C. pr. civ. to lead to the annulment of subsequent legal acts, contrary opinions have been expressed in case-law and legal literature. Thus, in judicial practice, it was held, in the context of the procedure of the abolition of a document following the closure of the file, that the prosecutor did not carry out an effective investigation, during the criminal investigation, which would allow the preliminary chamber judge to assess the termination of some sale-purchase agreements. It was pointed out that „in the present case, the termination of some sale-purchase contracts cannot be requested only on the argument that the power of attorney that was used is false, because the seller was the son of the owner, so he had a successional vocation, and the other heirs could exercise the paulian action. For those reasons, the actual investigation would have had to be carried out. In the present case, it must be established whether there was a tortious civil liability of the purchasers, who in the absence of an actual investigation are presumed by law to be in good faith”[14].

In another opinion[15], it was pointed out that in the procedure provided for by art. 549^1 C. pr. civ. the preliminary chamber judge does not have the possibility to order the restoration of the previous situation according to art. 256 C. pr. civ., only through such a solution can be ordered the annulment of the subsequent legal acts, with the consequence of returning the right of ownership over a real estate in the patrimony of the person harmed by committing the crime. It was considered that the purpose of the procedure for the abolition of a document in the case of closure of the file is to remove from the civil circuit the forged documents. The latter point of view is, in my view, correct, given that, indeed, the procedure provided for in art. 549^1 C. pr. civ. it cannot have as its purpose the restoration of the situation prior to the commission of the crime, the annulment of the subsequent legal acts being tantamount to the abolition of negotium, under the conditions that such an annulment implies.

As regards the persons who are summoned to the settlement of the complaint, according to art. 549^1 para. (2) C. pr. civ., for the fixed term, the prosecutor's notification shall be ordered and the persons whose legitimate rights or interests may be affected shall be summoned, to whom a copy of the ordinance is served, taking into account that, within 20 days from the receipt of the communication, they may submit written notes.

As regards the status of interested person, in the matter which is the subject of my analysis, in the case-law [16] it has been held that a person has this capacity if he is the beneficiary of a holographic will, by which the deceased left him his entire movable and immovable property, a will that was used by the beneficiary during the debate on the succession from the deceased, being issued the certificate of inheritance.

According to the provisions of art. 549^1 para. (3) C. pr. civ., the judgment according to this special procedure shall be made including by summoning the persons concerned, in order to ensure the protection of their interests. The legislature understood that it is necessary in such situations not only to protect the interests of the parties, but also of the persons concerned, since even in the present case in the matter of inheritances, the parties are not always the same as the persons concerned.

In a recent judgment, *the High Court of Cassation and Justice states that: „it was necessary to summon the interested party in the situation in the present case taking into account the procedure of cancellation of documents, in which art. 549^1 para. (3) C. pr. civ. provides that „for the fixed term, the notification of the prosecutor shall be ordered and the persons whose rights or legitimate interests may be affected shall be summoned".*

Thus, taking into account the findings of the Constitutional Court in the aforementioned decision on art. 549^1 C. pr. civ., applying by analogy to the particular situation in the present case, the High Court of Cassation and Justice finds that, in this case, the court had the obligation to order the summoning of the beneficiary of the will, namely the interested person D. Since the court issued an order that also concerned the interests of another person, had the obligation to apply art. 353 para. (1) in relation to art. 34 C. pr. civ. Consequently, the annulment of the documents infringed the right of a person who had a certain and real interest in the case, the latter having no possibility to make defences, thus infringing his right to a fair trial. » [17]

The obligation to summon in such situations is necessary, as the supreme court also points out, since, in the light of the special nature of that procedure and the need to ensure equal procedurality for all those concerned, the case cannot be judged without the persons concerned.

Conclusions

The termination of a document may give rise to various consequences, depending on the nature and features of the document disbanded. In this respect, by abolishing the document, the attested operation is left without legal effects, the judge being forced, among other things, to undertake an analysis from its perspective. The abolition of the will, the notarial declaration or any other document which may serve in matters of succession and which has a connection with a criminal offence, contributes to the removal of the consequences of the crime and the profit obtained by a person from committing a crime.

The abolition of a document therefore appears as a special solution which may be ordered by the judge of the preliminary chamber where, as a result of the intervention of cases which prevent the setting in motion or the exercise of criminal proceedings, the

criminal proceedings cannot be conducted and thus measures cannot be ordered to ensure the requirements required by society.

The role of the preliminary chamber judge in such situations is to ensure the restoration of legality, to settle according to the rules imposed by the legislator and within the limits established by it the situations that may be the subject of art. 549^1 C. pr. civ.

Bibliographical references

[1] Published in the Official Gazette, Part I no. 515 of 14 August 2013.

[2] Volonciu, Nicolae; Uzlău, Andreea Simona and collective (2017); Code of Criminal Procedure commented, Hamangiu Publishing House, Bucharest, p. 1511.

[3] Neagu, Ion; Damaschin Mircea (2018); Criminal Procedure Treaty. The Special Part, Universul Juridic Publishing House, Bucharest, p. 600.

[4] Beleiu, Gheorghe (2007), Romanian Civil Law. Introduction to Romanian civil law. Subjects of civil law, Universul Juridic Publishing House, Bucharest, p. 115.

[5] Nicolae, Marian (2017), Civil Law. General Theory, vol. I, Solomon Publishing House, Bucharest, 2017, p. 19.

[6] High Court of Cassation and Justice, Criminal Section, Conclusion no. 103 of 8 February 2017, not published.

[7] Decision no. 166 of 17 March 2015 of the Constitutional Court of Romania, published in Official Gazette no. 264 of April 21, 2015.

[8] Ibidem.

[9] Ghigheci, Cristinel; Neagoe, Vlad; The procedure for abolishing a document in the event of closure of the file, www.juridice.ro.

[10] Volonciu, Nicolae; Uzlău, Andreea Simona and colective (2017) *op. cit.*, p. 1512.

[11] Volonciu, Nicolae; Uzlău, Andreea Simona and colective (2017) *op. cit.*, p. 1513.

[12] High Court of Cassation and Justice, Criminal Section, Decision no. 54/A of 22 February 2019, not published.

[13] High Court of Cassation and Justice, Criminal Section, Decision no. 54/A of 22 February 2019, not published.

[14] High Court of Cassation and Justice, Criminal Section, Conclusion no. 381 of March 25, 2015, in A. Barbu, G. Tudor, A.M. Şinc, Criminal Procedure Code annotated with national and European jurisprudence, Hamangiu Publishing House, Bucharest, 2016, p. 1039-1040.

[15] Volonciu, Nicolae; Uzlău, Andreea Simona and collective (2017); Code of Criminal Procedure commented, Hamangiu Publishing House, Bucharest, p. 1519.

[16] High Court of Cassation and Justice, Criminal Section, Conclusion no. 103 of 8 February 2017, not published.

[17] High Court of Cassation and Justice, Criminal Section, Conclusion no. 103 of 8 February 2017, *op. cit.*

GENDER EQUALITY AND THE INSTITUTION OF INHERITANCE A COMPARATIVE LAW PERSPECTIVE: INDIA AND ROMANIA

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Abstract
India and Romania are two legal areas between which there are considerable differences, determined by historical, cultural developments and specific traditions, which have left their mark on the evolution of legal norms. From this perspective, the legal regime of the institution of inheritance is one of the most marked by the cultural differences and traditions existing in the two countries, especially when the principle of equality in general and gender equality is at stake.

The study aims to explore the constitutional and legal basis of the right to inheritance in the two states from the perspective of the principle of gender equality, revealing both the history of regulations and the influences that global developments in this field have on the regulations and jurisprudence of the two states.

Keywords: *right to inheritance, gender equality, constitutional review*

Inheritance in India

1.1. General remarks

One of the major challenges which India faces today is gender neutral laws. The Hindu Succession Act includes under its ambit succession of Buddhists, Sikhs, Jains and Hindus (more than 70% of Indians). In case of inheritance rights of women under Hindu Succession Act, differential treatment is provided in the provisions. According to the provisions, if woman dies intestate relatives of husband have stronger claim on the property in comparison to her parents and relatives. The case is altogether different when it comes to devolution of husband property where parents in law have no claim on the property irrespective of any situation or circumstances. Such treatment which has disparity in governing stands on the test of constitutionality and legitimacy. Article 14 and 15 (1) of Constitution of India poses a challenge to the constitutionality of provisions of Hindu Succession Act.

The relevant issue has been raised in the case of Kamal Anant Khopkar vs Union of India [WP(C) 1517/2018]. The Apex Court has directed Solicitor General to provide the view of Union Government on discriminatory provisions in Hindu Succession Act. Meenakshi Arora amicus curiae in the case has highlighted the issue of inequality in the Act and prompted the necessity of Supreme Court intervention. The Apex Court has also stated that legislative intervention is needed to reform the act.

It is necessary to see some cases where the unjustness of the provisions cannot be ignored.

In a recent case Manju Narayan Nathan v. Union of India and another [CWP No. 14305 of 2021 (O&M)], issues have been raised on devolution of intestate Hindu women who dies childless. The facts of the case stated, deceased Devina Bhardwaj who died childless in May 2021 her self- acquired property will devolve into the legal heirs of her husband. Both Chetan Bhardwaj and Devina Bhardwaj married in 2007 and were living Gurgaon. In 2014 they jointly purchased a home in which maximum expenses were bore by Devina. Chetan was scummed to death intestate in April 2021 due to covid. Soon, after that Devina also died intestate in May 2021. Devina property devolved into her mother-in-law as she was the legal heir of Devina according to section 15 of Hindu Succession Act. The net worth of property was INR 2.7 crore which included the self-acquired property of Devina. As, in such provisions no claim can be raised by parents of Devina. A pertinent issued which has been refereed by the apex court to subordinate courts deals with discrimination caused by section 15 of Hindu Succession Act. Aggrieved by the provisions of Hindu Succession Act, Devina's mother prayed to the High Court of Punjab and Haryana claiming her share of assets and challenging constitutional validity of section 15 Hindu Succession Act.

Similar issue was dealt by the Supreme Court in Prakash v. Radhacharan [(2009) 15 SCC 66].

According to the facts of this case, one Narayani Devi's husband died soon after the marriage. Her in laws abandoned her from the matrimonial home. She returned to her parents and started living with them. In the meanwhile, when she was living with her parents, she purchased a lot of property. Everything was going well for her, one fateful day she fell ill and died due to her organ failure. Both her parents and nephews of in laws filed claims over her self-acquired property. The matter went to the apex court, where giving plain reading to the provisions of Hindu Marriage Act all property of Narayani was granted to husband's nephews while her parents received nothing. The decision would have been different if Narayani had been a man

1.2 Devolution of property under Hindu Succession Act

According to the provisions of Hindu Succession Act, different rules have been laid for devolution of property belonging to women and men. Section 8 of Hindu Succession Act lays emphasis on devolution of property belonging to men. The first claim to his property belongs to class-I heirs which includes his wife, mother and lineal descendants. Second claim rests with class-II heirs which includes siblings, father and lineal descendants. Siblings of parents will have claim if there are no surviving class-I heirs. These are the rules through which the property of man devolves. According to this scheme, most of the men property is kept within natal family.

Section 15 deals with the devolution of women's property. Section 15(2) deals with any property which women inherited from her husband, her parents and her husband's family. According to Section 15(2)(a), in a situation where widow dies without a child, any property which she got from her husband or family will get back to heirs of husband. Here the phrase used „heirs of husband" refers to the list of heirs mentioned in Section 8. According to Section 15(1) first claim rests with woman's children and husband. Second claim rests with the heirs of husband followed by her parents and other heirs of her parents. According to Section 15(1), where a woman dies without child, heirs of husband have

stronger claim on her property than her parents including the claim on her self-acquired property. Whereas there is no reciprocal provision where a woman's family has a claim over the property of husband.

1.3 Constitutionality of Section 15 of Hindu Succession Act

Equality before law and equal protection of law has been laid down under Article 14 of the Constitution of India. Article 15(1) prohibits the state from any kind of discrimination against citizens based on sex, religion, race, caste or place of birth. From the understanding of provisions of Hindu Succession Act it leaves us in iota of doubt whether Section 8 and Section 15 are in accordance with constitutional guarantee of equality or not.

In the landmark case of Mamta Dinesh Vakil v. Bansi S. Wadhwa [LNIND 2012 BOM 748] the hon'ble High Court of Bombay has stated such kind of unequal treatment as unconstitutional. It was observed by the court that discrimination in Hindu Succession Act is based on sex which goes against the wires of Article 14 and 15(1) of Constitution of India. The question of Constitutionality was referred to larger bench by the Court. While the question of constitutionality may not be settled, judgments such as Om Prakash v. Radhacharan [(2009) 15 SCC 66] highlight the fact that discrimination under Hindu Succession Act is unjust to women. Particularly, Hindu widows with no surviving children.

1.4 India's International Treaties

India became signatory to Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980. The treaty was ratified by parliament in 1993. Gender neutral laws in property relating legislation is one of essential part of CEDAW. The Apex Court has, in number of judgements has already stated legislature, administration and judiciary should give due regard to international commitments of India under treaties like CEDAW.

In C Masilamani Mudaliar & Ors v Idol of Sri Swaminathaswami Thirukoil & Ors [(1996) 8 SCC 525], the Apex Court stated that it is necessary for parliament to eliminate gender-based discrimination in legislations as India is signatory to CEDAW treaty. Similar observations were made by Supreme Court other cases, like in Madhu Kishwar & Ors. v State of Bihar & Ors. [(1996) 5 SCC 125], and Githa Hariharan and Ors. v Reserve Bank of India and Ors. (MANU/SC/0117/1999).

1.5 Law Commission Report

In past some attempts have been made to reform these legislations. But these reforms were limited in their scope which resulted in failing the object.

In their 207th Report (2008) and their Consultation Paper on Family Law (2018) the Law Commission of India, took consideration of inequality caused in treatment of men's and women's self-acquired property and hence proposed amendments. The proposed amendment sought to introduce another sub section dealing with self-acquired property of women instead they should have proposed a common scheme for devolution of man and women self-acquired property [1].

The following challenges were faced by Law Commission's proposal. First, there is no definition of self-acquired property. Second, no changes were made in Section 15(2)(b), which requires the property that a woman has inherited from her husband to be passed to the husband's heirs if she dies without a child [2]. Third, it ignores the fact that the heirs of the

husband will be preferred over the woman's natal family if she has inherited the property in question from relatives other than her parents, such as her siblings or grand-parents, since it will continue to be governed by Section 15(1).

Till now, in parliament two private member's bills have been introduce. One by Anurag Singh Thakur in 2013 and the second introduced by Dushyant Chautala in 2015 which also seek to resolve the problem. However, both these bills suffered same problems as the proposal of the Law Commission. A comprehensive reform of the devolution scheme in the HAS is needed.

1.6 Existing Legislation and Way Forward

Indian Succession Act, 1925 (ISA) and the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (GSSNIP) are gender-neutral legislations dealing with devolution of property. ISA applies to Christians and Parsis, and GSSNIP applies to all persons domiciled in Goa. The British Colonial Government enacted the ISA in 1925. The progenitor of the GSSNIP — the Portuguese Civil Code — was enacted in Goa in 1870. The ISA is still on the statute books, and the GSSNIP replaced the Portuguese Civil Code in Goa in 2018.

2. Inheritance in ROMANIA

2.1 General remarks

The Constitution in force, adopted in 1991 and revised in 2003, enshrines the right of inheritance in Article 46, according to which „*the right of inheritance is guaranteed*". The constitutional text makes no distinction as to the beneficiaries of this right. The constitutional principle of equality in rights enshrined in Article 16 of the Constitution is applicable accordingly, which also entails the incorporation of gender equality. The constitutional provisions are developed in the infra-constitutional legislation, namely the Civil Code and Law No 71/2011 for the implementation of the Civil Code, as well as in Law No 36/1995 on notaries public and notarial activity, which also does not apparently raise any issue in view of the principle of equality in general and of the gender equality in particular.

However, given that inheritance law is „one of the parts that most deeply reflects and integrates the traditions and customs of the country whose legal system it serves", „perhaps because it is also the one that most deeply reflects the family" [3], the recent developments in the definition of family and marriage institutions in Europe are – we believe, challenges for this branch of law, being described as the most conservative part of the civil law. In relation to these developments, we believe that ensuring gender equality in the inheritance law in Romania requires a reflection on the content of the constitutional right of inheritance regulated by the Constitution of Romania, with particular reference to the legal inheritance and the rights of the surviving spouse.

2.2 The right of inheritance of the surviving spouse in Romania – a historical perspective

The study of the regulations from the old Romanian law reveals the custom of the land, whose codification in the first legislations reflects the concern for the identification of equitable solutions, meant to protect the surviving spouse, regardless of gender.

A remarkable study that provides substantial historical evidence regarding the surviving spouse's right of inheritance [4] reveals that the first codification of the old written Romanian law in which express endorsements were found regarding the surviving spouse's right of inheritance is The Code of Ypsilanti or Pravilniceasca Legal Register: „therefore, the uncertainty regarding the extent and nature of the surviving spouse's rights ended in 1780, with the adoption of the Code of Ypsilanti"[5] In accordance with the provisions of Pravilniceasca Legal Register to which the cited works refer, the inheritance rights of the surviving spouse were not conditioned by the gender of the predecessor spouse. Instead, the existence of the inheritance rights varied based on the birth of the descendants resulting from that marriage. In view of those in which we are interested in here, namely the gender equality, we note that the same rules were applied to both women and men, in the sense that the surviving husband, as well as the wife, enjoyed inheritance rights, in full ownership or usufruct, depending on whether or not they met the condition of giving birth to common children. Without going into details, we distinguish the specific legal regime of the dowry, namely the goods transferred from the patrimony of the girl's parents to that of the future wife. If the woman was the first to die, the dowry belonged to the descendants, and in their absence the dowry was returned to the family, and if the husband was the first to die the woman was obliged, according to Article 8 of the Chapter „For dowries" from Pravilniceasca Legal Register, to draw up an inventory to show the difference in dowry that was not included in the assets of the deceased's estate at the date of the inheritance settlement and to request it from the man's heirs. However, as a general characterization of the legal regime of the inheritance of the surviving spouse, including in view of the gender equality, we note from the same works that in the old Romanian law in Muntenia, between 1780-1818, the surviving spouse benefited from a satisfactory and fair patrimonial position. Regardless of whether the surviving spouse was a woman or a man and without an analysis of his or her estate, the nature and the emolument of the inheritance law depended on the existence or non-existence of that couple's descendants. [6]

The subsequently adopted acts, such as the Caragea Code, which applied in Wallachia from 1 September 1818 to 1 December 1865, or the Calimach Code, which applied in Moldavia from 1 July 1817 to 1 December 1865, the date on which the Cuza Civil Code came into force, maintained this concept of equality of spouses, even if a number of rules were introduced, including, for example, those related to the estate of the surviving spouse. However, in this regard, the same equality of spouses was noted, regardless of the gender, namely that „the right of the poor widow must be recognized to the poor man, proportionally to the number of children". [7] Though, even if these first regulations reveal a modern view in terms of the possibility of spouses to inherit from each other under similar conditions, the tradition and the very clear difference of the social roles assigned to women and men in society have a strong touch on the matrimonial regime and the right of inheritance, as revealed, for example, through the detailed analysis of the regulations or the legal regime of the dowry.

The regulation of the Civil Code of 1864 introduced substantial amendments to the inheritance law of the surviving spouse, but not from the perspective we analyse here, of the gender equality, but of the order of inheritance, equally applicable to the surviving spouses, irrespective of gender.[8] Strong criticism has been formulated in relation to these amendments, stating that „under the 1864 Civil Code, the surviving spouse's inheritance status was very unfavourable, unfair." [9] Subsequently, Law No 319/1944 established the

right of inheritance of the surviving spouse, regardless of whether it was about a man or a woman, whether or not they had children during their marriage, without discrimination in relation to their assets, the only condition for inheritance being the quality of spouse at the date of the inheritance settlement. Ruling upon Law No 319/1944, which, although preconstitutional, was adopted in the legal order established by the 1991 Constitution, the Constitutional Court established [10] that „*regarding the provisions of Article 1 c) of Law No 319/1944, (...) they do not violate the constitutional provisions related to the right to property and to the equal protection of private property by law. These legal provisions enshrine the right of the surviving spouse over the assets remaining in the assets of the deceased spouse's estate, the legislator establishing the legal reserved share and the share due to him/her following the inheritance settlement. Far from violating the constitutional provisions regarding the right to property, the provisions of Article 1 c) of Law No 319/1944 only remove the unfair situation of the surviving spouse, who, according to the provisions of the Civil Code, inherited the deceased spouse only after the last collateral relative of the twelfth degree, and by the effect of the law on the progressive inheritance tax of 28 June 1921, after the last collateral relative of the fourth degree."* Subsequently, by another decision [11], the Court reinforces these recitals, noting at the same time that according to Article 1 of the law, the surviving spouse has the right of inheritance both in competition with any of the classes of legal heirs, and by himself/herself in the absence of relatives from the four classes, and according to Article 5 of the law, he/she has a special right of inheritance over the furniture and the objects belonging to the household, as well as over the wedding gifts. Likewise, he/she has a temporary right of habitation over the dwelling house, under certain conditions, according to Article 4 of the same law. Thus, although the surviving spouse does not belong to any class of legal heirs, he/she competes with any class called for the inheritance settlement. He/she is neither removed nor excludes the deceased's relatives from the inheritance settlement.

The provisions of *Law No 319/1944* were resumed and improved by the current Civil Code, where the substance of the matter is given by Articles 970-974. Thus, Article 970 (1) of the Civil Code, in the wording in force at the moment, establishes, **without any distinction in relation to sex/gender,** that „*the surviving spouse shall inherit the deceased spouse*".

2.3 Equality and gender equality in the inheritance law. Who is the „spouse"?

Social developments, reflected in legislation and in the case-law of national and international courts, emphasize the fact that family and even marriage are evolving concepts. To this effect, the legal doctrine [12] emphasizes the connection between the inheritance law, the right to respect for private and family life, regulated in Article 8 of the Convention for the Protection of Fundamental Rights and Freedoms, in conjunction with Article 12 – the right to marriage and Article 5 of Protocol 7 equality between spouses, and the rich case-law of the European Court of Human Rights (ECHR) which reflects the evolutionary conception on the family. As one ECHR judge pointed out, „the field of inheritance and liberalities between close relatives is closely related to family life. It not only includes social, moral or cultural relationships, but it also includes material interests, as evidenced by the maintenance obligations between the members of a family and the place assigned to the legal reserved share in the domestic law of most Contracting States. And if the inheritance rights are not exercised, as a rule, until his/her death *de cuius*, so when the

family life ends in relation to him/her, this does not mean that no problems can be raised before the death, the inheritance can often be regulated by will, being an element of family life that cannot be neglected [13]. The examination of the case-law of the ECHR clearly reveals its applicability in matters of inheritance, the true „hard core" of the civil law. As a result of this case-law, directly applicable in the Romanian legal system, the constitutional space of the family, with its multiple dimensions and consequences in terms of regulating various legal aspects of family life, including inheritance law, is susceptible to reconsideration.

Thus, the concept that the relationship between a same-sex couple falls within the scope of the notion of „family life" has been straightened mainly in the ECHR case-law, later taken over by the CJEU and the national constitutional courts. Thus, with regard to these couples, the ECHR initially ruled that the relationships between partners do not fall under the obligation to respect family life, but private life. Therefore, due to the rapidly changing attitude of European society towards the same-sex couples, the Court reconsidered its approach, considering it artificial to argue that, unlike the couples of different sex partners, the same-sex couples may not enjoy a family life for the purposes provided for in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, the Court ruled that the cohabiting relationships of same-sex couples living in a *de facto* stable partnership fall within the scope of the notion of family life, as do the relationships between heterosexual couples in the same situation [14]. The relevant judgments in this regard are the judgments delivered in the Cases *Mata Estevez v. Spain (2001)*, *Karner v. Austria (2003)*, *Kozak v. Poland (2010)*, *Schalk and Kopf v. Austria (2010)*, *Vallianatos and Others v. Greece (2013)*. This development has continued to enshrine the positive obligation of the State to provide a specific legal framework for the recognition and protection of the same-sex union. Thus, for example, in the Case *Oliari and Others v. Italy* (Judgment of 21 July 2015), the ECHR concluded that Italy had breached its positive obligation to provide the applicants with a specific legal framework for the recognition and protection of the union which enshrine the relationship between same-sex couples. Likewise, in the Judgment of 23 February 2016 delivered in the Case *Pajic v. Croatia*, the European Court of Human Rights found a violation of Article 8 in conjunction with Article 14 of the Convention, noting that discrimination against unmarried couples of the same sex and unmarried couples of different sexes, based solely on the sexual orientation, constitute prohibited discrimination under the Convention. In its Judgment of 30 June 2016 in the Case *Taddeucci and McCall v. Italy*, the ECHR established that the very absence of the possibility for the same-sex couples to have access to a form of legal recognition placed the applicants in a different situation from that of an unmarried heterosexual couple. The Court noted that there is a „significant trend" around the world to treat same-sex partners as „family members" and to recognize their right to live together, and that there is an appropriate consensus at European level which, in the field of immigration, have a tendency to consider same-sex unions as „family life".

Similarly, the CJEU which held that the interpretation of Article 7 of the Charter, the content of which is similar to that of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, must be the same as the interpretation of Article 8 of the Convention (Case C -400/10 JMcB v Le of 2010 or C-673/16, Coman: «in this respect, as it is clear from the Explanations on the Charter of Fundamental Rights (JO 2007 C 303, page 17), in accordance with Article 52 (3) of the Charter, the rights guaranteed in

Article 7 thereof have the same meaning, and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. However, it is clear from the case-law of the ECHR that the relationship between a homosexual couple is likely to fall within the scope of the notion of „private life" as well as the notion of „family life" as well as that of a heterosexual couple who are in the same situation. [European Court of Human Rights, 7 November 2013, Vallianatos and Others v. Greece, CE:ECHR:2013:1107JUD002938109, § 73, as well as European Court of Human Rights, 14 December 2017, Orlandi and Others v. Italy, CE:ECHR:2017:1214JUD002643112, § 143]).» (paragraphs 49 and 50)

The acceptance of this case-law, with the consequent interpretation of the constitutional framework, was made by CCR in a case in which the constitutionality of Article 277 of the Civil Code prohibiting the same-sex marriages was challenged, as well as the recognition of the same-sex marriages legally concluded in other States. At the request of a legally married homosexual couple in Belgium, who challenged Article 277 of the Civil Code, practically requesting that their status be recognized in order to benefit from the right of residence on the territory of Romania as a family, CCR addressed the CJEU to clarify the applicability of the European Directive on free movement invoked by the authors of the appeal. In the case thus established, *Coman v. Romania* (C 673/16), the CJEU ruled that in a situation where a citizen of the Union exercised his/her freedom of movement by moving and actually residing, in accordance with the conditions laid down in Article 7 paragraph 1 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 in a Member State other than that of which he/she is a national and on that occasion established or consolidated a family life with a national of a third party State, of the same sex, to whom he/she is bound by a lawful marriage concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State whose nationality the citizen of the Union has refuses to grant a right of residence in the territory of that Member State to that national, on the ground that the law of that Member State does not provide the same-sex marriage. Likewise, Article 21 (1) TFEU must also be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a national of a third-party State of the same sex as a Union citizen whose marriage to the latter was concluded in a Member State shall have a right of residence for more than three months in the territory of the Member State of which the Union citizen is a national. That derived right of residence may not be subject to more stringent conditions than those laid down in Article 7 of Directive 2004/38.

Starting from those established by the CJEU, the CCR applied, within the constitutional review, the norms of European law mentioned and found that the provisions of Article 277 (2) of the Civil Code, according to which „*same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign nationals shall not be recognized in Romania*", cannot constitute the basis for the competent authorities of the Romanian State to refuse granting the right of residence, on the territory of Romania, to the spouse – a national of a Member State of the European Union and/or of a third country, a person of the same sex, who is bound by a marriage, legally concluded on the territory of a Member State of the European Union, with a Romanian citizen, domiciled or residing in Romania, or a citizen of a Member State of the European Union, who has the right of residence in Romania. Thus, given that the provisions of Article 277 (4) of the Civil Code states that „*The legal provisions regarding the free movement on the Romanian territory of the citizens*

of the Member States of the European Union and the European Economic Area shall remain applicable", the prohibition of recognition of marriage does not apply if the citizen of a Member State of a third country, a person of the same sex, married to a Romanian citizen or of a member state of the European Union, pursuant to Article 21(1) TFEU and Article 7(2) of Directive 2004/38, requests the granting of the right of residence, for a period of more than three months, on the territory of the Romanian state, in order to reunite the family[1].

Moreover, the issue of marriage itself and its definition is a current issue in Romania, where the referendum for the amendment of the Constitution in order to expressly establish marriage as a union between a man and a woman (and not between spouses) ended inconclusively, in the sense that the presence in the referendum did not outline a valid option[2] In any case, the Constitution of Romania, as other European constitutions[3], defines marriage as the foundation of the family [„*family* ***is founded on the marriage*** (...)]", so the two concepts of *family* and *marriage* must be analysed together in the light of the same developments.

In view of this analysis, the question arises as to who is the spouse in relation to the inheritance law in the situation in which the inheritance settlement in Romania regarding a marriage between persons of the same sex would be under discussion. These marriages are not recognized in the Romanian law but they are recognized in other EU member states. The decision issued by the CCR regarding the Case Coman is an interpretative decision, which does not fundamentally change the legislative solution enshrined in the Romanian law, according to which the same-sex marriages are not either allowed in Romania or recognized.

3. Conclusions

With reference to the case of India and Romania, the presented landmarks reveal different challenges that the two States encounter as regards the extent of the gender equality in the inheritance law.

As for India, differential treatment has been provided in provisions of the HSA for the devolution of property held by men and women. These provisions unfairly give more weightage to husband's family over the woman's own family, even when the question comes to her self-acquired property where she has used effort or skill. The legislation is a product of an era when it was inconceivable for Indian women to own and acquire property. Due to patriarchal society these legislations continue to stay in force but now questions have been raised on their constitutionality. This inequality is ultra vires of Articles 14 and 15 of the Constitution of India. It violates India's commitments under the CEDAW. It is unfortunate that the Parliament has allowed this discrimination to persist despite knowing of the existence of more equitable laws such as the GSSNIP and ISA in our own country. The

[1] Decision No 534 of 18 July 2018, Official Gazette no. 186 of 3 October 2018.

[2] By Ruling No 2 of 18 October 2018, published in the Official Gazette of Romania, Part I, no. 1012 of 29 November 2018, CCR found that the national referendum for the revision of the Constitution of 6 and 7 October 2018 is not valid, as at least 30% of the persons registered in the permanent electoral lists did not participate, in accordance with the provisions of Article 5(2) of Law No 3/2000 on the organization and holding of the referendum, subsequently amended and supplemented.

[3] For a study in this regard, see Timea Barzo, Family Protection in Central European Countries, in the volume Family protection from a legal perspective- Analysis on certain Central European Countries, Ferenc Madl Institute of Comparative law, 2021, pages 287-322.

Supreme Court's notice to the Union Government is an indication of India's evolving jurisprudence on questions of gender-equity. This is an opportunity for the Court and the Parliament to, once and for all, eliminate discrimination in a law that affects most Indian women. with the list of references.

As for Romania the issue of gender equality in the inheritance law reveals another aspect of the gender equality, determined by the development of the concept of family and marriage in the European space. With regard to these developments, we consider essential the CCR-ECHR-CJEU dialogue and the way in which the interpretation of the constitutional concepts through this dialogue will be reflected in the Romanian law. The permanent increase of the standards for the protection of fundamental rights required by Article 20 of the Constitution of Romania and these developments also emphasizes a revision of the Constitution regarding the extent of the fundamental rights that must not be neglected, requiring careful consideration on the way in which the new perspective of family and even marriage will be reflected in a future amendment to the Fundamental Law.

However, a common conclusion that opens new perspectives for comparative law studies is the strong influence of traditions on the legal institutions, the inheritance one being representative fosr the meaningful significance in this regard.

References

[1] Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving her self-acquired property with no heirs (Report No 207), by Law Commission of India, 2008.

[2] Consultation Paper on Family Law, by Law Commission of India, 2018.

[3] Dan Andrei Popescu – European inheritance law or how to cross the river feeling the stones. The right of inheritance between the trauma of tradition and the perspective of modernity. Principles of the European Succession Regulation, Romanian Review of Private Law no. 1 of 31 January 2014

[4] Alina-Emilia Ciortea – The surviving spouse's right of inheritance in Wallachia and Moldova in the XVIII-XIX centuries, Published in Studia Iurisprudentia no. 2 of 30 June 2019

[5] Mihail ELIESCU, Inheritance and its devolution in the law of the Socialist Republic of Romania, Academiei Publishing House, Bucharest, 1966

[6] Daniela Negrilă, Inheritance in the Civil Code, Universul Juridic, Bucharest, 2015

[7] Ibidem

[8] Ibidem

[9] Francisk Deak, Romeo Popescu, Treaty on Inheritance Law, Volume I – Legal Inheritance, Universul Juridic Publishing House, Bucharest, 2013, page 237

[10] Decision of the CCR No 237 of 9 March 2006 regarding the exception of unconstitutionality of the provisions of Article 30 of the Family Code and of Article 1 c) and Article 5 of Law No 319/1944 for the right of inheritance of the surviving spouse, published in the Official Gazette no. 268 of 24 March 2006

[11] Decision No 78 of 26 January 2020 on the exception of unconstitutionality of the provisions of Articles 1 and 2 of Law No 319/1944_for the right of inheritance of the surviving spouse, published in the Official Gazette no. 128 of 25 February 2010

[12] Sandra Gătejeanu- The right to respect for family life, Romanian Case Law Review no. 2/2012

[13] C. Bîrsan, European Convention on Human Rights. Comment on articles, volume I, Rights and freedoms, All Beck, Bucharest, 2005; volume 2, Proceedings before the Court. Enforcement of judgments, C.H. Beck Publishing House, Bucharest, 2006

[14] C. Grabenwarter, European Convention on Human Rights, CH Beck, Hart, Nomos, Helbing Lichtenhahn Verlag, 2014

KILLING AT THE REQUEST OF THE VICTIM AND THE POSSIBLE IMPLICATIONS OF THIS CRIME ON THE INSTITUTION OF *DE JURE* DEBARMENT

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Abstract

Inheritance is an independent institution, but it is closely related to other important legal concepts specific to civil law, such as family and property, as well as other branches of law, including those in the field of criminal law.

The correlation between inheritance and the matter of criminal law results from the need to meet the conditions of those called to inherit in order to have a succession vocation, being one of the imperative conditions imposed by the legislator in this regard.

In carrying out this correlative process, the debarment appears as a civil sanction that intervenes in the situation when one of the persons called to inherit is guilty of committing a very serious crime against the deceased.

The de jure debarment it is determined by the nature of the crime committed by the successor, the category of these facts, although limited, has a number of special features that often raise serious problems of interpretation for practitioners.

Killing at the victim's request is one of the crimes that can lead to a state of unworthiness along with other crimes that present a much higher degree of danger. Thus, it is included in the category of some of the most serious crimes, although there are many differences from them.

Keywords: *debarment, killing at the request of the victim, sanction*

1. Introduction

In order to be able to collect an inheritance, a person must meet a number of requirements, including succession capacity, succession vocation, and that person must not be disqualified. To these is added the acceptance of the inheritance, as no one can be obliged to receive goods in his patrimony without expressing his consent in this respect.

In view of the above, in the present study we have proposed to analyze together with the conditions that must be met in order to be attracted to the *de jure* debarment; the crime of killing at the request of the victim, respectively if it can be assimilated to other crimes that attract the *de jure* debarment (murder, manslaughter etc.).

According to Article 958 Cod Civil „the *de jure* debarment from succession applies to:

a) the person convicted of a criminal offense with intent to kill the one who leaves the inheritance;

b) the person criminally convicted of committing before the opening of the inheritance, an offense with intent to kill another successor who, if the inheritance had been opened at the time of the act, would have removed or restricted the perpetrator's vocation to inherit.

If the conviction for the deeds mentioned in par. (1) is prevented by the death of the perpetrator, by amnesty or by prescription of criminal liability, the debarment operates if those facts have been established by a final civil court decision.

The *de jure* debarment can be established at any time, at the request of any interested person or *ex officio* by the court or by the notary public, on the basis of the court decision resulting in the debarment."[1]

The succession debarment represents the forfeiture of the successor from the right to inherit by law or will, including the right to collect the succession reserve due to him according to the law, as he is guilty of a serious act expressly provided for by the legislature against the deceased or his successor. [2].

We note that the debarment appears as a civil law sanction that will be applied to the person found guilty of committing an act prohibited by criminal law, to the one who leaves the inheritance or to another person who may have the quality of successor.

Among the acts that attract the *de jure* debarment is the crime of killing at the request of the victim, which is thus assimilated from this perspective with other crimes that involve very dangerous ways of being committed.

In order to establish the similarities, but especially the differences between the crime of killing at the request of the victim and the other crimes against the person, as well as the implications it presents for the *de jure* debarment, we consider that a series of preliminary presentations on the conditions to be met by the institution of legal indignity are necessary.

The analysis of the implications of committing such an offense with regard to the *de jure* debarment was carried out with a brief critical examination of the possible solutions existing in judicial practice, as well as by referring to the perspective on this subject that we encounter in other legal systems.

2. **The conditions of *de jure* debarment**

A first condition that must be met is that the crime be murder (attempted murder) and be committed intentionally; as what the legislator is actually pursuing is to sanction the perpetrator because he deliberately proceeded to kill or attempt to kill the *de cuius* or another successor. Thus, it would seem immoral for him to come to the inheritance of the one he killed or tried to kill, or to obtain an inheritance by committing such an act.

Another condition results from the interpretation of the provisions of Article 958 (2) of the Civil Code, requiring the existence of a solution to convict the perpetrator. The legislator corrected the existing deficiency in the old Civil Code, as there were situations [3] in which the perpetrator of such an offense against the d*e cuius* subsequently committed suicide, and the provisions governing the debarment no longer find their applicability, as the provisions of the old Civil Code expressly required a solution of conviction. In such cases, the prosecutor had to close the case because the perpetrator was no longer alive.

Along with these we must add the need for the deed to be committed by a person who has a legal vocation to inherit, legal or testamentary vocation (participant in the crime as perpetrator, co-perpetrator, instigator or accomplice) [4].

Without deviating much from the proposed subject, we will not detail the elements that characterize the *de jure* debarment; but we will insist below on the link between the crime of murder at the request of the victim and one of its effects, the attraction of *de jure* debarment, by removing the disqualified from both legal and testamentary inheritance.

3. **Implications of the crime of murder at the request of the victim against the *de jure* debarment**

The crime of killing at the request of the victim is not a novelty in criminal matters, being provided in most states. However, it was not regulated in the old Criminal Code, but was instead provided in Article 468 of the Criminal Code of 1936 which stated that, „*the one who kills a man, following his insistent and repeated request, commits the crime of murder at the request and is punished with severe imprisonment from 3 to 8 years.*

The same penalty applies to a person who causes another to commit suicide, or strengthens his or her decision to commit suicide, or facilitates its execution in any way if the suicide has occurred.

The penalty is correctional imprisonment from one to five years, when the fact was committed, under the conditions of the preceding paragraphs, under the impulse of a feeling of pity, to put an end to the physical torments of a person suffering from an incurable disease, and whose death was inevitable because of this.''

According to Article 190 of the Penal Code, „Killing committed upon explicit serious, conscious and repeated request by a victim suffering from an incurable disease or from a serious impairment, attested medically, which causes permanent and unbearable suffering shall be punishable by no less than 1 and no more than 5 years of imprisonment."[5].

The reintroduction of this text was necessary, first of all, as a result of the new regime of mitigating circumstances enshrined in the General Part of the Criminal Code. Indeed, if under the current regulation, the circumstance provided for in Article 190 of the Penal Code can be used as a judicial mitigating circumstance, thus leading to the application of a penalty below the special minimum, in the new regulation, even keeping in mind a mitigating judicial circumstance, the applied punishment will no longer be obligatorily below this minimum. Therefore, in order to allow the application of a penalty corresponding to the gravity of this act, a separate legal regulation was necessary. The marginal designation of murder was preferred at the request of the victim and not that of murder at the request of the victim, in order to exclude this fact from the antecedents of the aggravated murder provided by Article 189 (1) e) of the Penal Code. [6]

Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe on the protection of the human rights and human dignity of the incurable and the dying calls on the Member States to regulate in national law a mechanism for the protection of such patients against certain dangers or fears (for example: artificially prolonging the course of the disease, either by using disproportionate medical measures or by continuing treatment without the patient's consent). The Parliamentary Assembly also recommends that the Committee of Ministers encourage Member States to respect and protect the dignity of the terminally ill or the dying in all respects, for example by supporting a ban on the deliberate suppression of their lives. [7]

In the light of the foregoing and the elements of the content of that offense, the question of the implications of a deed falling within the provisions of Article 190 of the Penal Code on *de jure* debarment must be considered.

In principle, following a *stricto sensu* analysis of the conditions laid down by civil law in order to attract the *de jure* debarment and which I have listed above, the crime of murder at the request of the victim falls into the category of deeds that legally entitle the debarment from succession, if the perpetrator has a succession vocation to the inheritance of the *de cuius*.

With regard to the subjective side, it should be noted that it is committed with direct or indirect intent, and it is therefore necessary for the perpetrator to predict the outcome of his action, ie the death of the victim. [8]

From the perspective of the subjective side, being a crime that is always committed intentionally and which results in the death of the person, it can be considered that from a criminal point of view, the circumstances in which such an act is committed are not likely to remove criminal liability.

However, examining from a subjective point of view, we believe that a much more in-depth analysis should be undertaken, especially on the conditions that need to be met, as the offense requires the perpetrator to comply with the victim's wishes, therefore the result is pursued primarily by the victim, not by the perpetrator, the latter acting at his urging.

In order to achieve the material element, the victim's request must meet a number of special conditions, including:

- to be explicit, ie not to leave room for interpretations by the author;
- to be serious, real. A joke request will not be considered;
- to be aware; the victim must be responsible at the time of the request. The responsibility of the victim at the time of the request will be assessed on a case-by-case basis, taking into account the state of affairs of the victim at that time;
- repeatability; spontaneity is eliminated and the victim is required to persevere in the suppression of life or even in multiple circumstances. [9]

These requirements are cumulative and they outline a completely exceptional situation. The purpose of setting such restrictive conditions is to limit as far as possible the possibility of applying this attenuated form of murder and, as a result, to exclude false altruistic motives, which could possibly be invoked even if, in reality, it was murder [10].

The judiciary must pay particular attention to the assessment of the conscious nature of the application in the event that it was made by a person who has diminished or greatly diminished discernment, when one can justifiably foreshadow the fact that, although we are not in the presence of an disabled person, the demand for the end of life does not meet the condition of conscious nature. Likewise, special care must be taken in the case of requests for euthanasia made by minors even in the event that their request is confirmed or approved by the legal representative. [11]

In addition to these conditions, the reason for this request must also be taken into account, the condition that determines the decision to kill in such a situation, since, as stated in Article 190 of the Penal Code, the victim suffers from an incurable disease or a serious medical illness, causing permanent and unbearable suffering. In other words, as shown above, the commission of such a crime is a materialization of the will of the victim determined by a state of illness very difficult to bear.

In such a context, from our point of view, the author acts in the last resort, when there is no chance of recovery for the victim who suffers from the condition or illness that is medically attested.

To sanction such an act from a civil perspective, which is committed under such conditions, does not fit into the pattern for which the institution of *de jure* debarment was built. We make this statement, because we notice from the content of this synthetic analysis that we are not dealing with a crime of murder in the usual version, but with an act of murder that is carried out in very special conditions, in which the role of instigator belongs to the victim.

We consider that this framework for committing such a crime is in contradiction with the aspects for which the *de jure* debarment was created, as the differences between the crime of murder (for example), and such a crime is obvious, especially when it comes to the motivation for committing the crime.

Returning to the analysis of the crime, we should also consider the person who could be an active subject, as most of the time he is a person emotionally related to the victim through kinship or friendship [12], since when someone is in such a position, those close to them (who also have a possible succession vocation) are often at their side.

Even the Constitutional Court has ruled in a decision on the constitutionality of *de jure* debarment, limiting the scope of offenses that can be sanctioned by it. Thus, the content of that judgment states that „...the perpetrator of a murder cannot claim the same legal status as other citizens, among whom he has excluded himself by his act, so that the debarment instituted in respect of him does not contravene the provisions of Article 16 and Article 20 of the Constitution..."[13].

From the text of the decision it results that the constitutional court took into account when pronouncing it, the crime of murder, being about different situations that imply the commission of distinct deeds.

In view of these issues, we believe that the legal framework for the application of this civil sanction for acts of murder should not be extended at the request of the victim, as the text of the decision is of strict interpretation.

The decision of the Constitutional Court is clear, leaving no room for interpretation, and possible arguments to the contrary do not find their purpose.

As we have shown above, due to the fact that the act of killing is determined by the victim's request, by the expression of his will, this crime should not attract the *de jure* debarment, since the deceased, due to the unbearable torments, and for which there is no chance of survival, makes such a request to the author. At the same time, it must be borne in mind that in such situations, always due to the medical diagnosis, the death of the victim is a certainty. The aspect that is not known, but can only be anticipated with reference to a certain period of time is the moment when the victim will die.

From our point of view, these are sufficient reasons to support the idea that the justification of *de jure* debarment in such a hypothesis is not found, since there is no reason for the perpetrator to really pave the way for the collection of an inheritance by murder.

We do not omit, in addition to those presented, the provisions of Article 22 (2) of the Penal Code, „Consent by the victim does not apply in case of crimes against life, and in case the law excludes this avenue of justification".

The role of the text of the law is to emphasize that the existence of such a consent does not present a justifying value in the situation of committing a crime against life, which the suspect can use from a criminal perspective, having no effect on the civil side which implies a possible participation of the perpetrator in the succession debate of the victim.

The victim's consent is not a justifiable cause, having only the ability to change the legal framework [14].

In support of the above, we find opinions expressed in older specialized works where it is shown that „*the murder was committed intentionally, because the civil law does not punish the material fact of the murder, but the guilty intention to kill".* [15] In other words, the one who intends to kill the *de cuius* should be sanctioned with the imposition of

indignity, and the intention should come from the perpetrator. However, in the case of this crime, as we have shown, the perpetrator commits the crime at the urging of the victim.

This crime criminalizes both active euthanasia and passive euthanasia, but not to be confused with medically assisted suicide, which involves the help given by a doctor to a patient who is trying to commit suicide by offering or indicating the lethal means [16].

Often such situations are encountered in disadvantaged areas, in families who cannot afford expensive medical treatments to treat incurable diseases. Thus, the terrible suffering that the victims go through causes those close to them to commit such actions.

We support the sanctioning of such acts from the perspective of criminal law, but as we have shown in such situations, such as the one presented above, it is not justified to attract a civil sanction such as the *de jure* debarment. For example, if a daughter kills her mother in a situation that is completely circumscribed in the pattern presented, it is justified to punish her with a penalty as a result of criminal liability, but excluding her from the inheritance may seem too much, especially if the two had relatives who did not take care of the victim in any way and who may thus have the way open for the collection of an inheritance which they do not deserve.

The repercussions on the criminal side of the rights that the perpetrator should normally enjoy go beyond the degree of necessity that such a situation would impose, as, as we have shown above, such acts are often committed by those close to them in times of weakness, marked by empathy for the suffering the victim endures and who believe that committing such an act could help them.

It is not our intention to admit that one can inherit by committing a crime of murder, since in view of the cases presented such cases are quite special, determined by special circumstances, and the deed is not a murder itself, but a murder that involves a series of characteristics that distinguish it from the murder in the classic version.

4. **Conclusions**

We consider that the legislator was wrong when he chose to adopt this ineffective framework regarding the allowing of sanctioning by *de jure* debarment of those who are guilty of committing acts of murder at the request of the victim.

In order to correct this deficiency, we consider that the legislator should intervene in order to expressly provide for the exemption of this crime from those who attract the *de jure* debarment.

The re-evaluation of this subject should be carried out promptly as the current perspective outlined around this subject allows for judgments that create a series of more than unfair situations.

For all these reasons, we reiterate the fact that from the perspective of criminal law it is fair to bring criminal liability to the perpetrator, but as far as its prohibition to inherit by its sanction with the *de jure* debarment is concerned, it is too much, and it is necessary to exempt those who are guilty of committing such crimes from the application of this measure.

The problems that we have pointed out in this study are some of the reasons that lead to the existence of such solutions in this field, being necessary as we have specified a careful assessment of these aspects in order to ensure a correct application in the future of the legal provisions and the prevention of such situations.

Bibliographical references

[1] The Civil Code, adopted by Law no. 287/2009, published in the Official Gazette. no. 511 of July 24, 2009.

[2] Stoica, Veronica; Dragu, Laurențiu (2012), *Moștenirea legală în noul Cod civl (Legal inheritance in the new Civil Code),* Universul Juridic Publishing House, Bucharest, p. 54.

[3] Case Velcea and Mazăre v. Romania, ECHR, 64301/01, available on www.juridice.ro.

[4] Stănciulescu, Liviu (2017); *Moștenirea. Doctrină și jurisprudență (Inheritance. Doctrine and jurisprudence),* Hamangiu Publishing House, Bucharest, p. 76.

[5] The Criminal Code, adopted by Law no. 286/2009, published in the Official Gazette. no. 510 of July 24, 2009.

[6] Boroi, Alexandru (2021); Drept penal. Partea generală (Criminal law. The general part), C.H. Beck Publishing House, Bucharest, p. 58.

[7] Udroiu, Mihail (2021); Sinteze de drept penal. Partea specială (Criminal law summaries. The special part). Vol I, C.H. Beck Publishing House, Bucharest, 2021, p. 73.

[8] Boroi, Alexandru*;op. cit.,* p. 60.

[9] Cioclei, Valerian (2019); Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului (Criminal law. Special Part I. Offenses against the person and offenses against property), C.H. Beck Publishing House, Bucharest, p. 40.

[10] Udroiu, Mihail; *op. cit.,* p. 76.

[11] Cioclei, Valerian; *op. cit.,* p. 39.

[12] Boroi, Alexandru. *op. cit.,* p. 61.

[13] Eliescu, Mihail (1966); *Moștenirea și devoluțiunea ei în dreptul Republicii Socialiste România (Inheritance and devolution under the law of the Socialist Republic of Romania),* Academia Republicii Socialiste România Publishing House, Bucharest, p. 74.

[14] Boroi,Alexandru; *op. cit.,* p. 59.

[15] Boroi, Alexandru; *op. cit.,* p. 61.

[16] Decision no. 530 of November 13, 2005 of the Constitutional Court of Romania, published in the Official Gazette. no. 1040 of November 23, 2005.

PRACTICAL CONSIDERATIONS REGARDING THE DUTIES OF THE SECRETARY GENERAL OF ADMINISTRATIVE TERRITORIAL UNITS IN OPENING SUCCESSION PROCEEDINGS

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Abstract

This article is an analysis of the practical aspects of the duties of the secretary general of administrative territorial units in matters of succession. The article examines the administrative procedure for serving the notification to open succession proceedings, as described in the Administrative Code and in other legal acts.

Keywords: *secretary general of the administrative territorial unit, Administrative Code, succession proceedings, notification*

1. General considerations

The study of the way in which the legal provisions on the secretary general of administrative territorial units evolved in the national legislation shows that this senior function has „gradually replaced the function of the notary, taking over some duties of the latter, under various forms of administrative organisation[2]".

An analysis of the duties of the secretary general of administrative territorial (sub)units as listed under art. 243 of the Administrative Code reveals that currently they already perform notarial acts as well as administrative procedures that may result in the triggering of notarial procedures such as succession proceedings.

Thus, art. 243 paragraphs (3)-(7) of the Administrative Code regulates the duty of the secretary general of administrative territorial (sub)units in what concerns the notification to open succession proceedings.

The notification to open succession proceedings is in our view an administrative procedure that may trigger the successional debate procedure which can take place exclusively in front of a competent notary public or in front of the court competent in the territory where the deceased had their last domicile. Such notification does not prove the capacity of legal heir or a property right over the movable or immovable property owned by the deceased.

Whereas succession proceedings are regulated by Law 36/1995 on notaries public and notarial activities, republished, as subsequently supplemented and amended[3], the same does not apply to the procedure of notification to open succession proceedings.

The incomplete regulation of the drawing up and service of the notification to open succession proceedings as well as the absence of a mandatory and unequivocal legal benchmark created a situation favourable to the emergence of heterogeneous administrative practices.

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[2] Dana Apostol Tofan, *Drept administrativ,* vol. I, 5th ed., C.H. Beck, Bucharest, 2020, p. 275.

[3] Published in the Official Gazette no. 92/16 May 1995.

The Code of Administrative Procedure, currently being drafted, can provide a solution to the need to regulate on a framework procedure for the notification to open succession proceedings.

This paper attempts to discuss the practical aspects of the duties of the secretary general of administrative territorial (sub)units in succession matters.

II. The national legal framework for drawing up/serving the notification to open succession proceedings by the secretary general of the administrative territorial unit

In the light of the provisions under art. 103 paragraph (1) of Law 36/1995 on notaries public and notarial activities, republished, as subsequently supplemented and amended, the serving of the notification to open succession proceedings by the secretary general of an administrative territorial unit is an administrative procedure which may result in triggering the notarial succession proceedings.

According to the provisions under art. 243 paragraph (3) of the Administrative Code, „(3) *The secretary general of the commune, city, municipality or of the administrative territorial subunit of the municipality respectively, serves a notification to open succession proceedings to the Chamber of Notaries Public as well as to the National Office for Cadastre and Real Estate Publicity within whose territory the deceased had their last residence:*

a) within 30 days from the death of a person where the death occurred at the place of domicile;

b) at the date of acknowledgement of the death where such death occurred on the territory of another administrative territorial unit;

c) at the date when a notification is received from the territorial office in the territorial competence of which the immovable property of deceased person registered in land registers set up as a consequence of the completion of the systematic registration is located".

The same provisions are to be found also under art. 12 paragraphs (4)-(7) of Law no. 7/1996 on the cadastre and real estate publicity, republished, as subsequently supplemented and amended[4].

This duty assigned to the secretary general of administrative territorial units was first introduced in the previous law[5] by Law no. 133/2012 approving Government Emergency Order no. 64/2010 amending and supplementing the Law on the cadastre and real estate publicity no. 7/1996[6].

Law no. 264/2021[7] amended art. 11 paragraph (2) (g) of Law no. 7/1996[8] the effect being that the serving of the notification to the Chamber of Notaries Public in the case of

[4] Published in the Official Gazette no. 61/26 March 1996.

[5] Art. 117 [1] of Local Public Administration Law no. 215/2001, republished in the Official Gazette of Romania, no. 123 of February 20, 2007, as subsequently amended and supplemented.

[6] Published in the Official Gazette no. 506/24 July 2012. This legal act introduced article 117[1], of Law no. 215/2001, regulating the duties assigned to the secretary general of administrative territorial units.

[7] Law no. 264/2021 modifying and supplementing the Law on cadaster and real estate publicity no. 7/1996, and amending art. 121 of the Land Fund Law no. 18/1991, published in the Official Gazette no. 1065/8 November 2021.

[8] Art. 11 „(2) *The technical specifications for cadastre work in view of registering buildings in the land register shall be approved by an administrative order of the general director of the National Agency, published in the Official Gazette of Romania, Part I, and including mainly the following steps: ....*

undebated successions is to be performed by the city hall instead of the Office for Cadastre and Real Estate Publicity (OCPI).

The drawing up of the *notification* was a duty of the secretary general of administrative territorial units also under Government Decision no. 44/2004 approving implementing regulations for Law no. 571/2003 on the Fiscal Code[9], point 215 paragraphs (5) – (9) of which provided that „*(5) In accordance with the provisions of art. 68 of the Law on notaries public and notarial activities no. 36/1995, published in the Official Gazette of Romania, Part I, no. 92 of May 16, 1995, as subsequently amended and supplemented, hereinafter referred to as Law no. 36/1995, and of art. 75 of the regulation referred to under point 275, the secretary general of the administrative territorial unit/sector secretary in Bucharest, hereinafter referred to as secretary competent for the municipality where the deceased had their last domicile, when aware that the estate includes immovable property, shall, when checking the data recorded in the agricultural register, serve the notification to open succession proceedings to the notary public in charge of the succession proceedings index, also mentioning the data provided under article 72 of the regulation, within a maximum of 30 calendar days from the date of death, subject to the sanctions provided in the law",* while the drawing up of the notification is described under points (6)-(9).

In this context, the Joint Order of the Ministry of Public Finances and of the Ministry of Administration and Internal Affairs no. 1528/2006 on the approval of standard forms to establish, determine, control, collect and monitor local taxes and fees as well as other income to local budgets[10] introduced the obligation of local public authorities to draw up the respective notification, that is Annex 24 – The notification to open succession proceedings.

The technical rules applicable to entries in the agricultural register for the period 2020 – 2024[11] also provide under art. 42[12] *Instructions to fill in Chapter XIII: „Recordings relating to notifications/requests to open succession proceedings lodged with notaries public" of the agricultural register".*

III. Specific issues in fulfilling the duties of the secretary general of administrative territorial (sub)units in succession matters

Article 243 paragraph (3) of the Administrative Code enshrines the duty of the secretary general of administrative territorial units to serve the notification to open

g) *notification of the Chamber of Notaries Public by the city hall, in the case of undebated successions, in view of assigning the succession case to the competent notary public*;…"

[9] Published in the Official Gazette no. 112/06 February 2004.

[10] Published in the Official Gazette no. 1032/27 December 2006.

[11] Common order no. 25/1.382/37/1.642/14.297/746/2020 approving the Technical rules applicable to entries in the agricultural register for the period 2020 – 2024 published in the Official Gazette no. 307/13 April 2020.

[12] Art. 42 „ – In view of service to the Chamber of Notaries Public in the territorial competence of which the deceased had their last domicile, the following items shall be filled in respect of notifications to open succession proceedings according to the provisions of art. 12 paragraph (4) of Legea nr. 7/1996 Cadastre and real estate publicity law, republished, as subsequently amended and supplemented, as well as the following:

a) death certificate number;

b) registration date and number assigned to the notification to open succession proceedings in the general correspondence register of the relevant local public administration;

c) registration number assigned in the register of notifications to open succession proceedings;

number and date of acknowledgement of receipt by the notary public".

succession proceedings to the Chamber of Notaries Public as well as to the National Office for Cadastre and Real Estate Publicity within whose territory the deceased had their last domicile. It also prescribes the deadlines for serving the notification as follows: **a)** within 30 days from the death of a person where the death occurred at the place of domicile;

b) at the date when notified of the death where such death occurred on the territory of another administrative territorial unit; **c)** at the date when the notification is received from the territorial office in the territorial competence of which the immovable property of the deceased person registered in land registers set up as a consequence of the completion of the systematic registration is located."

An analysis of the content of paragraph (4) of the same article reveals the content of the *notification*, namely: family name, first name and personal identification number of the deceased; date of death (day, month, year format); last domicile of the deceased; movable or immovable property of the deceased as recorded in fiscal records or in the agricultural register, as appropriate; information on potential successors (family name, first name and address where to serve summons).

The notification to open succession proceedings, as approved under Annex 24 to Order no. 1528/2006 consists of four parts, as follows:

I. Elements identifying the deceased – testator;

II. Elements identifying the presumtive heirs (potential successors) of the deceased;

III. Succession debts, that is debts of the testator to the local budget at the date of death

IV. Immovable property of the testator.

A comparison between the elements to be included in the notification according to the provisions of the two previously mentioned legal acts reveals that succession debts, that is debts of the testator to the local budget at the date of death, are not mentioned in the Administrative Code.

A procedure needs to be established for the performance of the duty to draw up and serve the *notification*, as no legal act exists in this respect.

Although at a first glance the carrying out of this duty according to the existing provisions appears to be a simple task, the actual situation is quite different.

The specialised literature[13] contains frequent criticism in respect of this duty, which is qualified as utopian.

It must be decided whether the notification shall be served exclusively to the Chamber of Notaries Public and to the Office for Cadastre and Real Estate Publicity (OCPI) or whether it can be issued to presumtive heirs or to other persons who proved they have a legitimate interest.

The practical issue to be solved concerns the procedure to be used where the notification is drawn up at the date where the death of a person is recorded and subsequently served within the 30 days deadline to the Chamber of Notaries Public, namely is a new Annex 24 to be drawn up at the date of receipt of the notification by OCPI?

Also, an analysis of the provisions under art. 40 paragraph (7) of ANCPI (National Agency for Cadaster and Real Estate Publicity) Order 700/2014 approving the Regulation

[13] Cristina Feurdean, *Statutul juridic al secretarului unității administrativ-teritoriale,* Universul Juridic, Bucharest, 2018, p. 140.

on the approval, reception and recording in the cadastre and in the land register records[14] leads us to the conclusion that in order to be able to invoke the quality of presumtive heir when lodging the application for recordings to be made in the land register, Annex 24 can also be issued to the potential successors of the deceased. The questions to be answered are how many copies should be drawn up and how many times can such copies be issued? In such situations presumtive heirs should fill in an application, attaching both civil status records of the deceased and of all their presumtive heirs, as well as property deeds in respect of the immovable and movable property owned by the deceased.

By analysing the legal text we can determine that Annex 24 or the *notification* is drawn up by the secretary general of the administrative territorial unit where the deceased – testator – had their last domicile.

As to the date where the notification is drawn up, two situations may occur, namely

a) the date of death where the death occurred at the place of domicile or the date when notified of the death where such death occurred on the territory of another administrative territorial unit;

b) the date when the notification is received from the territorial office in the territorial competence of which the immovable property of the deceased person registered in land registers set up as a consequence of the completion of the systematic registration is located".

If in the first situation the identification information of the deceased, testator, may be available, that is their family name, first name, personal identification number, date of death, date of birth and last domicile as resulting from civil status procedures, that is the registration of death, mentions on civil status records, as well as the identification information of the presumtive heirs (potential successors) of the deceased, as the person declaring the death must fill in a statement, such information is difficult to obtain in the second situation, as land registers set up as a consequence of the completion of the systematic registration include only the family name and the first name of owners.

To fill in information on succession debts, that is debts of the testator to the local budget at the date of death, as well as on the movable and immovable property of the testator, we proceeded to draw up internal notes requesting information from the agricultural compartment/office and from the office/service for taxes and fees.

Account needs to be taken of the fact that where the deceased owned movable and immovable property located in another administrative territorial unit than the one where they were domiciled and the local authority drawing up the notification is not aware of such property, the respective property is not included in the notification except where a statement of the presumtive heirs to the effect that such property exists is available. This is unlikely to be the case in notarial succession proceedings, as notaries request interested persons to

[14] Art. 40 „paragraph. (7) The application for recordings to be made may be lodged by the holder of the right or by the person having an interest in the recording, in person or through a general or special personal representative who can prove such quality by means of an authentic letter of attorney or an authorisation from the representative of the legal person, by an authorised attorney, by a notary public, in person or through a notarial delegate, by a judicial officer, by the natural or legal person that drew up the cadastre documentation, as well as by any of the potential successors of the deceased mentioned in annex 24 to the Joint Order of the Minister of Public Finances and of the Minister of Administration and Internal Affairs no. 2.052 bis/1528/2006 on the approval of standard forms to establish, determine, control, collect and monitor local taxes and fees as well as other income to local budgets.

produce property deeds in respect of the movable and immovable property owned by the deceased, as well as a tax registration certificate issued for the deceased.

According to the list of items to be filled in in the agricultural register according to the Technical specifications for entries in the agricultural register for the period 2020 – 2021, the *notification* is to be registered in the general correspondence register at the level of local public administrations and not in a special register, as it was provided by Government Order no. 44/2004.

The secretary general of administrative territorial units or their delegate, as single signatory thereof, is the sole responsible for the truthfulness of the data in the *notification*

According to the text, the secretary general of administrative territorial units may delegate this duty[15] to officials exercising delegated duties as registrars, on mayor's order, upon their proposal, the mayor having the responsibility to monitor the carrying out of such duties by the secretary general of the administrative territorial unit or by the delegated registrar, subject to the disciplinary and administrative liability of the responsible person, according to the law[16].

Art. 46 paragraph (2) of Law no. 7/1996 lists the acts that constitute administrative offences, while letter k) provides that „*the failure to comply by the secretary general of the administrative territorial unit or by their delegate with the duty to serve to the competent Chamber of Public Notaries the notification to open succession proceedings in respect of deceased persons who had their last domicile in the respective administrative territorial unit;"* shall be sanctioned by a fine ranging from 2.000 lei to 4.000 lei.

Studying the legal provisions in this matter and those applicable to notarial activities we determine that the notary public receiving Annex 24 has the duty to register the succession case, to initiate the case and to subsequently summon the parties (presumtive heirs) to the notarial office in view of debating the succession. Given the provisions under art. 1 of Law 36/1995 which confer a non-binding and non-contentious nature to notarial activities, the question arises weather such succession proceedings triggered by Annex 24 might constrain the parties to draw up an act/go through a notarial procedure although they might not wish to do so at the respective point in time. Also, the legal provisions do not establish a link between the date when the succession is opened and Annex 24, namely: a) the date of recording in the general correspondence register of the administrative territorial unit; b) the date where the annex was communicated to the Chamber of Notaries Public and recorded in their evidence register; c) the date the succession case was registered in the successions register of the notary public. Such a date might be subsequently relevant in potential contentious succession proceedings.

IV. Conclusions

This study aimed at describing the practical aspects of the duty of the secretary general of administrative territorial units in matters of succession.

The proof of the capacity of legal or testamentary heir, as well as the proof of the property right of heirs accepting the succession over the estate of the deceased, as apportioned to them, is determined based on the heir certificate issued by a notary public

[15] Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ,* vol. I, Universul Juridic, Bucharest, 2018, p. 400.

[16] Emilia Lucia Cătană, *Drept administrativ,* C.H. Beck, Bucharest, 2017, p. 119.

according to the provisions of art. 1.132 of Law no. 287/2009 – the Civil Code[17], and of Law no. 36/1995.

Thus, since the *notification* does not prove the capacity of heir or the property right over the movable or immovable property owned by the deceased, and since it is a mere administrative procedure, we are questioning its efficiency.

We would like to express our hope that the new Code of Administrative Procedure, currently under elaboration, will regulate the procedure for the drawing up, issuing and serving of the notification to open succession proceedings in such a way as to render it necessary and efficient.

[17] Published in the Official Gazette no. 511/24 July 2009.

EXIT FROM UNDIVIDED OWNERSHIP OF JOINT HEIRS. WAYS AND MEANS

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Abstract

Periodic property is a legal institution newly introduced by the adoption of the Civil Code [1], being found in the contents of articles 687-692. It can be seen as a form of property right in which each holder exercises in his own name and personal interest the prerogatives of his property right for specific periods, which are repeated successively and perpetually, at regular intervals, involving at least two holders, natural or legal persons. Periodic ownership is not to bse confused with joint ownership, as in periodic ownership each holder exercises the right of ownership alone and there are several owners of the same property and not several co-owners of the same property. [2] Like any facet of property rights, it covers moments of its division, moments of the creation of new resulting real rights and moments when it ceases to exist in its original form. The study will set out the ways and means by which periodic ownership ceases, transforming/returning to its basic form.

Keywords: *periodic property; undivided ownership; heir; property right; partition*

1. Origin and evolution of the concept of ownership

Research into the evolution of property as a primary right is of historical importance both from a theoretical and practical point of view, since knowledge of it contributes to a better understanding of the rules governing this matter in modern law. [3] A well-known jurist of the 20th century, a 19th century jurist, E. Lerminier, stated that „*law must be studied historically: without knowledge of history, of what was and lasted before us, we would always remain incomplete, ignorant and unjust; if we tried to despise the past, we would lose the understanding of the present and of our own laws"* (E. Lerminier, 1829) [4].

Property law is a concept of great complexity and is the result of a long evolution of legal life and thought in our system of continental law [5] Enshrined in legal norms, property law in terms of its historical character makes its presence felt with the emergence of the state and implicitly of law in general and disappears with their disappearance. [6]

In the doctrine of Roman law, some authors have defined property as the right to use, to gather the fruits and to dispose of the thing as far as the reason of law allows, applying the adage *dominium est jus utendi, jus fruendi et abtendi re sua, quatenus juris ratio patitur* [7] From the beginning, there have been voices that have shown that property was born as private property, based either on occupation, i.e. taking possession of the objects of nature, or on work, or on a social convention [8].

Property can be defined on the basis of a number of main elements, namely: *(i)* the right of ownership is an appropriation, a right to appropriate goods, or a social relationship in which appropriation is carried out and which enables it to be carried out; *(ii)* the right of ownership has a historical and class character; *(iii)* the content of the right we find the prerogative of possession, use and disposition and *(iv)* the holder of the right exercises the prerogatives in his own name and exclusive interest. [9]

Taking into account the rigours of the characteristics outlined, the Civil Code that came into force in 1865, following the Napoleonic model of 1804, treats property as a central institution, so that it defines property in art. 480 of the Civil Code as the right that someone has to enjoy and dispose of something exclusively and absolutely, but within the limits determined by law. [10]

We consider that the right of ownership is self-defining in itself and not by being related to other rights, being the only right that allows its holder to exercise all his prerogatives in his own power and interest [11]. With regard to the exclusive nature of the right, the holder is the only one entitled to exercise all its attributes and, at the same time, the only one who can oppose any possible disturbance in its exercise, whether the source of the disturbance is the result of an action or abstention by private individuals or the State.

Interesting in our analysis is the characteristic of the right of ownership to have a perpetual character, a character which highlights that the right of ownership does not have a limited duration in time and is not lost by non-use on the part of the holder. Doesn't the new institution of periodical ownership defeat precisely this perpetual character? This question will certainly be answered below.

2. Periodic ownership – form of manifestation of property rights

The concept of periodic ownership is also known as *time-sharing* or spatio-temporal co-ownership and its essence consists in the presence of several holders who exercise their rights over the same right but successively and independently, at specific intervals of time, without their concurrence.

In the documentation carried out, we have identified a first rudimentary version of this new legal institution, as a form of property right, through the transposition into national law of Directive 94/47/EC of the European Parliament and of the Council of 26 November 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [12] by Law No 282/2004 on the protection of purchasers in respect of certain contracts relating to the purchase of the right to use immovable properties on a timeshare basis. [13] The transposition of the Directive into national law indirectly led to the regulation for the first time of this form of ownership but following the review of the European Union *acquis*, the European Directive was repealed by Directive 2008/22/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [14] which was transposed into Romanian law by O. U.G. no. 14/2011 for the protection of consumers in the conclusion and execution of contracts on the acquisition of the right of use of one or more accommodation premises for a fixed period, long-term contracts on the acquisition of benefits for holiday products, resale contracts, as well as exchange contracts [15] thus repealing the previous regulation. [16]

Periodic ownership can be defined as a form of ownership whereby each holder exercises in his own name and interest the prerogatives of his ownership right for fixed periods, which are repeated successively and perpetually, at regular intervals, involving at least two holders who may be natural or legal persons (including the State).

The essential features of periodic ownership are: the plurality of holders of the right of ownership and the exercise of the prerogatives of this right successively and repeatedly by holders at fixed, equal or unequal intervals. Of the prerogatives of the right of periodic

ownership, only the attribute of use is exercised successively and repetitively by the holders. The units of time must always be determined, and not only determinable, but the parties may also make this determination at a later date. The attribute of possession and the attribute of disposition are exercised concurrently and jointly by the holders of the right of periodic ownership, which is why, in the Civil Code, periodic ownership is a particular case of co-ownership, with the following defining elements what distinguishes periodic ownership from its proximate kind (common ownership n.s.) is the exercise by several holders of the real right of use of an asset (movable or immovable), in its entirety, successively and repetitively, at specific intervals of time (equal or unequal), and not concomitantly and continuously, as in the case of forms of common ownership proper. [19]

The express regulation of this new legal institution is found in Article 687 of the Civil Code, a rule of law which has a suppletive role in the absence of any provision to the contrary; the suppletive nature of the rule of law also results from Article 67 of the Civil Code Implementation Act [18] which stipulates that the provisions on periodic ownership in the Civil Code are without prejudice to the provisions of GEO no. 14/2011 [20].

According to Article 687 of the Civil Code, periodic ownership arises on the basis of a legal act, the provisions on the land register applying accordingly; the rule exhaustively limits the ways of acquiring this right to the concept of a legal act in general, any other way of acquiring ownership, such as usucaption, being excluded. [21] It is inconceivable that periodic ownership should be usucapted precisely because the possession exercised, as a state of fact, cannot be continuous. Periodic ownership can also arise through a legatee. However, this should not be confused with the situation where the right of one of the holders of periodic title passes by bequest, in which case periodic title precedes the bequest. [22]

Periodic ownership, although it is generally referred to as forced co-ownership (art. 646, para. 1 of the Civil Code), in reality, it is not common property, being exclusively a form of forced ownership. [23]

3. Ways and means of terminating periodical ownership – exit from undivided ownership by heirs who are co-regular owners

The legislator establishes a unique way of creating periodical ownership in Article 688 of the Civil Code, its source being the legal act. We consider that the concept of legal act contained in the aforementioned provision is a comprehensive one, comprising both the well-known distinction between unilateral and bilateral/multilateral legal acts and the broader concept of the notion, which includes both a court decision and an administrative act, the legislator's intention being to remove periodic ownership from the effect of a mode of acquisition of ownership based on the element of possession as a state of fact, the temporal intermittence of periodic ownership being incompatible with uninterrupted possession. Moreover, the legislator points out that the necessary element to be analysed is the will of the co-owners to possess in such a way, so the central element to be analysed is consent, i.e. the will to be the holder of the right under such conditions, since any legal act presupposes a manifestation of will expressed for the purpose of producing legal effects. But what happens when this will which gave rise to the creation of the periodic property disappears?

In the section of the Civil Code devoted to periodical ownership, the legislator does not resolve this question, but limits himself to providing solutions regarding the termination of

periodical ownership only in the event of the fault of a co-owner in the performance of his obligations, the remedy indicated in Article 691 of the Civil Code being the exclusion of the co-owner through a judicial procedure only on condition that the other co-owner or a third party buys the share [24].

Interesting is the situation of some periodic co-owners who have acquired this form of ownership through inheritance, whether legal or testamentary, since the will to participate in such a form of co-ownership may be lacking, not being an original will.

If we were to look obscurely only at the provisions of Article 691 of the Civil Code concerning the termination of periodic ownership by a judicious method applied following a finding of fault in the performance of obligations by a co-owner and those of Article 692 of the Civil Code, we would wrongly conclude that only by agreement could such a form of ownership be terminated.

However, the solution in the case of heirs who are regular co-owners of the property to end this situation is to be found in Article 1143 para. 1 of the Civil Code, which states that no person may be obliged to remain in undivided ownership, the heir having the possibility to request to leave undivided ownership at any time. [25] It is clear from the interpretation of this rule that even in the case of joint heirs who are periodic co-owners, the exit from the indivision can be achieved by way of partition of the estate. Thus, according to Article 1144 of the Civil Code, they have the possibility of partition by goodwill, in which case the temporal equivalent of the right of ownership is valued by equivalent, after the valuation of the heirs who are regular co-owners in a sum of money by way of a fee, and partition in kind is not possible.

In the event of disagreement between the heirs of the periodic co-owners, we consider that the only effective way of terminating the periodic co-ownership is judicial partition. Article 669 of the Civil Code reinforces and highlights the method of termination of co-ownership, in this case of periodic co-ownership, emphasising that this can be requested at any time and, according to Article 670 of the Civil Code, it can be done by agreement or by court order.

It should be noted that the legislator does not lay down any criteria for sharing the right itself, but refers expressly in Article 676 of the Civil Code to rules on how to divide the property.

We consider that the use of the term property is unsatisfactory as long as it is considered separately from the existence of the right, the property being only a derived object of the subjective right. However, we consider that by virtue of the adage mutatis mutandis, for the sake of consistency of reasoning, this rule may also be applicable to the sharing of the periodic co-ownership of heirs. It is obvious that paragraph 1 of the rule [26] cannot be applicable in this situation, since periodic property cannot be shared in kind if the property is not conveniently shareable from a material point of view, the criterion used being that of maintaining its economic value.

In this situation, we consider that the termination of the periodical property can be achieved by the combined application of Art. 676 para. 2 with art. 692 of the Civil Code in the sense that the court will either assign the property to a co-owner in exchange for the obligation to pay a sum of money or by selling the property through public auction. However, the problem that arises is reflected in the method of determining the percentage of *(i*) the fee and *(ii)* the share of the price obtained at public sale. We consider that the solution to this issue is contained in Article 5(5) of the Directive. 3 of the C.prc.civ. [27]

which requires the judge to take into account the requirements of equity when the law expressly and restrictively provides for certain methods of settlement. In our opinion, the concrete application of the requirements of equity to the above-mentioned situation can be summed up by determining the percentage share taking into account the primary determination of the repetitive interval and by a mathematical operation to determine the percentage as a result of the actual time interval during which a co-owner holds the use of the right and subsequently applying corrections, for example: if the object of the periodic ownership in constitutes an apartment located on the sea mall, it is obvious that the time interval in the summer season, as a way of use, has a more significant value than the use outside the summer season; therefore, we consider that, by analogy, the criteria for determining the assessment of the lack of use can also be applied to determine the sulti / share due from the price.

We therefore consider that the periodic ownership in the situation of heirs can be terminated either by exclusion, as a special way provided for by law, but also by means of voluntary or judicial partition.

4. Conclusions

The emergence of periodic co-ownership in national law is a factor that demonstrates the evolution of social thinking on the concept of ownership, which has moved beyond the material boundaries of the right itself, aiming in particular to determine the effective exercise of the right with all its prerogatives only from a temporal point of view. Periodic co-ownership originates in the possibility of the right of property to define itself and not by the realisation of relations between the right of property and other rights, being the only right that allows its holder to exercise all its prerogatives in his own power and interest.

What is striking about periodic ownership is its origin, which is circumscribed by the existence of a will expressed for the purpose of producing legal effects, since periodic ownership can only arise from a legal act, the other ways of acquiring the right of ownership being excluded ab initio.

Although the special rules governing periodic property did not appear to provide for any solution as to how to terminate it where there is no fault on the part of a co-owner in the performance of his obligations, it has been shown that, particularly in the case of heirs who are periodic co-owners, where the affectio specific to this form of property is lacking, the means of terminating ownership is partition, whether voluntary or judicial; the peculiarity of this is that the legislator has not established objective criteria for determining the extent of the share, but leaves to the light and wisdom of the judge the method of partition, the limits imposed being those supported by the requirements of equity.

Lastly, we would state that periodic ownership is nothing new, it has existed since the advent of property law, but in our era it has begun to be effective through the actual use of this form of ownership.

Bibliographical references:

[1] *Civil Code*, Law no. 287/2009, published in M.Of. 511 of 24 July 2009

[2] *New Civil Code for all to understand*, p. 1. material prepared by the Superior Council of Magistracy available at: https://www.csm1909.ro/Download.aspx?guid=152462b5-3001-46a8-9547-402778405ef5-InfoCSM

[3] ZAMFIR, ROXANA SEVERINA, *Historical profile on private property law*, p. 1. material available at https://drept.uvt.ro/administrare/files/1481046727-drd.-roxana-severina-zamfir.pdf

[4] M.A. BOLCA, *The history of property in the Romanian past. PhD thesis*, Cluj-Napoca, 2010, p. 3, apud E. Lerminier, *Introduction générale à l'histoire du droit*, 1829

[5] V. STOICA, *Drept civil. Drepturi reale principale* 1, Editura Humanitas, Bucharest, 2004, p. 214.

[6] V. Hanga, *Drept privat roman*, Editura Didactică și Pedagogică, Bucharest, 1971, p. 171.

[7] Article 836 of the Italian Civil Code of 1942 states that ownership is „*the right to use and dispose of a thing fully and exclusively".*

[8] J. MANOLIU, Gh. DURAG, *Civil Law. Drepturi reale principale,* Editura Fundației „Chemarea", Iași, 1994, p. 40.

[9] *Ibidem* p. 42.

[10] C. BÎRSAN, *Drept civil. Main rights in rem*, Hamangiu Publishing House, Bucharest, 2008, p. 29.

[11] E. CHELARU IN FL.A. BAIAS, E. CHELARU, R. CONSTANTINOVICI, I. MACOVEI, *New Civil Code. Comments on articles*, C.H. Beck Publishing House, Bucharest, 2012, p. 608.

[12] Published in OJ L 280/83 of 29.10.1994.

[13] Published in M.Of. Part I No 580/30 June 2004;

[14] Published in OJ L33/10 of 3.2.2009;

[15] Published in OJ L33/10 of 3.2.2009;

[16] ZAHARIA, Silvia, *Periodical ownership*, material available at https://avocatsilviazaharia.ro/proprietatea-periodica/#_ftn6

[17] ZORILĂ, ALEXANDRA, *Periodic ownership – a first in Romania*, material available at https://abcjuridic.ro/proprietatea-periodica-o-premiera-in-romania/

[18] Law no. 71/2011, published in Official Gazette no. 409/2011, corrected in Official Gazette no. 489/2011.

[19] Collective, *New Civil Code. Notes. Correlations. Explanations*, C.H. Beck Publishing House, Bucharest 2011, p. 236.

[20] Published in M.Of. no. 134/2011

[21] F.A. BAIAS, E. CHELARU, R. CONSTANTINOVICI, I. MACOVEI (coord.), *New Civil Code. Commentary on articles*, C.H. Beck Publishing House, Bucharest 2012, p. 742.

[22] I. ADAM, *Civil Law, General Theory of Real Rights*, C.H. Beck Publishing House, Bucharest 2013, p. 415.

[23] I. LULA, *Observations on the regulation of periodical property in the new Civil Code in New Romanian Codes. Studies and legal research*, Universul Juridic Publishing House, Bucharest 2011, p. 158

[24] Art. 691 para. (3) C.civ. „*Exclusion may be ordered only if one of the other co-owners or a third party buys the share of the excluded one."*

[25] Art. 1143 par. 1 Civil Code. „*No one may be obliged to remain in the joint tenancy. The heir may at any time ask to leave the undivided estate, even when there are testamentary agreements or clauses providing otherwise.”*

[26] Art. 676 para. (1) Civil Code. „*The partition of the common property shall be made in kind, in proportion to the share of each co-owner.”*

[27] Art. 5 para. 3) C.prc.civ. „*If a case cannot be resolved either by law or by custom, or in the absence of the latter, by the legal provisions relating to similar situations, it must be judged on the basis of the general principles of law, taking into account all the circumstances and taking into account the requirements of equity.”*

HOMICIDE AT THE REQUEST OF THE VICTIM, CONSEQUENCES ON SUCCESSOR UNWORTHINESS

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Abstract
Succession unworthiness is a legal institution with a long tradition, drawing its origins in Roman law. Beyond the way it has been regulated over time and the cases that have attracted this civil sanction, the foundation of the institution lies in the idea that it would be unfair and immoral for a person to be fit to inherit the deceased against whom he proved unworthy. Although it is unanimously accepted that no one can open their way to an inheritance through murder, the intervention of the indignity of law in the case of committing the crime of homicide at victim's request seems to find no justification.
Keywords: *Succession, homicide at the victim's request, succession unworthiness*

1. Introductory remarks

From ancient times legacy has played a very important role in society, the essence of the notion of „succession" and its significance for human evolution from a socio-legal point of view being masterfully explained in legal doctrine: „Succession carries with it this meaning of vector of history itself because it marks an avatar of collective life-the transmission of material signs (heritage), of a former existence, to the successors of an individualistic and certain human paradigm. We can say that with the consolidation of the concept of succession, history began, that is, the essential message that transits time beyond the death of an entity"[1].

Man, a transient being, perishes, inevitably, through death, with the consequence, from a legal point of view, of his disappearance as a subject of law[2], but his patrimony remains and is transmitted to the heirs according to the rules of inheritance law.

More precisely, according to the provisions of art. 955 Civil Code, the patrimony of the deceased is transmitted by legal inheritance, also called ab intestat, except for the situation in which the one whose inheritance is in question disposed otherwise by will. Therefore, in our law, the testamentary inheritance[3] represents the derogation from the common law inheritance, which is the legal one[4].

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[1] V.M.Ciucă, Roman Law. Lessons. Volume II, Second Edition, addenda, corrigenda et augmenta, „Alexandru Ioan Cuza" University Publishing House, Iași, 2014, p. 692, cited by M.A. Itu, „The boundaries of succession indignity", https://www.juridice.ro/736514/granitele-nedemnitatii-succesorale.html#_ftn1.

[2] D.Chirică, „Civil law treaty. Successions and liberalities", 2nd ed., Hamangiu Publishing House, Bucharest, 2017, p. 1.

[3] The testamentary inheritance is the one that is deferred according to his will of cujus, manifested during his life through one of the testamentary forms provided by law.

[4] The legal inheritance is the one that is deferred according to the supplementary rules established by law, to the persons, in the order and in the quotas determined by law, taking place both when the person dies without leaving a will and when the will left concerns only a part of the estate.

In order to be able to inherit, regardless of whether it is a legal or testamentary inheritance, the Civil Code provided that a person must meet certain conditions, two positive, namely the existence of succession capacity and succession vocation, and a negative one, that of not being unworthy of inheritance.

Although, apparently, the regulation of cases that attract indignity is unequivocal, the incidence of succession indignity in the case of the crime of homicide at the request of the victim, introduced by the new Criminal Code in the category of crimes against life, has sparked doctrinal controversy[5].

We will present our own point of view after exposing some considerations regarding the institution of the indemnity of succession, especially regarding its origin, history, legal nature, as well as the particularities of the crime of murder at the request of the victim, emphasizing the reason for the incrimination that no sound opinion can be expressed on the issue at hand.

2. Succession unworthiness

its origin in the Roman institution of disinheritance[6], the concept conceived in the time of Emperor Justinian, by Novella 115, based on the dualism of indignity-disinheritance, respectively disinheritance consists of a testamentary clause of punishment that could intervene strictly in express and limiting cases, provided by the legislator[7].

The old Romanian law took over this dualism since the customary law period, being maintained in the incipient development stage of written law, Matei Basarab's Rule, also known as „Îndreptarea Legii", as well as in the first modern codifications during the Phanariot rule, the Calimach Code[8]. Caragea's code referred exclusively to disinheritance, not unworthiness[9].

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[5] S.Mișinică, „Succesion indignity", https://www.juridice.ro/719672/nedemnitatea-succesorala.html; I.Genoiu, „The terms of the right to inherit in the new Civil Code „, Law Review no. 6 / 2011; S.Murariu, „Succession indemnity related to the crime of homicide at the request of the victim", https://www.juridice.ro/396336/nedemnitatea-succesorala-raportata-la-infractiunea-de-ucidere-la-cererea-victimei.html, A.Călin, „The indignity of succession. Reflections on crimes that attract the indignity of legal succession", https://www.juridice.ro/467272/nedemnitatea-succesorala-reflectii-privind-infractiunile-care-atrag-nedemnitatea-succesorala-de-drept.html.

[6] C. Hamangiu, „Romanian Civil Law Treaty", vol. III, National Publishing House, Bucharest, 1928, p. 372.

[7] A.Murphy, „Restauratio Iustinianus. On the reform of disinheritance in Romanian inheritance law", Studia Universitatis Babeș Bolyai Iurisprudentia, nr.4/2020, p. 653-671, https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/issue/view/63/8.

[8] A. Murphy, „The evolution of the dualism of indignity-disinheritance in the old Romanian law, from the Correction of the Law to the Calimach Code", in the International Conference of PhD students in law. European legal studies and research, 12th edition, Universul Juridic Publishing House, Bucharest, 2020, p. 460-466. The author shows that both codes take over the Roman conception of the indignity-disinheritance dualism (i.e. substantiation of indignity as a legal presumption of disinheritance), but the physiognomy of these legal figures differs depending on the degree of development known by the written law. On the one hand, the Rule of Matei Basarab rudimentarily configures this dualism: institutions are not referred to as unworthiness and disinheritance, and the distinction between the two must be deduced as the effect of exclusion from inheritance is the result of the deceased's own will or legal presumption. On the other hand, the regulation of the Calimach Code presents a little more clarity, in the sense that it uses the terms unworthy and disinherited, and the dualism is integral in terms of effects: both institutions result in deprivation of the entire inheritance, including the right to legitimacy, because disinheritance is justified only for the removal of those entitled to the reserve, while the other institution replaces this role in the case of the others.

[9] D. Alexandreco, „Principles of Romanian Civil Law", vol. II, Graphic Workshops SOCEC & Co., Societate Anonimă, Bucharest, 1926, p. 35.

Under the rule of the Civil Code of 1864, succession unworthiness, as a civil sanction[10], was characterized by the following: it was applicable only in the case of committing the acts expressly and limiting provided by law and only in the field of legal inheritance, the texts that provided for it being imperative and of strict interpretation; its effects came into force by law, the one who left the inheritance unable to remove its effects by forgiving the unworthy for his deed; although it was a sanction which should have had effect only in respect of the perpetrator, his descendants bore the consequences as the unworthy could not be represented so that, in competition with other descendants of a closer rank, they were removed; it produced relative effects in the sense that the scope of the sanction could not be extended to other inheritances, the indignity being removed only from the inheritance of the person against whom he committed the deeds; the sanction of indignity, being provided for deeds committed with guilt, the heir should have acted with discernment, in the absence of discernment it is not possible to speak of guilt[11].

According to art. 655 of the old Civil Code, three cases of unworthiness were provided: the attack on the life of the one who left the inheritance; the defamatory capital accusation against the one who left the inheritance and the non-denunciation of the murder of which the victim who left the inheritance fell.

With the entry into force of the new Civil Code, the succession unworthiness has undergone significant changes, it can be stated in essence that: it remained a negative condition, but not a special one, being incidental in the case of testamentary inheritance; there was a reformulation but also a significant widening of cases of unworthiness, being regulated two types of unworthiness, legal and judicial; legal and judicial unworthiness have different legal regimes, both in the cases in which they intervene and especially the more energetic effects of legal unworthiness, acting in the force of law, as opposed to judicial unworthiness where the court assesses whether or not to remove from inheritance; in contrast to the previous regulation, in which the effects of unworthiness could not be removed by the will of the one who left the inheritance, at present, this effect can be produced by a legal act, drawn up under the conditions of art. 961 para. 1 of the Civil Code, and which produces specific consequences, both in the case of legal and judicial unworthiness[12].

The cases of legal unworthiness are provided by art. 958 of the Civil Code, respectively the criminal convicted person for committing an offense with intent to kill the heir and the criminal convicted for committing, before the opening of the inheritance, an offense with

[10] It has been shown that, during the period of application of the Civil Code of 1864, two theories were put forward in the legal literature as to the legal nature of unworthiness. In the first opinion, it was characterized as a civil punishment based on public policy reasons, and it cannot be admitted that a person guilty of any of the acts expressly provided by the legislator towards another person to inherit it. Another opinion expressed was that unworthiness is a civil sanction, due to its legal nature, respectively that it applies only to legal inheritance, in the cases expressly and exhaustively provided and operating by law. See I.Nicolae, „Legal devolution and testamentary devolution of inheritance", Hamangiu Publishing House, Bucharest, 2016, p. 60.

[11] Fr. Deak, „Treaty of Succession Law", 2nd edition, updated and completed, Universul Juridic Publishing House, Bucharest, 2002, p. 60-61.

[12] B.Pătrașcu, I.Genoiu, „Renewal of civil legislation – expectations and results. Special look at some institutions of succession law, Romanian Academy, Institute of Legal Research „Acad. Andrei Rădulescu", Papers presented at the annual session of scientific communications „Romanian law on the 100th anniversary of the Great Union. Dimensions and trends" Bucharest, April 20, 2018, p. 13-15.

intent to kill another successor who, if the inheritance had been opened at the date of the deed, it would have removed or restricted the vocation to inheritance of the perpetrator, while the cases of judicial unworthiness are regulated by art. 958 of the Civil Code, namely the person criminally convicted for committing, intentionally, against the one who leaves the inheritance of some serious acts of violence, physical or moral, or, as the case may be, of some deeds that resulted in the death of the victim; the person who, in bad faith, hid, altered, destroyed or falsified the will of the deceased; the person who, through malice or violence, prevented the heir from drawing up, amending or revoking the will.

The current Civil Code, as well as the previous one, does not contain a definition of unworthiness, lato sensu the succession unworthiness representing a sanction that applies to the one who committed certain serious acts against him de cujus or against a successor of his, being thus fallen the right to reap the inheritance normally due to him, including the succession reserve[13].

Regardless of the number of cases of indignity or their formulation over time, the foundation of the institution lies in the idea that it would be unfair and immoral for a person to be fit in terms of succession to receive an inheritance from the deceased to whom – proved by his unworthy behavior.

3. Homicide at the request of the victim

Art. 190 Criminal Code criminalizes the killing at the explicit, serious, conscious and repeated request of the victim who suffers from an incurable disease or a serious medical illness, causing permanent suffering and hard to bear, the penalty being imprisonment from 1 to 5 years.

The 1969 Criminal Code did not contain such an offense or a similar offense, the incrimination being a return to an offense already existing in the 1936 Code which regulated, as attenuated variants of murder, the act committed as a result of the victim's persistent and repeated pleas (homicide at the request of the victim), as well as the act of pity, to put an end to the physical torment of a person suffering from an incurable disease and whose death was inevitable because of it[14].

Therefore, the current regulation is in the tradition of our pre-war criminal legislation but also of most European criminal codes that provide for crimes with similar constitutive content, respectively art. 216 German Criminal Code, art. 77 Austrian Criminal Code, art. 143 para.4 Spanish Criminal Code, art. 134 Portuguese Criminal Code, art. 114. Swiss Criminal Code and art. 235 Norwegian Criminal Code.

In addition, the legislator explained the need to reintroduce this text, first of all, in view of the consecration of a new regime of mitigating circumstances. Under the rule of the Criminal Code of 1969, the circumstances considered by art. 190 Criminal Code could be used as a judicial mitigating circumstance, with the consequence of lowering the sentence below the special minimum provided for the crime of murder. In the new regulation, the punishment is no longer below this minimum, even in the presence of a mitigating judicial circumstance, „Therefore, in order to allow the application of a punishment corresponding

[13] F. Deak, R. Popescu, „Treaty of succession law. Vol.I. Legal inheritance", Universul Juridic Publishing House, Bucharest, 2013, p. 95.

[14] G. Bodoroncea, V. Cioclei „Criminal Code. Commentary on articles", 3rd edition, Ed.C.H. Beck 2020, p. 392.

to the degree of social danger of this deed, a separate regulation was necessary. Finally, the marginal name of homicide at the request of the victim was preferred and not that of murder at the request of the victim, in order to exclude this fact from the antecedents of the qualified murder provided by art. 186 letter e) Criminal Code"[15].

Either we appreciate the incrimination as an attenuated variant of murder[16], or a form of active euthanasia[17], two circumstances which, combined, justify the establishment of the same penalty limits in this case of intentional death of the victim as in the case of culpable homicide.

First of all, there must be a request from the victim addressed to the perpetrator in the sense of killing them, a request which means a request, having an explicit, express, undoubted character, which leaves no room for doubt as to the will of the victim, a clear manifestation of its will expressed in writing, orally and including, according to some authors, by unequivocal, undoubted gestures, so as not to cast any shadow of doubt as to the real meaning[18].

The request must also be serious, as it is obvious that a request made by the victim jokingly (jocandi causa) would not justify attracting mitigating and conscious treatment, which implies the idea that the victim must have discernment or representation of his own actions and the ability to direct their actions in order to persuade the perpetrator to proceed with the execution of the material element of the offense[19].

The repeated nature of the request means its repetition, the wording at least twice, the condition being met at the time of the second request, independently of other subsequent resumes of the request[20].

The explicit, serious, conscious and repeated request of the victim must be doubled by the pre-existence of a medically certified incurable disease or serious illness, causing permanent and unbearable suffering.

An incurable disease is one that, in relation to the current state of medicine, cannot be cured, has no cure, while infirmity has been defined in forensic doctrine as, „that physical disability represented by the loss of an organ and / or cessation or a significant and permanent decrease in its functionality; the significant or permanent loss or reduction of a sense"[21], the existence of their medical attestation being necessary.

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[15] Explanation of Reason, PL-x no. 304/2009 Draft Law on the Criminal Code, p. 23, http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf.

[16] V. Cioclei, „Criminal law. Special Part I. Crimes against the person and crimes against property", 4th edition, C.H. Beck, Bucharest, 2019, p. 39.

[17] S. Bogdan, D.A. Serban, „Criminal law. The special part. Crimes against the person and against the administration of justice", 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 76.

[18] R.M. Oprea, M.T. Orjan, „Killing at the request of the victim – between tradition and the challenges of today", https://www.juridice.ro/595260/uciderea-la-cererea-victimei-intre-traditie-si-provocarile-actualitatii.html.

[19] Regarding the need for the full capacity of the person making the request to retain his / her conscious character, it was stated that it cannot be „de plano" excluded that the person does not have full capacity to exercise from the perspective of civil law, essential for the validity of the request being the existence of discernment, respectively the ability to fully understand the consequences of the request made, S.B., D.A. Șerban, *op. cit.* pp. 79-80.

[20] R.M. Oprea, M.T. Orjan, prev.quoted.

[21] V. Iftenie, D. Dermengiu, „Medicină legală", Ed. C.H. Beck, București, 2009, p. 164.

This pathological condition of the victim causes permanent and unbearable suffering, attributes criticized in terms of clarity in doctrine, especially in the context in which the legislator did not provide any criteria for assessing the severity or difficulty of tolerance, thus reverting to the judiciary to examine such a case very carefully in order to determine, on a case-by-case basis, whether the actual condition of the victim corresponds to the premise.

From the intertwining of these two elements, the victim's request and their particular pathological condition, results the „remarkable peculiarity" of the crime, consisting in the fact that the passive subject is also the moral perpetrator, relying on the feelings of pity and compassion of another person for to obtain a redemption from his constant and inexhaustible sufferings, while the motive and purpose of the direct author materialize in the desire to free the person suffering from the torments they are going through[22].

This explains the legislator's option for mitigating criminal liability for persons who kill the victim under the conditions of art. 190 of the Criminal Code, clarified by one of the members of the Commission for the elaboration of the Criminal Code, Prof. Valerian Cioclei „What we want to incriminate here refers first of all to those deeds committed by extremely close persons, people who can no longer bear their suffering". The professor cited the case of a mother who had killed her 23-year-old autistic daughter with a pillow in France 15 years ago after suffering terrible torments and being confronted with a system unprepared to treat such persons and diseases. „It is a very painful and very serious deed for the one who assumed such an act, which carries the punishment in itself. It's not easy to do that. That's why we decided to introduce this type of killing[23]".

4. Discussions

Starting from the regulation of the unworthiness, provided by art. 958 para.1 lit. a) of the Civil Code, respectively „the person criminally convicted for committing a crime with the intention of killing the one who leaves the inheritance", and considering that the crime of homicide at the request of the victim can be committed, as a form of guilt, only with intent, we appreciate that the civil sanction also operates with regard to the person who kills the victim under the conditions of art. 190 Criminal Code.

The opinion is based on the very unequivocal wording of the text of the law which refers to crimes committed with the intent to kill, without providing for any exception. In fact, most of the doctrinal works on civil law state the same point of view[24].

Apart from this argument, the legal force of which cannot be denied, the history and reason for regulating the indignity, as presented, should lead to the opposite conclusion, in the sense that the civil sanction is not applicable to the perpetrator of the act provided by art. 190 Criminal Code.

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[22] I. Dobrinescu, „Homicide at the request of the victim. Theoretical considerations regarding the purpose and functions of the incrimination", Universul Juridic Premium, nr.6 / 2019, https://www.universuljuridic.ro/uciderea-la-cererea-victimei-consideratii-teoretice-cu-privire-la-scopul -and-functions-of-incrimination /

[23] V.Cioclei quoted by D.Țigui, „Homicide at the request of the victim-active euthanasia", Universul Juridic Premium no. 9 / 2021,https://www.universuljuridic.ro/ucidere-la-cererea-victimei-eutanasie-activa/.

[24] Fl.A. Baias, E. Chelaru, R.Constantinovici, I.Macovei, „The new Civil Code. Commentary on articles", 3rd edition, C.H. Beck Publishing House, Bucharest, 2021, p. 1074, I.Nicolae, prev. quoted p. 63, D.Chirică, prev. quoted p. 20.

The perpetrator does nothing but fulfill the conscious and explicit will of the deceased to put an end to their suffering and if, from a criminal point of view, the reason for the incrimination can be identified[25], the application of the civil sanction seems to be unfounded.

The criminal punishment intervenes because, although any person has the exclusive control of one's own body and life, according to paragraph 2 of art. 26 of the Constitution, „there is no right to over the life of another person, even if they explicitly, seriously, consciously and repeatedly ask, because of the suffering they are in, for such a solution"[26].

In terms of inheritance law, however, we consider that it is not necessary to remove the successor from the inheritance because he did not prove his unworthiness by committing the deed, but heeded the request of the deceased to end their suffering caused by a pathological condition causing terrible torment. However, such an act, the moral perpetrator of which is the victim, does not justify the incidence of legal unworthiness.

De lege ferenda, we consider that succession unworthiness should not operate regarding the successor who commits the crime provided by art. 190 Criminal Code.

The importance of clarifying, even doctrinally, the issue at hand is overwhelming. If for this purpose the written pages will contribute a basis for information and political-legal and legislative guidance, their purpose and the passion from which they sprang will find both fulfillment and justification.

Bibliography

[1] V.M. Ciucă, Roman Law. Lessons. Volume II, Second Edition, addenda, corrigenda et augmenta, „Alexandru Ioan Cuza" University Publishing House, Iași, 2014.

[2] M.A. Itu, „The boundaries of succession indignity", https://www.juridice.ro/736514/granitele-nedemnitatii-succesorale.html#_ftn1.

[3] D. Chirică, „Civil law treaty. Successions and liberalities", 2nd ed., Hamangiu Publishing House, Bucharest, 2017.

[4] S. Mișinică, „Succesion indignity", https://www.juridice.ro/719672/nedemnitatea-succesorala.html.

[5] I. Genoiu, „The terms of the right to inherit in the new Civil Code", Law Review no. 6 / 2011.

[6] S. Murariu, „Succession indemnity related to the crime of homicide at the request of the victim", https://www.juridice.ro/396336/nedemnitatea-succesorala-raportata-la-infractiunea-de-ucidere-la-cererea-victimei.html.

[7] A. Călin, „The indignity of succession. Reflections on crimes that attract the indignity of legal succession",https://www.juridice.ro/467272/nedemnitatea-succesorala-reflectii-privind-infractiunile-care-atrag-nedemnitatea-succesorala-de-drept.html.

[25] There are authors who question even the purpose and functions of the incrimination in the case of this crime, appreciating that „The option to incriminate these facts is presented (not only) as a defense reflex, but also as an act of moral denunciation of a category of facts that raise multiple moral and cultural dilemmas. We find ourselves, therefore, in one of those historical situations of transition in which criminal law increasingly reflects certain cultural idiosyncrasies, certain moral and religious „sensibilities" of society, once strongly cemented and unshakable, but which today appear more and more diluted „I. Dobrinescu, prev. quoted p. 15.

[26] T. Toader, „The New Criminal Code. Comments on articles", Hamangiu Publishing House, Bucharest, 2014, p. 335.

[8] C. Hamangiu, „Romanian Civil Law Treaty", vol. III, National Publishing House, Bucharest, 1928.

[9] A. Murphy, „Restauratio Iustinianus. On the reform of disinheritance in Romanian inheritance law", Studia Universitatis Babeș Bolyai Iurisprudentia, nr.4/2020, p. 653-671, https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/issue/view/63/8.

[10] A. Murphy, „The evolution of the dualism of indignity-disinheritance in the old Romanian law, from the Correction of the Law to the Calimach Code", in the International Conference of PhD students in law. European legal studies and research, 12th edition, Universul Juridic Publishing House, Bucharest, 2020.

[11] D. Alexandreco, „Principles of Romanian Civil Law", vol. II, Graphic Workshops SOCEC & Co., Societate Anonimă, Bucharest, 1926

[12] I. Nicolae, „Legal devolution and testamentary devolution of inheritance", Hamangiu Publishing House, Bucharest, 2016.

[13] Fr. Deak, „Treaty of Succession Law", 2nd edition, updated and completed, Universul Juridic Publishing House, Bucharest, 2002.

[14] B. Pătrașcu, I. Genoiu, „Renewal of civil legislation – expectations and results. Special look at some institutions of succession law, Romanian Academy, Institute of Legal Research „Acad. Andrei Rădulescu", Papers presented at the annual session of scientific communications" Romanian law on the 100th anniversary of the Great Union. Dimensions and trends" Bucharest, April 20, 2018.

[15] F. Deak, R. Popescu, „Treaty of succession law. Vol.I. Legal inheritance", Universul Juridic Publishing House, Bucharest, 2013.

[16] G.Bodoroncea, V.Cioclei „Criminal Code. Commentary on articles", 3rd edition, Ed.C.H. Beck 2020.

[17] V. Cioclei, „Criminal law. Special Part I. Crimes against the person and crimes against property", 4th edition, C.H. Beck, Bucharest, 2019.

[18] S. Bogdan, D.A. Serban, „Criminal law. The special part. Crimes against the person and against the administration of justice", 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2020.

[19] R.M. Oprea, M.T. Orjan, „Killing at the request of the victim – between tradition and the challenges of today",https://www.juridice.ro/595260/uciderea-la-cererea-victimei-intre-traditie-si-provocarile-actualitatii.html.

[20] I. Dobrinescu, „Homicide at the request of the victim. Theoretical considerations regarding the purpose and functions of the incrimination", Universul Juridic Premium, nr.6 / 2019, https://www.universuljuridic.ro/uciderea-la-cererea-victimei-consideratii-teoretice-cu-privire-la-scopul -and-functions-of-incrimination /.

[21] D. Țigui, „Homicide at the request of the victim-active euthanasia", Universul Juridic Premium no. 9 / 2021,https://www.universuljuridic.ro/ucidere-la-cererea-victimei-eutanasie-activa/.

[22] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, „The new Civil Code. Commentary on articles", 3rd edition, C.H. Beck Publishing House, Bucharest, 2021.

[23] T. Toader, „The New Criminal Code. Comments on articles", Hamangiu Publishing House, Bucharest, 2014.

THE NON-PENALTY CLAUSE CONSISTING IN THE WITHDRAWAL OF FALSE TESTIMONY

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Abstract

In this paper I have made a brief analysis of the cause of impunity provided by Article 273 (3) Criminal Code in the case of the crime of false testimony. According to this non-penalty clause, the witness shall not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the commencement of the criminal action or in other cases before a decision or another solution is given, following the false testimony given. The offense of false testimony consists in the act of a witness who, in a criminal, civil or other proceeding in which witnesses are heard, gives false statements, or does not tell everything they know regarding the essential acts or circumstances in relation to which they are heard

The crime of false testimony has raised certain legal issues in the judicial practice. Moreover, in connection with this crime, an appeal was admitted in the interest of the law in connection with the relationship between this crime and the offense of favoring the perpetrator, by which it was established that this crime cannot be retained in formal competition with the crime of favoring the perpetrator. At the same time, a preliminary ruling was given on the quality of active subject of the offense of false testimony of the whistleblower who benefits from the non-penalty clause provided for in Article 290 (3) of the Criminal Code in the case of the crime of bribery.

Considering certain points of view expressed in the doctrine regarding the cases in which non-penalty clauses of this crime may intervene in criminal cases, as well as the specificity of other proceedings in which witnesses are heard, I have proposed an analysis of this non-penalty clause from the perspective of the situations in which it can be invoked and the particular situation imposed by the succession procedure in cases where it is necessary to hear witnesses.

Keywords: *false testimony, cause of impunity, criminal case, notarial procedure, false statements*

1 Introductory considerations regarding the crime of false testimony

According to Article ***273 (1) of the Penal Code***, „*The act of a witness who, in a criminal, civil or other proceeding in which witnesses are heard, gives false statements, or does not tell everything they know regarding the essential acts or circumstances in relation to which they are heard, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine*".

In addition to the standard version of this crime, in Article ***273 (2) of the Penal Code*** an aggravated variant is also provided, which is retained when the active subject of this offense is by a witness whose identity is protected or who is included in the witness protection program, an investigator working undercover, a person who prepares an expert

report or an interpreter or if the act is committed in relation to an offense for which the law provides life imprisonment or a term of imprisonment of 10 years or more.

The social value protected by this norm of incrimination consists in the good execution of the act of justice, which presupposes the finding of the truth in the cases in which witnesses are heard, expert reports are prepared or interpreters or undercover investigators are used. In the literature it has been shown that the reason for this rule of incrimination results from the special importance that the legislator attaches to the process of administering justice, evidence with witnesses, judicial expertise and interpretation. This is because the people involved in such proceedings enjoy credibility and can make an essential contribution to finding out the truth.[1].

The non-penalty clause provided for in Article ***273 (3) of the Penal Code*** provides that „*The witness shall not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the commencement of the criminal action or in other cases before a decision or another solution is given, following the false testimony given.*". The reason why the legislator provided for another non-penalty clause is the major interest in finding out the truth in any case or court proceeding in which witnesses are heard, requiring the perpetrator to be motivated to reconsider the false testimony in order not to be held criminally liable, in order to avoid a judgment or an unfair solution in the process of administering justice[2].

Thus, we consider that the text of the law must be interpreted on the basis of this reasoning considered by the legislator, namely that this non-penalty clause aims to avoid pronouncing an unfair solution against a certain person as a result of a false testimony. In other words, false testimony should be able to be withdrawn at the latest at the time when a judgment is given or another solution is given as a result of such an act. Moreover, the offense of false testimony has as its precondition the existence of a cause of any kind or of another procedure, such as a notarial procedure[3], in which persons from those provided in the incrimination norm are involved[4].

2 Distinction between the non-penalty clause provided for in Article 273 (3) of the Penal Code and other criminal law institutions which it resembles

The non-penalty clause provided for in Article 273 (3) of the Criminal Code is part of the broader category of cases that remove criminal liability. As stated in the doctrine, the cases that remove criminal liability are certain conditions, situations, circumstances, subsequent to the commission of the crime, regulated by law, in the presence of which the criminal legal relationship of conflict is extinguished, respectively the right of the state to apply a sanction to the offender who committed an offense[5].

Cases that remove criminal liability are divided into general and special cases. General cases removing criminal liability are covered in Article 152, Article 153, Article 157, 158 and Article 159 of the Criminal Code and, as the name implies, have general applicability, ie they are incidental to any offense or to a wider category of offenses. These are: amnesty, prescription of criminal liability, lack of prior complaint, withdrawal of prior complaint and reconciliation of the parties.

Special cases that remove criminal liability are also referred to as „non-penalty clauses" or impunity cases.[6]. Some of these cases are provided for in the general part of the Criminal Code and have a wider scope: in this regard, we consider the withdrawal and

prevention of the result provided by Article 34 of the Penal Code and the prevention of the commission of the crime by the participant, provided for in Article 51 of the Penal Code.

The other special cases that remove the criminal liability are provided either in the special part of the Criminal Code, such as the denunciation of the act by the bribe-taker in the case of the offense of bribery provided for in Article 290 (3) of the Penal Code or the withdrawal of the false testimony in the case of the offense of false testimony provided for in Article 273 (3) of the Penal Code, either in other special criminal laws or in non-criminal laws with criminal provisions, such as the case of Article 200 (1) of Law no. 8/1996 on copyright and ancillary rights[7], or the non-penalty clause provided for in Article 10 (1^1) of Law no. 241/2005 for preventing and combating tax evasion[8].

In the foreign literature there are authors who distinguish between non-penalty clauses (impunity) and cases of removal of criminal liability, considering that those cases which occur after the commission of the act, such as, for example, denunciation and withdrawal, are cases of impunity which cannot be included in the category of cases of removal of criminal liability;[9]. The Plenum of the Supreme Court, by the Guidance Decision no. 3/1969, settled this dispute definitively in Romania, the denunciation and withdrawal being included in the category of cases of removal of criminal liability.

As has been correctly shown in the literature, the special causes of impunity provided in the special part of the Criminal Code or in special laws containing criminal provisions, are subjective and take into account the conduct of the perpetrator after the commission of the act, as opposed to the special cases provided in the general part of the Criminal Code, which are also subjective but take into account the conduct of the perpetrator during the commission of the act[10]. All these cases remove the criminal liability, but the deed is still considered a crime. Only its consequence, ie criminal liability, is removed as a result of the intervention, subsequent to the commission of the deed, of such a case. This characteristic distinguishes between cases which remove criminal liability and cases which remove the criminal nature of the act as a result of the absence of one of the essential features of the offense, such as justifying cases and cases of non-imputability governed by Article 18-31 of the Criminal Code [11].

With regard to justifiable and non-imputable cases, in such cases the act no longer constitutes an offense and in these circumstances criminal liability no longer occurs, as criminal liability can have no other basis than to commit an offense, according to Article 15 (2) of the Penal Code. These cases consist of certain situations, states, circumstances that existed at the time of the crime, which prevent the realization of an essential feature of the crime and thus exclude the criminal nature of the act[12].

In contrast, in the case of cases that remove criminal liability, the act is a crime, being removed only the consequence of this fact, ie criminal liability. They occur during or after the commission of the act, do not justify the act and are not based on the lack of constitutive elements of the crime, being only impediments to the application of criminal law[13].

Therefore, the non-penalty clause provided for in Article 273 (3) of the Criminal Code is part of the broader category of cases that remove criminal liability, in this category being considered a special cause of impunity provided in the special part of the Criminal Code. In the generic assessment of the social danger of the crime of false testimony, the legislator considered that there is a certain state, circumstance, subsequent to the commission of the crime[14], which influences this social danger, leading to the abolition of the criminal punishment. This condition takes into account the conduct of the perpetrator after

committing the crime, conduct consisting in retracting the false statement under certain conditions.

The classification of the case of impunity provided for in Article 273 (3) of the Penal Code in the category of cases which remove criminal liability results in several specific features, which are common to these cases. Thus, the non penalty clause consisting in the withdrawal of the false testimony[15]:

- it is a case of substantive criminal law, with all the consequences arising from it, such as: in case of succession of laws, the more favorable criminal law applies; the interpretation of the rules governing this case must be restrictive, the interpretation by analogy not being allowed, as in the case of the rules of criminal procedural law;
- this cause occurs after the commission of the act;
- the non-penalty clause does not exclude the existence of the crime nor the guilt of the perpetrator;
- its main effect is the non-application of the criminal law;
- procedurally, the effect of this case shall be expressed by filing in accordance with Article 315 (1) b) in relation to Article 16 (1) h) Code of Criminal Procedure, or termination of criminal proceedings in accordance with Article 396 (6) in relation to Article 16 (1) h) of the Code of Criminal Procedure.

3 Legal issues resolved by the Supreme Court in connection with the crime of false testimony

A first issue that arose in connection with the offense of perjury was whether the participant in the offense could be an active subject of that offense, who was tried separately from the other participants and heard as a witness in the separate case concerning the latter participants. In resolving this issue of law, the Supreme Court has shown that a person summoned as a witness who tells the truth can incriminate himself, and if he does not tell the truth, avoiding self-incrimination, he can commit the crime of false testimony. However, such a mechanism would practically lead to the prosecution of the person heard as a witness, which is not fair in the case of criminal prosecution bodies, before the hearing of the person, had data showing that the person had participated in the commission of the act which is the subject of his hearing as a witness. Only a person who has not participated in any way in the commission of the crime, but who has knowledge of essential facts or circumstances concerning the settlement of the case, should be considered a true witness.

In these conditions, by Decision no. 10/2019 pronounced by the HCCJ The panel for resolving legal issues in criminal matters established that the participant in the commission of a crime who was tried separately from the other participants and subsequently heard as a witness, in the disjointed case, cannot have the quality of active subject of the crime of false testimony.

With regard to the way in which the right of the witness not to be charged in the provisions of Article 118 of the Code of Criminal Procedure is regulated, where it is shown that the witness statement given by a person who, in the same case, prior to the declaration or later, he acquired the quality of suspect or accused, cannot be used against him, the Constitutional Court established by Decision no. 236/2020 that this legislative solution contained in the provisions of Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and non-self-incrimination, is unconstitutional.

Another legal issue that has received contradictory solutions from the courts has been the legal classification of the act of a person heard as a witness to make false statements or not to say everything he knows about the essential facts or circumstances about which they were asked respectively, the question was raised whether such an act can be included only in the crime of false testimony or the crime of false testimony can be retained in formal competition with the crime of favoring the perpetrator. By Decision no. 1/2019 pronounced by the HCCJ – The panel competent to judge the appeal in the interest of the law, it was established that such a deed meets the elements of typicality only of the crime of false testimony. In the recitals of the decision it was shown that the favoring of the perpetrator has the character of a general but subsidiary incrimination, between the offenses of favoring the perpetrator and that of false testimony there is a relationship of subsidiarity of the type general crime – special crime, which means that the crime of favoring the perpetrator can only be retained when there are no other specific incriminations of favoritism, such as the crime of false testimony.

4 The non-penalty clause provided by Article 273 (3) of the Penal Code

The legislator has provided a non-penalty clause for the crime of false testimony, which becomes applicable if the perpetrator withdraws his testimony in criminal cases before the arrest, detention or initiation of criminal proceedings or in other cases before a decision has been given or another solution has been given, as a result of false testimony. As we have shown, the rationale for this non-penalty clause is to allow the perpetrator to reconsider the false testimony before a judgment is given or an unfair solution is given as a result of a false testimony.

From the analysis of this non-penalty clause, it is observed that it considers two distinct situations, namely the situation in which false testimony is given *in criminal cases* and the situation in which false testimony is given *in other cases*. In other cases, the legislature considers *civil cases or any other proceedings in which witnesses are heard.*

We will further analyze separately the two situations considered by the provisions of Article 273 (3) of the Penal Code.

4.1.Withdrawal of false testimony in criminal cases

According to the text of the law, in order for this non-penalty clause to be retained in criminal cases, the perpetrator must withdraw false testimony before *detention or arrest, or before the commencement of the criminal action*.

We note that unlike the old Penal Code, in which case the expression „*or in all proceedings*" was used, when the situation was considered when false testimony could be withdrawn before a judgment was handed down or a solution was given as a result of false testimony[16], of the current the Penal Code, the legislator uses the expression „*or in other proceedings*", which excludes criminal cases. The doctrine has argued that the replacement of the expression *or in all proceedings* with the expression *or in other proceedings* in the current regulation practically excludes the possibility that in criminal cases the withdrawal of false testimony can operate until a judgment or another solution is given as a result of false testimony[17].

It is clear from the *ad literam* interpretation of the text of the law that this non-penalty clause cannot operate if false testimony is given, for example, for the first time at trial in the first instance to the detriment of the defendant, but is retracted before pronouncing a

decision as a result of false testimony. However, we do not see any reason why the person should no longer be encouraged to withdraw false testimony in the trial phase, given the reason for this non-penalty clause. Therefore, we consider that the use of the expression *or in other proceedings* did not seek to exclude criminal cases, being only a simple error of expression to the legislator; in reality a non-penalty clause is also applicable if false testimony is given after the defendant has been sent to trial and is retracted before a judgment is handed down as a result of false testimony.

In the doctrine it has been shown that in criminal cases the non-penalty clause refers only to the case in which false testimony is given against the author, and not to the situation in which it is given in his favor[18]. In other words, it is argued that this non-penalty clause is not incidental in situations where false testimony given in favor of the author is retracted. This opinion is based on Decision no. 2083/2001 pronounced by the Supreme Court of Justice, Criminal Section, which has been taken over and commented on in the literature[19] erroneously, we consider. In fact, from the analysis of this decision it can be seen that the supreme court held that false testimony made in favor of the defendant can be withdrawn during the criminal trial, with the consequence of impunity, and after the arrest of the defendant. The Supreme Court concludes that the condition provided by this non-penalty clause, as false testimony be withdrawn before the arrest of the defendant refers to the situation when the arrest was ordered as a result of false testimony, and not to the situation when false testimony was in favor of the defendant, and not related to his subsequent arrest. This conclusion even results from the interpretation of the text of the law, which imposes the condition that the retraction of the false testimony take place before the detention, arrest or initiation of the criminal action *as a result of the false testimony* is ordered. However, the detention, arrest or initiation of criminal proceedings as a result of false testimony may take place only if false testimony is given to the detriment of the perpetrator. If false testimony is given in favor of the perpetrator, it is clear that the detention of the arrest or the initiation of criminal proceedings does not take place as a result of the false testimony.

In conclusion, the time limitation of the time until which false testimony can be retracted in order to be able to apply a non-penalty clause refers only to the situation in which false testimony is given to the detriment of the author, and not in the case where false testimony is given in favor of the author, in which case the retraction may be made at any time. This conclusion, with which we agree, was expressed, albeit in isolation, in the doctrine as well, in the sense that it was shown that although the text of the law does not expressly provide, „The non-penalty clause will operate until a decision or other solution is taken in criminal cases as well, regardless of whether the arrest, arrest or initiation of the criminal action has taken place, if false testimony is made in favor of the suspect or defendant and, consequently, has no effect on the action taken”[20].

4.2.Withdrawal of false testimony in other cases

According to the text of the law, in order for this non-penalty clause to be retained in cases other than criminal cases, the perpetrator must withdraw false testimony *before a decision or another solution is given*, as a result of false testimony. When referring to other cases, the legislator shall consider civil cases or any other proceedings in which witnesses are heard.

We notice that in this situation the deadline until which false testimony can be retracted in order to become a non-penalty clause incident is the one of pronouncing a decision or the

one in which a solution is given, as a result of the false testimony. Also, this time limit until which the false statement may be withdrawn must be observed regardless of in whose favor the retracted false statement is made.

One of the most frequent procedures in which witnesses are heard is the notarial succession procedure, provided by Article 103-120 of the Law on Notaries Public and Notarial Activity no. 36/1995. Thus, according to Article 108 of this normative act, *within the notarial succession procedure, the quality of the successor and/or, as the case may be, the title of legatee, as well as their number are established by civil status documents, by will and by witnesses.* At the same time, the same text of the law provides that *the assets that make up the estate are proved by the agreement of the heirs or by any means of proof.* Therefore, it is obvious that in the notarial succession procedure the evidence with witnesses can be administered.

As for the solutions that can be given in the notarial succession procedure, they depend on the outcome of the succession debate.

If the notary public finds that there are no assets in the estate, he orders the closure of the procedure and files the case as having become devoid of purpose. If there are assets and the agreement between the heirs has been reached and sufficient evidence has been administered, the notary public draws up the final conclusion of the succession procedure. This conclusion has the probative force of an authentic document.

From the analysis of the provisions of Article 113 (2) i) of Law no. 36/1995, it is undeniable that when closing the notarial succession procedure the notary must also take into account the testimony of witnesses. Thus, this text of the law shows that the final conclusion of the succession procedure must also include the statement of those present regarding the number and quality of the heirs, corroborated with the testimony of the witnesses.

In conclusion, one of the procedures in which witnesses are heard is the notarial succession procedure. If a witness heard in the succession proceedings makes false or misleading statements in relation to the essential facts about which he is being questioned, in order to benefit from the non-penalty clause provided for in Article 273 (3) of the Criminal Code, they must withdraw their declaration at the latest at the time when the notary public closes the procedure or until the date on which the notary public draws up the final conclusion of the succession procedure, regardless of in whose favor the declaration is made.

5 Conclusions

As can be seen, although the text of the law governing false testimony and the non-penalty clause provided for in Article 273 (3) of the Penal Code does not seem to raise any particular issues, in practice there are quite a few situations which they raised issues of interpretation. Certain issues of law have been resolved by the Supreme Court or have been resolved by judicial practice, as we have shown in this article. However, other solutions of the jurisprudence have not been correctly understood in the doctrine, as we have shown above. In some cases, however, the solutions offered by the jurisprudence have not been accepted in the doctrine. Thus, by Decision No. 74 / RC of March 8, 2016, the High Court of Cassation and Justice held that this non-penalty clause is not applicable if the criminal investigation for the crime of false testimony was initiated against the false witness, even if the withdrawal of the false testimony took place before the final settlement of the case in

which it was made. In an opinion expressed in the doctrine[21], with which we agree, this conclusion of the Supreme Court has been challenged, arguing that the text of the law makes no distinction as to whether or not to initiate criminal proceedings against the witness for the crime of perjury.

It is also stated in the doctrine that in order for the person to benefit from this non-penalty clause, the withdrawal of the false testimony must be effective, in the sense that the witness must provide the details that he perceived directly, which were essential and on which he was asked, and not only to declare that he withdraws the false testimony, thus maintaining the rest of the statement, which contained aspects inconsistent with reality[22].

Bibliography

[1] C. Rotaru, A.-R. Trandafir, V. Cioclei, *Drept penal. Partea specială II. Curs tematic (Criminal law. Special Part II. Thematic course)*, C.H. Beck Publishing House, Bucharest, 2016, p. 97-98;

[2] Alexandru Boroi, *Drept penal. Partea specială (Criminal law. Special Part), 4th Ed. – revised and supplanted*, C.H. Beck Publishing House, Bucharest, 2019, p. 395;

[3] Decision no. 562/1998 pronounced by the Bucharest Court of Appeal, Criminal Section II, in the Journal of Criminal Law no. 4/1998, p. 149, apud C. Rotaru, A.-R. Trandafir, V. Cioclei, *op. cit.*, p. 100;

[4] C. Rotaru, A.-R. Trandafir, V. Cioclei, *op. cit.*, p. 100;

[5] *C. Mitrache, C. Mitrache*, *Drept penal român. Partea generală(Romanian criminal law. The general part)*, Universul Juridic Publishing House, Bucharest, 2014 p. 393;

[6] C. Mitrache, C. Mitrache, *op. cit.*, p. 394;

[7] According to Article 200 (1) of Law no. 8/1996, republished, „*A person who, prior to the commencement of criminal proceedings, denounces to the competent authorities his participation in an association or cartel for the purpose of committing one of the offenses referred to in Article 193, thus allowing the identification and prosecution of other participants, shall not be punished"*;

[8] *Gh. Voinea*, Non-penalty clauses provided by special laws, in Law no. 12/2006, p. 180.

[9] See in this sense, *R. Merle, A. Vitu*, *Traité de droit criminel*, Paris, 1964, p. 1928;

[10] *C. Mitrache, C. Mitrache*, *op. cit.*, p. 346;

[11] B. Vîrjan, Infracțiunile de evaziune fiscală(*Tax evasion offenses*), 3rd Ed. – revised and supplanted, C.H. Beck Publishing House, Bucharest, 2020, p. 317;

[12] *V. Dongoroz*, *Explicaţii teoretice ale Codului penal român, partea generală(Theoretical explanations of the Romanian Criminal Code, general part)*, vol. I, Academiei Publishing House, Bucharest, 1969, p. 332;

[13] *Ş. Siclodi*, *About the cases that remove the criminal liability, in* R.R.D. no. 2/1970, p. 33;

[14] *V. Dongoroz*, *op. cit.*, p. 137;

[15] *Ş. Siclodi*, *op. cit.*, p. 34;

[16] According to Article 260 (2) from the old Penal Code, „the act provided for in the preceding paragraph shall not be punished if, in criminal cases, before the arrest of the accused occurs *however in all cases* before a judgment has been given or another solution has been given as a result of the false testimony, the witness shall withdraw his testimony";

[17] Tudorel Toader, M.-.I Michinici, A. Crișu-Ciocântă, M. Dunea, R. Răducanu, S. Răduleț u, *Noul Cod Penal. Comentarii pe articole(The new Penal Code. Comments on articles)*, Hamangiu Publishing House, Bucharest, 2014, p. 442;

[18] C. Rotaru, A.-R. Trandafir, V. Cioclei, *op. cit.*, p. 104;

[19] Bodoroncea G., Kuglay I., Lefterache L.V., Manea T., Nedelcu I., Vasile F.M., Codul penal. Comentariu pe articole(The criminal code. Comment on articles), CH Beck Publishing House, Bucharest, 2014, p. 587;

[20] Vasile Dobrinoiu, Ilie Pașcu, Mihai AAdrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, The New Penal Code Commented. Vol. II. Special part, Universul Juridic Publishing House, Bucharest, 2012, p. 443;

[21] C. Rotaru, A.-R. Trandafir, V. Cioclei *op. cit.* p. 114;

[22] HCCJ Special Chamber, Decision no. 74/RC of March 8, 2016 (www.scj.ro), apud C. Rotaru, A.-R. Trandafir, V. Cioclei, *op. cit.* p. 113.

Section E

Subsection 1

Regulation no. 650/2012 versus Regulation no. 2201/2003. Measures related to succession or parental responsibility?

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Abstract

In the context of freedom of movement in European Union, successions with cross-border implications have already generated juridical and practical difficulties, even more enhanced in case of successions involving minor heirs, sometimes without legal representation. In this last hypothesis, a guardian ad litem is necessary to be appointed.

The act of designation itself, as well as the subsequent acts concluded by the guardian (e.g., inheritance settlement agreements), generated discussions concerning their legal qualification (measures related to succession or measures related to parental responsibility), with direct consequences concerning juridical instruments applicable.

There is a competition between two legal instruments of secondary law of the European Union, equally directly applicable and mandatory, respectively Regulation no. 650/2012 in matters of successions and Regulation no. 2201/2003 in matrimonial matters and matters of parental responsibility.

Given that the two mentioned regulations contain different sets of provisions (which therefore generate different consequences), identification of the applicable legal instrument has an obvious importance, especially since cases that call into question this aspect have already begun to appear relatively often in practice.

Keywords: *succession with cross-border implications, parental responsibility, international competence, prorogation of competence*

1. Introduction

Regulation no. 650/2012 in matters of successions is part of a growing network of European rules adopted in the framework of judicial cooperation in civil matters, context in which juridical literature already pointed out that: „As this branch of European law is still in its infancy, the interaction between these instruments is not always very clear (…) in the medium term, we will see more and more preliminary questions related to the intersection of these European rules." [1]

This study aims to analyze the interaction between Regulation no. 650/2012 on succession matters and on creation of a European Certificate of Succession and Regulation no. 2201/2003 on matrimonial matters and matters of parental responsibility in a particular context, respectively successions with extraneous elements involving minor heirs assisted/represented by a guardian *ad litem* (where the element of foreignness is represented by the habitual residence of the minor, which is different from the habitual residence of the deceased).

A possible conflict might arise, related to the designation and the acts concluded by the guardian *ad litem* which must to be approved in court, between Article 4 of Regulation no.

650/2012 (according to which courts of the Member State where the *deceased* had his/her habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole) and Article 8 of Regulation no. 2201/2003 (providing jurisdiction in matters of parental responsibility in favor of courts where the *child* is habitually resident).

Determination of the aplicable instrument has implications on international competence (the court of the habitual residence of the deceased or the court of the habitual residence of the child), and even a possible splitting of the competence between these courts and consequences in such case.

The subject presents importance, both as cases based on this scenario have already appeared in practice (including our national jurisprudence), and also because the subject has not yet been discussed in Romanian juridical literature.

For accuracy, a final clarification is necessary, according to which the hypothesis considered in the present study is that of a succession pending in front of the court of the habitual residence of the deceased, where one heir is a minor and it is necessary to appoint a guardian *ad litem,* who subsequently will represent/assist the minor and may conclude acts on his behalf.

2. Content

2.1 Successions with cross-border implications

Regulation no. 650/2012[1] does not contain a definition of „succession having cross-border implications" or a list of elements on the basis of which those implications can be accurately identified.

The Guide drafted by the European Commission [2] provides examples of some elements that may characterize a cross-border succession: „A cross – border (or international) succession is a succession that brings together elements from different countries: for example, the deceased lived in a country other than his or her country of origin, *the heirs of the deceased live in another country* or the deceased, he owned property in several countries". (our underline)

In consensus with juridical opinions [3], Advocate General Sanchez-Bordona also considered in case *E.E.*[2] that „The *location of* assets, *heirs*, legatees or other relatives of the deceased, and the deceased's nationality, are among the data that may typically be taken into account". (our underline)

It follows that a situation where a succession is pending before the court of the habitual residence in a Member State (MS), involving minor heirs whose habitual residence is in another MS, falls into the concept of „succession having cross-border implications".

If this succession involves minor heirs with no legal representation, two EU Regulations come forward and might come to a collision, respectively Regulation no. 650/2012 and Regulation no. 2201/2003[3] (as part of European law, Regulations take precedence over the provisions national law with regard to matters relating to their scope

[1] Regulation (EU) no. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L201/07 (27/07/2012).

[2] Opinion of Advocate General, *E.E.*, C-404/14, EU:C:2020:230, para. 33, 35. His opinion was appropriated by the Court of Justice of European Union in CJEU, *E.E.*, C-404/14, EU:C:2020:569, para. 45.

[3] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L338/1 (12/23/2003).

and therefore no reference can be made to national rules when examining the various problems that may arise).

2.2 Regulation no. 650/2012 – scope and application

Regulation (EU) no. 650/2012 (also known as Regulation Bruxelles IV) was adopted in order to simplify succession planning and management in case of successions with cross-border implications and applies to succession of persons who died on or after 17 August 2015.

It establishes EU-wide rules on jurisdiction and the applicable law governing succession matters in the EU, as well as rules on recognition and enforcement of decisions given in EU countries, the acceptance and the enforcement of formal legal documents issued in EU countries, and also introduces a European Certificate of Succession.

With such a wide range, the Regulation replaces the existing national regulations in the field of international law of succession, which is a major achievement of the EU legislature in this area [4].

For the purpose of this study, we will determine the area of application of this Regulation starting from recital 9 in the preamble, worded as follows: „The scope of this Regulation should include *all civil-law aspects of succession to the estate of a deceased person*, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession." (our underline)

On the other hand, according to Article 1 para. 2 (a) and (b) of the same Regulation, the following shall be excluded from the scope of this Regulation: „(a) the status of natural persons, as well as *family relationships* and relationships deemed by the law applicable to such relationships to have comparable effects; (b) the *legal capacity of natural persons*, without prejudice to point (c) of Article 23 para. 2^4 and to Article 26^5". (our underline)

In conclusion, the general rule that this Regulation shall apply to all civil aspects of a succession involves exceptions regarding family relations and the legal capacity of natural persons.

2.3 Regulation no. 2201/2003 – scope and application

Regulation no. 2201/2003 (also known as Regulation Bruxelles IIbis) contains uniform rules for jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

Article 1 para. 1 of the Regulation provides that it shall apply, whatever the nature of the court, in civil matters relating to: „(b) the *attribution*, *exercise*, delegation, restriction or termination *of parental responsibility*". Subsequently, para. 2 explains that the matters referred to in para. 1 (b) may, in particular, deal with: „(b) *guardianship*, curatorship and similar institutions; (c) the *designation and functions of any person or body having charge of the child's* person or *property*, representing or assisting the child; (e) *measures for the protection of the child relating to the administration, conservation or disposal of the child's property*". (our underline)

[4] The capacity to inherit.

[5] Entitled „Substantive validity of dispositions of property upon death".

Subsequently, Article 2 para. 7 of the Regulation defines the term „parental responsibility", respectively „all rights and duties relating to the person or the *property of a child* which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect". (our underline)

It follows that Regulation no. 2201/2003 applies to the attribution and exercise of parental responsabilities (among which rights and duties related to property of the child), including the designation and functions in case of guardianship.

On the other hand, para. 3 of Article 1 clearly states that this Regulation shall not apply to: „(f) trusts or *succession*". (our underline)

2.4 Interaction between Regulation no. 650/2012 and Regulation no. 2201/2003

In the context presented above, it seems that the two Regulations are complementary: as succession is excluded from the scope of Brussels IIa Regulation, the latter should not conflict with the Succession Regulation. Similarly, as family relationships and legal capacity of natural persons are not regulated by the Succession Regulation, there should be no reason for collision.

This complementary interpretation concerning interaction between Regulations no. 2201/2003 and no. 650/2012 is also consistent with the case-law of the Court of Justice of European Union (CJEU), which stressed the importance of an interpretation such as to „avoid any overlap between the rules of law that those texts lay down and any legal vacuum"[6].

Nevertheless, in case of situations where the appointment of the guardian *ad litem* (and the subsequent acts concluded on behalf of minor children) take place in the framework of a pending succession, apparently, there is a conflict between Regulation on succession and Regulation on parental responsibility.

The problem is generated in the context of coexistence of Article 4 of Regulation no. 650/2012 (headed „General jurisdiction", providing: „The courts of the Member State in which the *deceased* had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.") and Article 8 para. 1 of the Regulation, headed „General jurisdiction", stipulating: „The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized").

The question arises whether the designation and the approval in court of acts concluded by a guardian *ad litem* constitute measures relating to the exercise of parental responsibility within the meaning of Article 1 para. 1 (b) of Regulation no. 2201/2003 and thereof falling within the scope of this regulation, or whether they are to be considered as measures relating to succession within the meaning of Article 1para. 3 (f) of the same Regulation, and thereof excluded from its scope and within the area of application of Regulation no. 650/2012.

Subsequent to qualification, some other delicate issues come into discussion, respectively international competence and even splitting the competence depending on the nature of the decision (related to succession or to parental responsibility).

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[6] CJEU, *Nickel & Goeldner Spedition,* C-157/13, EU:C:2014:2145, para. 21, CJEU, *F-Tex SIA,* C-213/10, EU:C:2012:215, para. 29 (these cases did not take in discussion Regulations no. 650/2012 and no. 2201/2003, but the vector lines of juridical reasoning remain the same).

2.5 Measures related to succession or parental responsibility?

2.5.1 Qualification

In our opinion, the mere fact that designation and approval of acts issued by the guardian *ad litem* appear in the framework of proceedings concerning succession cannot be regarded as decisive as to whether those measures should be classified as falling within the Regulation on successions.

As the Advocate General Kokott observed in her opinion delivered in case *Matoušková*[7], „legal capacity and the associated representation issues must be assessed in accordance with their own criteria and *are not to be regarded as preliminary issues dependent on the legal acts in question*". (our underline)

We consider that the primary goal of such measures is to protect the best interests of the child. Indeed, necessity to obtain in court designation of a guardian and approval of acts concluded on behalf of the minor are direct consequences of the status and capacity of the minor and, at the same time, constitute protective measures for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Article 1 para. 1 (b) and para. 2 (e) of Regulation no. 2201/2003.

The case-law of CJEU supports this line of reasoning in decision *Schneider*[8] as follows: „the fact that judicial authorisation is necessary for the disposal of immovable property belonging to persons under guardianship is the immediate consequence of their lack of full legal capacity, being a requirement laid down for their protection in that context".

Case *Schneider* concerned application of Regulation no. 44/2001[9], where a national of a MS who „lacked full legal capacity" applied by his guardian in non-contentious proceedings brought before a court in another MS (where the property was situated) for authorisation to sell his share of a property situated in that other MS. The court had doubts about its jurisdiction, although under Article 22 para. 1 of the Regulation in discussion the courts of the MS in which the property is situated had jurisdiction in proceedings which have as their object rights *in rem* in immovable property.

CJEU held that Regulation no. 44/2001 does not apply to proceedings concerning the legal capacity of natural persons within the meaning of Article 1 para. 2 (a) of Regulation no. 44/2001, and thus such proceedings fall outside the material scope of the Brussels I Regulation.

We consider that, although case *Schneider* concerned Regulation no. 44/2001, the same line of reasoning should be pursued in the context of Regulation no. 650/2012, as the premises are the same, respectively measures related directly to the legal capacity of a natural person representing, by their own nature, actions intended to ensure that the requirements of protection and assistance of minor children are met.

Moreover, notwithstanding the fact that the case law presented is concentrated on the acts concluded by the guardian *ad litem*, we appreciate that both arguments and solution are equally aplicable to the appointment of the guardian.

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[7] Opinion of Advocate General, *Marie Matoušková*, C-404/14, EU:C:2015:428, para. 41.

[8] CJEU, *Schneider*, C-386/12, EU:C:2013:633, para. 26.

[9] Council Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12/1 (01/16/2001), also known as Brussels I Regulation, repealed by Regulation (EU) no. 1215/2012.

As the CJEU stated in case *Matoušková*[10], „the appointment of a guardian for the minor children and the review of the exercise of her activity are so closely connected that it would not be appropriate to apply different jurisdictional rules, which would vary according to the subject-matter of the relevant legal act".

We conclude therefore that both appointment and acts concluded by the guardian *ad litem* fall under the scope of Bruxelles II bis Regulation and should be considered as measures related to parental responsibility, and not matters of succession.

This conclusion is also consistent with Regulation no. 650/2012, which excludes from its scope the legal capacity of natural persons according to Article 1 para. 2 (b)[11].

2.5.2 International competence

As already announced, the qualification as measures related to parental responsibility entails consequences concerning the international competence of the court, attributed under Article 8 para. 1 of Regulation no. 2201/2003 to the court of the habitual residence of the child.

Since it is not the object of this study, it should be briefly mentioned that neither Regulation no. 2201/2003, nor Regulation no. 650/2012 provide a definition for the notion of „habitual residence" of the child [5]/of the deceased [6].

It should also be stressed that „habitual residence" is an autonomous concept, distinct from that used by national legislators, interpreted in a unitary way and developed therefore by the case-law of CJEU, which established vector criteria to be taken into account when determining the habitual residence [7].

Depending on factual elements of each case, habitual residence of the minor and habitual residence of the deceased might coincide or not.

If they should coincide, international competence both for succession measures and also measures related to parental responsibility will practically be „cumulated" if favor of the same court, without prejudice to juridical arguments above mentioned, related to the distinction between these two types of measures.

In a case before a German court seized with succession proceedings of a person deceased in Germany, the guardian *ad litem* (designated by the German judge) concluded a settlement agreement with the other heirs, validated by this court. It was argued that international competence was justified by Article 8 of Regulation no. 2201/2003, and the and the transaction was not legally or economically disadvantageous for the child. The appeal court upheld this decision, arguing that the German courts had jurisdiction because at the time of the notification of the court in order to validate the transaction the child's domicile was in Germany[12].

This conclusion of the German court, for which we are in agreement, arises nevertheless another question: should the child move into another state during succession proceedings, the court will maintain competence for other measures related to parental responsibility?

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[10] CJEU,*Marie Matoušková*, C-404/14, EU:C:2015:653, para. 30.

[11] Exceptions under Article 23 para. 2 (c) governing only the aspects relating specifically to the capacity to inherit and in accordance with Article 26 para. 1 (a) concerning the capacity of the person making the disposition of property upon death to make such a disposition do not apply.

[12] Decision pronounced by Offenburg Tribunal, Germany, case no. 11 F 9/20, definitive by decision pronounced by Court of Appeal of Karlsruhe.

We consider the answer should be negative, as the reference point concerning „time of the notification of the court" is, in our opinion, the notification for measures related to parental responsibility (and not for succession proceedings). Moreover, time of notification for *each* parental measure should be taken into account (competence is not „gained" by virtue of one measure, if the child moves afterwards).

It results therefore that, although the succession is pending at the court where the habitual residence of the deceased is situated, the designation and acts of the guardian *ad litem* fall into the competence of the court of the habitual residence of the child.

2.5.3 Splitting the decision-making process or prorogation of competence

Cumulating aspects already discussed draws the consequence that international competence is divided in cases of succession involving minor heirs for which a guardian *ad litem* is appointed.

Measures related to successions fall within the competence of the court in the MS where the habitual residence of the deceased is situated, which is to be considered the connecting factor to establish general juriddiction (Article 4 of Succession Regulation), whereas measures related to parental responsibility are to be taken by the court of the habitual residence of the child (Article 8 para. 1 of Regulation no. 2201/2003).

This conclusion arises though the question whether the best interests of the child would be compromised by a splitting of the decision-making process concerning succession proceedings between two different MS, one in which the succession proceedings have been opened and the other where the habitual residence of the child is situated. Also, depending on procedural domestic law (which may stipulate suspension of proceedings), it might appear a delay of succession, related to the period necessary for the court of the habitual residence of the child in order to appoint the guardian *ad litem*/validate his/her acts.

In that respect, a possible solution might reside in Article 12 para. 3 of Regulation no. 2201/2003, according to which courts of a MS also have jurisdiction in relation to parental responsibility in proceedings other than divorce/legal separation/marriage annulment where:

- first, the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, and,
- second, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

As long as the abovementioned conditions are fulfilled, Article 12 para. 3 of Regulation no. 2201/2003 operates a prorogation of competence in favor of the court dealing with the matters relating to succession, which by consequence will be able to also deal measures related to parental responsibility.

3. Conclusions

The designation and approval of acts concluded by a guardian *ad litem* on behalf of minor children involved in succession with trans-border implications constitute measures relating to the exercise of parental responsibility, and not measures relating to succession.

Although performed in the framework of the succession, they therefore fall into the competence of the court of the habitual residence of the child under Article 8 of Regulation no. 2201/2003, and not the court where the habitual residence of the deceased is situated.

Article 12 para. 3 of Regulation no. 2201/2003 may operate a prorogation of competence in favor of the court dealing with succession, provided that conditions stated are fulfilled. This solution protects both the interest of the child that decisions which concern him/her should not be divided between courts, but also the requirement to settle the case of succession in a reasonable time, according to Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms[13].

Difficulties persist tough in case that Article 12 para. 3 is not applicable and bring into light once again the necessity of close cooperation among courts such as to reach speediness appropriate in order to solve cases brought before them.

References

[1] Vlad, I-L. (Universul Juridic, București, 2016). Succesiuni internaţionale: Regulamentul nr. 650/2012: Tratate internaţionale în domeniu, p. 10;

[2] Comisia Europeană (Luxemburg: Oficiul pentru Publicaţii al Uniunii Europene, 2017). Succesiunile transfrontaliere. Ghidul Cetățenilor, p. 3, available[Online]: https://portal.just.ro/309/SiteAssets/SitePages/acasa_default/Succesiunile%20transfrontaliere%20-%20Ghidul%20cetatenilor.pdf, last accession 23 April 2022, 12.17;

[3] Wautelet, P. (Academy of European Law, 2017). Succesiuni transfrontaliere (de bază) Proiect: Îmbunătățirea aplicării Regulamentelor UE în materia dreptului familiei și a succesiunilor, p. 4, available[Online]:http://www.eracomm.eu/Better_Applying_the_EU_Regulations/kiosk/pdf/case_studies/topic3/Case_study_topic3_Introductory_RO.pdf, last accession 23 April 2022, 10.14;

[4] Załucki, M. (Revista de Derecho Civil, vol. III, núm. 1, 2016, Estudios). New Revolutionary European Regulation on Succession Matters. Key Issues and Doubts, p. 166, available [Online]: file:///C:/kits/162-867-1-PB.pdf, last accession 23 April 2022, 14.44;

[5] For a detailed analysis of the notion of „habitual residence" of the child, A.M. Voiculescu (Nicolae Titulescu, Journal of Scientific International Session organised Nicolae Titulescu University of Bucharest, Deusto Bilbao University şi Foundation for Law and International Relations „Niculae Titulescu", The 14th International Conference „Challenges of the Knowledge Society", Editura „„„„ 2021). Still in discusion: Habitual residence of the child, pp. 345 – 353;

[6] For an analysis of the notion of „habitual residence" of the deceased, Framar, S.A, Vučko, K. (Croatian Law Centre, Electronic edition, 2020). A Guide to the implementation of Succession Regulation (EU) no 650/2012, pp. 19-21, available[Online]: https://www.notariesofeurope.eu/wp-content/uploads/2020/07/Guide-to-Succession Regulation.pdf

[7] Criteria to be taken into account for determination of habitual residence, Popescu, D.A. (Magic Print, Onești, 2014). Ghid de drept internațional privat în materia succesiunilor, pp. 62-63.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950.

THE ECCLESIASTICAL SUCCESSION IN THE EUROPEAN SPACE

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Abstract
The present study proposes for analysis a less known and accessible normative field, which lacks in terms of jurisprudence but which has often aroused attention by the way in which the succession rules of the Romanian law come into competition with the statutory provisions of church. We will identify special situations, which derogate from the common law in the matter of successions of hierarchs and monks and which bring to research the anomalous legacy. In order to have an overview of the regulations under analysis, we will study the issue from the perspective of the Statutes of the main Orthodox Churches in the European space with the regulations in force.
Keywords: *ecclesiastical succession, monk, anomalous inheritance, status, church legislation, special law*

Introduction

The law of succession, constituting a set of civil norms that establish the destination of *de cujus* patrimony, is not interested in any metaphysics or transcendence, does not take into account the person's confession but capitalizes on his legal will[1].

The ecclesiastical successions aroused a special interest precisely because of the way of regulation related to the confession and the civil legislation. Where can we place this category in the context of inheritances, here is the question we want to find the answer through our research by comparing the civil law and the church law with the regulations in force. When we talk about the ecclesial succession we refer strictly to the aptitude of church and its members to be holders of the succession rights as it appears from the content of art. 195-197 of the Statute of the B.O.R.[2] These statutory provisions are joined by the regulations of the Law no. 489/2006 on religious freedom and the general regime of cults[3].

In general, the succession transmission is guaranteed by the provisions of the art.no 46 of the Romanian Constitution. However, the legal headquarters of the matter finds its source in the Civil Code which devotes a separate book, entitled „On inheritance and liberalities" from the art.no. 953 to the art. no. 1163.

Going through both church and civil law regulations, we notice that there are used two terms, such as *succession* and *inheritance*. The legal definition given by art.no. 953 of the Civil Code uses the term *inheritance*: „Inheritance is the transfer of the patrimony of a deceased person to one or more persons in existence". It seems that the doctrine has consecrated this term considering it as being more appropriate to define the transmissions *mortis causa*. The notion of succession is used in a broader sense, referring to any

[1] Vasilescu, P. Kocsis, J. (2016). Drept civil. Succesiuni. Editura Hamangiu. p. 1.
[2] BOR statute republished in the Official Gazette no. 97/20.02.2020.
[3] Law no. 489/2006 on religious freedom and the general regime of cults, republished in the Official Gazette no. 201 din 21.03.2014.

transmission of rights, between the living people or for the cause of death. Regardless of the terminology used, the legal institution remains the same, keeping its regime and characteristics unchanged.

Civil law versus church law

The term *inheritance* is absolutely synonymous with *succession*, both notions having the meanings mentioned above. As stated before, the word succession highlights the relational aspect, as well as that in the sphere of legal relations one person leaves the place to another one. The notion of *inheritance* may suggest that something is acquired from an ascendant, while ensuring continuity.

However, the succession in the church is a way of accumulating the church patrimony and acquiring the temporal goods, hence the use of this term more frequently, as it emphasizes the continuing character of the social-philanthropic work of church with the help of acquired goods, which pass from the deceased person to his/her successor. We notice that the patrimony does not disappear with the death of its owner but it maintains its existence through the transmission to those who succeed him/her. Therefore, there can be no patrimony without the owner.

As we mentioned before, the inheritance is also a way of acquiring property, the two institutions being in an interdependence but also with a pronounced translational character of rights[4].

The European legislation, by Regulation no. 650/2012, defines inheritance as any succession regarding the patrimony of a deceased person and covers any form of transfer of property, rights and obligations due to death, while establishing the rule of transfer of rights of the institution of inheritance[5].

On February 23rd, 1949, the decree was issued by which the Presidium of the Grand National Assembly approved the Organization and Functioning Statute of the Romanian Orthodox Church. From 1949 until 2008, when a new statute was approved, the orthodox church life in Romania was guided from the legislative point of view according to the provisions of this statute attributed to the Patriarch Justinian. The statute of the BOR regulated the vocation of ecclesiastical legal persons to succeed since its appearance in 1949 by the content of art. No. 194 which provided that „Dioceses have a vocation over the entire succession of their hierarchs, and they are regarded as reserved successors of a half from this fortune, in case they come in competition with the seat heir or testamentary successors. The rights of the seat heir or testamentary successors will be reported only on the non-reserved half of the dioceses and are regulated according to the provisions of the Civil Code".

The natural person is the main actor in the law scene, it is the premise and the finality of the existence and application of legal norms, being assigned both general norms and a secondary legislation to which we will refer in what follows. In its existence, the natural person actively participates in an established State-Church relationship. This relationship is based on the constitutional foundation of the human right to religious affiliation, of the autonomy of cults, which allowed the development of a legislative framework that opens

[4] Negrilă D., Moștenirea în Codul Civil. Studii teoretice și practice. Universul Juridic, 2018, București, p. 22-23.

[5] Vlad, I.L. (2016) International successions. Article 3 (a) of Regulation (EU) No 650/2012 of the European Parliament and Council from the 4th of July, 2012.

the way for particularities regarding the relationship between the cult staff and the cults, but with a series of exceptions related to the general civil legislation regarding the law of succession.

According to the provisions of art. 195 of the BOR Statute, „Dioceses have a vocation over all the successor assets of their hierarchs". The civil capacity to inherit therefore belongs to the Church. At the same time, art. No. 196 of the new Statute provides that „*The property of monks and nuns brought with them or donated to the monastery at the entrance to monasticism, as well as those acquired in any way during their lifetime in the monastery remain entirely in the monastery to which they belong and cannot be the subject of subsequent claims"*. Art. no. 197 states that „*For retired or no longer in the position of hierarchs, the Holy Synod shall regulate their rights in accordance with the statutory and regulatory provisions of the church."* We therefore notice a change in the statutory regulations from the year 1949 regarding the patrimony and inheritance quotas, which in the new Statute completely eliminates the succession reserved and the possible sesary or testamentary successors, without taking into account the provisions of the Civil Code.

Canonization of civil law

With regard to this regulation, it is necessary to interfere with some clarifications.

At a first sight, it appears that the vocation of the Diocese would be on all the goods of the hierarchs (according to art. 195), but we know that art. 196 confines the succession table only to the goods brought with monasticism, as well as the ones obtained in any way during the monastic life (hence, all the goods).

The same prohibition is established by the Law of Cults 489/2006, by art. No. 31 paragraph 1: „the goods that are the object of contributions of any kind – contributions, donations, successions – as well as any other goods legally entered in the patrimony of a cult cannot be the object of subsequent claims." Again, we must note in a negative way the major inaccuracy of the text and the legal terms used, as well as the incompatibility with the principles of civil law, but also of the constitutional ones[6], in the sense that the text of the fundamental law defends and guarantees the right to property, also understanding the possibility of claiming goods from any person who unjustly owns them. Thus, if the text of art. No. 196 is *ad litteram* interpreted, it follows that the third parties could no longer use the action in the claim, regardless of the manner in which their property came into the possession of the monk and, subsequently, that of the monastery.

In its turn, the Romanian Constitution as the supreme law in art. 46 guarantees the right to inheritance[7] and in art. 73 it says that the general regime of property and inheritance is in the field of organic law[8] voted in Parliament, can only be amended or changed by a normative act with the same legal force as the Civil Code, which falls into the same category of the organic laws.

[6] Art. 44 alin. 2 of the Constitution: „Private property is equally guaranteed and protected by law, regardless of the owner".

[7] Art. 46 of the Romanian Constitution The right to property is guaranteed.

[8] Art. 73 of the Romanian Constitution (1) The Parliament adopts constitutional laws, organic laws and ordinary laws. (2) The constitutional laws are those of revision of the Constitution. (3) The organic law regulates:… m) the general legal regime of property and inheritance.

In this context, the B.O.R. Statute being approved by Government Decision in 2008[9] and subsequently amended by Order of the State Secretariat for Religions in 2019[10], cannot forbid the property of a monk to be inherited by the civilian relatives, who according to the law, have the right of succession. We can therefore state that from the perspective of the civil law, the Article 196 of the B.O.R. Statute does not have the necessary legal force to remove the provisions of the art. 964 of the Civil Code, which stipulates the legal principles of the legal devolution within the inheritance.

The Civil Code does not specify or refer to any special law governing certain situations, such as the present one, of the inheritance of monks and hierarchs. Even if legal norms regarding the special succession of monks and hierarchs and the succession capacity of the Church (through its persons of canonical public law) are not taken over, a reference to canonical norms, an integral part of the Romanian legal system, would have been necessary. In keeping with the Code, we consider that given the quality of Hierarch or monk and the origin of the goods, the Dioceses, respectively the monasteries, are the beneficiaries of an anomalous succession by virtue of which they have vocation to the entire succession table of the deceased, entry into monasticism, as well as those acquired in any way during the life in the monastery (as provided for monks, art. 195 of the BOR Statute). Civil law consequences: indirect inheritance. We can also discuss here a legal inheritance, both in legal and testamentary succession.

According to the rules of interpretation, the special law applies as a matter of priority. *Specialia generalibus derogant* is a legal principle which implies that the special norm is the one that derogates from the general norm and that the special norm is of strict interpretation in the respective case. Moreover, a general rule cannot remove a special rule from its application. This was also pronounced by the High Court of Cassation and Justice of Romania, in Decision no. 33 of June 9, 2008[11], and established that, by virtue of the principle *specialia generalibus derogant*, the competition between the special law and the general law is resolved in favor of the special law, even if this fact is not expressly provided in the special law.

Our opinion is that in the competition between the two, the civil provisions do not apply in the matter of the anomalous succession we are discussing. Therefore, strictly related to the goods brought in monasticism by the Hierarch or monks, donated to the monastery, the Church (through its legal persons under public law) or the pastorate Diocese, or on the goods acquired in any way during the monastic life and which the Hierarch or monk does not disposed during his life in favor of other persons, at the moment of opening the succession, no reserve heir may have a vocation to the succession.

Similarities of the Statutes of the Orthodox Churches in the European space on successions

In order to have an overview of the regulations subject to analysis, we can also study the issue from the perspective of the Statutes of the main Orthodox Churches in the European space.

[9] GD 53 of 16 January 2008 on the recognition of the Statute for the organization and functioning of the B.O.R., published in the Official Gazette no. 50 of 22 January 2008.

[10] SSC Order 116/2019 on the Statute for the organization and functioning of the B.O.R., published in the Official Gazette no. 13 of January 10, 2020.

[11] The decision was published in the Official Gazette of Romania, Part I, no. 108 of February 23, 2009.

The statute of the Bulgarian Church provides in art. 170 par.4 „Before entering the monastic rank, the candidate will be obliged to dispose of his/her goods in the terms of the law and in accordance with the law. Everything he/she has acquired since coming to monasticism belongs to the monastery whose brother or sister he/she is".

The Statute of the Serbian Church[12] in art. 36-38 „The members of the monastic order cannot own any real estate. After the death of a monk, his movable property belongs to the monastery of which he was a member, provided that he has not alienated his property during his lifetime. The bishop can consider his own only the goods he acquired during his life, to own and dispose of it during his life. The bishop may bequeath one-third of these properties at his discretion; the second third he will leave in his will for the needs of the diocese; and the last third will be left in his will to foundations or other individual funds for the general needs of the Church, the Bishop, who is not a diocesan Bishop, will leave the second third in his will to any diocese. If a Bishop dies without leaving his will, his movable and immovable property will be used to pay for funeral expenses and any debt he may incur, and the remainder will be shared by the Holy Synod of Bishops according to the needs of the Church". This regulation reminds us of the Saxon statutory model[13] which establishes a succession algorithm in which the will expressed mortis causa is valued and imposed. The right of the bishop to dispose freely inter vivos of the goods acquired during his life is also expressed.

The Statute of the Church of Cyprus[14] in art. 66 paragraph 7 „The monk is not entitled to have any personal property, and everything he has is obliged to distribute the existing property before pruning, in compliance with the provisions of the laws of the state regarding the rights of his heirs. The property which he acquires in any way, after pruning, must be transferred to the monastery, within a reasonable period of time, which, however, may not be more than one year from the acquisition. „ The statute reserves the full succession vocation in favor of monasteries and the Cypriot constitution grants an exclusive right to the Orthodox Church to regulate its own internal affairs and property, in accordance with the Statute and the Holy Canons.

In the Greek Orthodox Church, the regime of church property is governed by Law 3414/1909 on the General Ecclesiastical Fund, which provides the same vocation of the monastery as sole heir, but the monk receives 50% of the lifetime use of property acquired by donation or inheritance after the monastic vow. The legislation of the Holy Mountain, through the Statutory Charter, is even stricter stipulating that the monastery is not responsible for the assets of the inheritance for any debts of the monks that would have been contracted without its written consent. The legal force is, however, given by the provisions of art. 99 of the Hellenic Civil Code, which establishes that the inheritance of clergy and monks does not fall under its scope, but of the special laws mentioned above. We notice that in the Greek legislation we have that nominal-canonical consecration of the church norms

[12] Constitution of the Serbian Orthodox Church, Second Edition, given by the Holy Synod of Bishops, Belgrade, 1957.

[13] Metropolitan Andrei Șaguna drafted a law of organization, known as the Organic Statute, approved by a National-Church Congress in 1868, which provided for the autonomy of his Church from the state, but also the participation of the laity in the management of church life. administrative and economic. http://sfantul-andrei-saguna.blogspot.com/p/viata-sfantului-andrei-saguna.html

[14] http://churchofcyprus.eu/wp-content/uploads/2015/10/KATASTATIKO_KAThAREYOYSA.pdf.

correlated with the civil law, that is exactly that correspondence that is missing in the Romanian legislation, which would give legal force art. 195-196 of the BOR Statute.

Conclusions

As we can see, the succession vocation of the dioceses and monasteries is justified starting from the nature of their activity but also from the way of life of the monks by renouncing the worldly ones as well as by the civil death as a renouncer of material goods. However, contemporary law no longer recognizes civil death as valid, as there is no longer any possibility of prohibiting a person from acquiring a patrimony, nor can he be forced to give up his own patrimony.

At the same time, if we interpreted ad litteram the content of article 195 of the BOR Statute, we could deduce that third parties could no longer use the action in claim, without taking into account the way in which the property came into the monk's possession and later in the monastery's patrimony. The action in movable or immovable claim would no longer be possible if the property entered its patrimony through one of the situations stipulated by art. 195 of the Statute, in this case a conflict of laws appears violating the principle of protection of property rights in the claim, the provisions regarding the acquisitive prescription are violated as well as the constitutional provisions enunciated in art. 44, paragraph 2 „Private property is guaranteed and protected equally by law, regardless of the owner." The act of depriving the hierarch or monk of his right to dispose of his personal property *mortis causa* violates the constitutional provisions as well as those of the European Convention on Human Rights.

Last but not least, the legal basis for accepting the succession vocation of dioceses and monasteries is the anomalous legacy, a reminiscence of the Roman law and the Roman jurists who applied this principle contrary to the rule, it being a customary institution that would allow based on art. 1 Civil Code[15], deprivation of the succession patrimony of some persons from the regulations of the inheritances in force. However, the legislation affiliated to the Civil Code only recognizes minor anomalies with minor applications without covering the entire estate. As we have previously shown, the BOR Statute is adopted by a normative act inferior to the Civil Code, not having the ability to modify its provisions. We can state that the provisions of art. 195-197 of the BOR Statute do not create legal effects.

We conclude by saying that our society does not have a clear and specific civil law that gives legal force to the canonical rules pertaining to religious cults, and Law 489/2006 on Cults, as they regulate their law today, is not enough.

Bibliography

1. Vasilescu P. Kocsis J., Civil law. Succession. Hamangiu Publishing House, Bucharest, 2016.

[15] Art. 1 Civil Code (1) The law, customs and general principles of law are sources of civil law. (2) In cases not provided by law, the customs apply, and in their absence, the legal provisions regarding similar situations, and when there are no such provisions, the general principles of law. (3) In matters regulated by law, the customs shall apply only to the extent that the law expressly refers to them. (4) Only the customs according to the public order and good morals are recognized as sources of law. (5) The interested party must prove the existence and content of the customs. Uses published in collections prepared by entities or bodies authorized in the field are presumed to exist, unless proven otherwise. (6) For the purposes of this Code, customs means usage (custom) and professional practice.

2. Vlad, I.L. (2016) International successions. Art. 3, letter a) of Regulation no. 650/2012. International treaties in the field. The Legal Universe, Bucharest, 2018

3. Negrilă D., Inheritance in the Civil Code. Theoretical and practical studies. The Legal Universe, Bucharest, 2018

4. Civil Code and Implementing Law, Hamangiu Publishing House, Bucharest, 2021

5. Romanian Constitution and related legislation. The Legal Universe, Bucharest, 2022

6. Statute for the organization and functioning of the Romanian Orthodox Church, Biblical and Mission Institute Publishing House, Bucharest, 2008

7. Law no. 489/2006 on religious freedom and the general regime of cults, republished in the Official Gazette no. 201 from 21.03.2014

8. GD 53 of 16 January 2008 on the recognition of the Statute for the organization and functioning of the B.O.R., published in the Official Gazette no. 50 of 22 January 2008.

9. SSC Order 116/2019 on the Statute for the organization and functioning of the B.O.R., published in the Official Gazette no. 13 of January 10, 2020.

Online resources

10. http://sfantul-andrei-saguna.blogspot.com/p/viata-sfantului-andrei-saguna.html

11.http://churchofcyprus.eu/wpcontent/uploads/2015/10/KATASTATIKO_KAThAREYOYSA.pdf

12.https://ejustice.europa.eu/printContentPdf.do?printPdfAll=1&plang=ro&idTaxonomy=487&action=printContentPdf&initExpCourtRes=1&useContId=74319

LEGAL CONSEQUENCES OF THE RIGHT OF RETENTION OF ONE SPOUSE OVER THE PROPERTY OF THE OTHER SPOUSE IN THE EVENT OF INHERITANCE DEVOLUTION

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Abstract

The right of retention established by Article 352(2) of the Civil Code by way of security for the benefit of the spouse who has paid the joint debt relates to the other spouse's own property, until the debts owed by the latter to the former have been paid in full. We have therefore noted that the scope of the object of this right of retention with a special nature is broader than that of the right of retention governed by the provisions of Articles 2495-2499 of the Civil Code – the common law on the subject, since it is no longer necessary to establish a link between the property on which the right of retention is established and the debt that generates this right. The same is the case with regard to the right of retention provided by the special regulation of Article 365 of the Civil Code. In both situations, the death of the spouse, prior to the settlement of the debts for which the right of retention provided by the two legal texts mentioned above was established, may give rise to important and diverse consequences in the case of inheritance devolution, circumstances analyzed in this study.

Keywords: *right of retention, spouse's property, inheritance devolution, retention*

1. The seat of the subject matter:

1.1. The seat of the subject matter of the right of retention under common law

The right of retention is defined by the Civil Code[1] in Article 2495, which states that „*a person who owes a debt to remit or return a property may retain it as long as the creditor does not perform his obligation arising from the same legal relationship, or, as the case may be, as long as the creditor does not compensate him for the necessary and useful expenses he has incurred for that property or for the damage the property has caused him*".

Expressis verbis the legislator also establishes the exceptions when the right of retention cannot be exercised or invoked: the first situation is related to the property – „*the right of retention cannot be exercised if the possession of the property results from an unlawful act, is abusive or illegal, or if the property is not subject to legal seizure"*, and the second situation is related to the person – „*the right of retention cannot be invoked by the owner in bad faith, except in cases specifically provided by law*".

1.2. The subject matter of the right of retention in family law:

In the field of family law, Art. 352 of the Civil Code – subsidiary liability for joint debts – refers to the institution of retention in paragraph (2), according to which „*the spouse*

[1] Law no. 287/2009 on the Civil Code of Romania, rep.

who has paid the joint debt under the terms of paragraph (1) has a right of retention over the property of the other spouse until the debts owed to him or her by the other spouse are paid in full", and Art. 365 of the Civil Code states that „*upon termination of the regime of separation of property, each spouse has a right of retention over the property of the other spouse until the debts owed by one spouse to the other spouse are paid in full".*

2. Legal characteristics:

2.1. General legal characteristics of the right of retention

Seeing the legal regulation of this institution and the doctrinal opinions expressed[2], it can be assumed that the right of retention is considered as an imperfect security interest, together with mortgage and pledge, with the mention that the right of retention is not a real security interest, since it does not give its holder any right of preference and absolutely no right of legal seizure of the immovable property.

For a right of retention to be established, the debt of the retainer must be certain, liquid and payable and the thing in respect of which the right is sought to be established must be tangible, movable or immovable property.

We assume that although the right of retention appears to be a security for a debt, in reality the debt and the right of retention cannot be equated, as the latter cannot be considered a right that can be valued in money.

It should be noted that the origin of the right of retention can be explained by the natural link between the debt and the property, based on a pre-existing legal relationship of a conventional nature, by virtue of which the retainer takes possession of the property. Of course, there are situations where the agreement to which I have referred explains the creditor's entry into possession of the property, without being the source of the retainer's debt.

As a mechanism, the right of retention requires a legal or material connection between the debt and the property: legal connection exists when the debt and the obligation of restitution have a common origin, being incurred from the same legal relationship, and material connection implies that the debt due by the creditor of the obligation of restitution arises from the possession of property.

And for the sake of reason, we state – material connection links an obligation and a property, while legal connection links two mutual obligations.

The right of retention confers to the holder only one prerogative, that of refusing to hand over the encumbered asset, the retaining creditor not having the right to use the encumbered asset nor to appropriate its fruits. Consequently, the retainer may not use the retained immovable property and the fruits produced by this property, if any, will be set off against the debt, or the retainer will be liable to pay civil compensations for non-use.

A person exercising a right of retention has the rights and obligations of a trustee of another person's property, who is empowered with simple administration, the provisions of Articles 795-799 of the Civil Code applying accordingly.

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[2] See A., Augustin, *Le droit de retention,* Ed. Economica, Paris, 2005; V., Paul, *Privire asupra naturii juridice a dreptului de retentie*, in S.U.U.B. no. 2/1993; V., Stelian I., *Dreptul de retentie în raporturile juridice civil*e, Ed. Universul Juridic, 2010; V., Stelian I., *Dreptul de retenție în cazul conexitatii juridice, forma de manifestare a execepției de neexecutare*, in Revista Dreptul no. 11/2016; V., Marin, *Dreptul de retentie, aplicatii in materie civila, comerciala si maritima*, Ed. Lumina Lex, 2001.

Usucaption cannot be claimed under a right of retention. The acquisitive prescription or usucaption is that way of acquiring the property right and other real rights (*e.g.* – usufruct, use, habitation, easement, building rights), by exercising possession of immovable property for a period of time provided by law.

With regard to the extinction of the right of retention, the legislator has established that it ceases if the interested party records the amount claimed or provides the retainer with sufficient security. It should be noted that involuntary dispossession of property does not extinguish the right of retention. The person exercising this right may demand the return of the property, subject to the rules applicable to the limitation period for the main action and to the acquisition of movable property by the holder in good faith.

2.1.1. Special regulations of the right of retention in the Romanian Civil Code, on various matters:

The right of retention is also reflected in the effects of the admission of claim in the generous content of Article 566 of the Civil Code, which states that the defendant has a right of retention on the products until the reimbursement of expenses incurred for their production and harvesting, unless the owner provides the defendant with a sufficient guarantee. The right of retention cannot be exercised in any case in respect of goods that are subject to a right of retention, or where the goods have been acquired by violence or fraud, or where the goods are perishable goods, or where they are subject, as a result of the passage of a short period of time, to a significant reduction in value.

In terms of administration, Article 856 of the Civil Code stipulates that „*the administrator has a right of retention over the property administered until the debt to him has been paid in full.* „

In terms of tenancy, we will examine in priority the provisions of Article 1823 of the Civil Code – in relation to improvements made by the lessee, Article 1823 of the Civil Code enshrining a coherent legal regime, likely to define the status of each of the contracting parties.

Basically, according to Article 1.821(1) of the Civil Code, upon termination of the tenancy, the lessee is obliged to return the property in the condition in which he received it, except for what has been lost or damaged due to age. In addition, as is well known, the lessee must not alter the property (Article 1.800 of the Civil Code). As a consequence, the lessee does not have to make any improvements to the leased property.

If, however, improvements have been made, we will have to distinguish between a situation where there has been prior agreement by the lessor and a situation where there has been no such agreement:

Where the improvements have been carried out with the prior consent of the lessor (a situation that is encountered in practice in particular where the property is not in a condition that meets the lessee's standards, or where the lessee has to adapt it to serve its purpose), the lessor is entitled to keep the autonomous and added works carried out on the property during the tenancy, and the lessee is entitled to compensation for these works, which he proves to have carried out. Articles 578, 581, 583(1), 584(1) and 585(1)(a) and (2) of the Civil Code shall apply, as the lessee has the status of bona fide author of the work. Until the payment of compensation, the lessee has a right of retention on the leased property, in accordance with the provisions of Art. 2.495 et seq. Civil Code.

If the improvements have been carried out without the lessor's prior consent, the lessor has two possibilities:

a) To keep the autonomous and added works carried out on the property during the tenancy, without being liable to pay any compensation. Obviously, the provisions of Article 1.788 (3) and (4) of the Civil Code remain applicable to repairs which, although they were the responsibility of the lessor, were carried out by the lessee under the law; or,

b) To require the lessee to restore the property to its original condition and to pay compensations for any damage caused to the property by the lessee. Obviously, all costs incurred in restoring the property to its previous condition will be borne by the lessee, who may also be liable to pay compensation for damage caused to the property (*e.g.* – damage to installations, rooms, annexes etc.) and for other damage caused to the lessor (*e.g.* – because of the work to restore the property to its previous condition, the lessor was unable to use or rent it).

Although according to Art. 597 of the Civil Code, works made by a bad faith possessor are subject to the rules applicable to the bad faith author and, although Art. 2.496 para. (2) of the Civil Code provides that the right of retention can only be invoked by the bad faith possessor in cases specifically provided by law, in order to remove any possible application of the right of retention in such a situation, in Art. 1.823(3) of the Civil Code, it is categorically stated that in the absence of the prior consent of the lessor, the lessee may under no circumstances invoke the right of retention.

In terms of the mandate agreement, the Civil Code states in Article 2029 of the Civil Code that „*in order to warrant all his debts against the principal arising from the mandate, the agent has a right of retention on the properties received during the execution of mandate from the principal or on his behalf*".

In terms of the commission agreement, it is stated that for his debts against the principal, the agent has a right of retention on the principal's property in his possession – Article 2053 of the Civil Code.

In terms of the consignment agreement, Article 2062 of the Civil Code provides that „*in the absence of a stipulation to the contrary, the consignee does not have a right of retention over the goods received on consignment and the amounts due to the consigner for his debts against him. The consignee's obligations regarding the maintenance of the goods remain valid in case of exercise of the right of retention, but the storage costs are incumbent on the consignor if the exercise of the right of retention has been justified".*

In terms of hotel deposit, the institution of the right of retention is explicitly regulated, stating that in the event of non-payment by the client of the price of the room and hotel services provided, the hotelier has a right of retention on the goods brought by the client, except for the documents and personal effects of no commercial value. The hotelier may request the recovery of properties over which he has exercised his right of retention, according to the rules laid down in the Code of Civil Procedure in terms of the movable property legal seizure.

In terms of the bailment agreement, the legislator has established in Article 2153 of the Civil Code that in no case may the lessee invoke the right of retention for obligations that would arise for the lessor.

In terms of preferential debts on movable property, we find the effects of the right of retention as a special privilege, i.e. „*the debt of the person exercising a right of retention is*

privileged in respect of the property over which the right of retention is exercised, as long as this right subsists".

Last but not least, in terms of compensations, Article 2505 of the Civil Code provides that prescription does not prevent the extinction by compensation of mutual debts or the exercise of the right of retention, if the right of action was not time-barred at the time when compensation or the right of retention, as the case may be, could have been opposed.

2.2. The legal characteristics of the right of retention of a spouse over the property of the other spouse:

2.2.1. With reference to Article 352(2) of the Civil Code:

The spouse who has paid the joint debt under Article 352(1) of the Civil Code shall have a right of retention over the property of the other spouse until the debts owed to him or her are paid in full.

Without issuing an exhaustive analysis, we note that the general rule is that the joint creditors of the spouses can pursue the joint properties. Only if these properties are not sufficient, joint creditors can pursue the personal properties of each spouse.

The liability of spouses with their own property for joint debts is a subsidiary liability. This means that if the spouses' joint creditors pursue each spouse's own properties first for the spouses' joint debts, the spouses may invoke the benefit of discussion, i.e. the exception whereby the spouses ask the creditors to pursue the joint properties first and only if they are not sufficient to satisfy the debt, to pursue their own properties.

The spouses' liability for joint property is joint and several. This means that a joint creditor can claim against either spouse for the entire outstanding debt.

If the spouse concerned has paid the entire joint debt, he or she is subrogated to the creditor's rights for what he or she has incurred in excess of the share that would be due to him or her from the community if the liquidation were made at the date of payment of the debt. This governs the recourse action of the spouse who has paid the debt in excess of his or her due share.

Until such time as the spouse who has paid the joint debt recovers from the other spouse the amount paid in excess of his or her share of the debt, he or she has a right of retention on the other spouse's property.

This gives the paying spouse a right of action in favour of the other spouse, by which he or she can apply to the court to retain the other spouse's properties until the debts he or she owes him or her have been paid in full[3].

It has also been argued in the doctrine that, taking into account that the text under consideration exclusively refers to „*the other spouse's property*" and that during the matrimonial regime of legal community, the spouses have only common property and their own property, we conclude that the right of retention governed by Article 352 para. (2) of the Civil Code can only concern the debtor spouse's own property. In fact, if the right of retention were to extend to the joint property, the holder of this right would be in a position to retain his property. It is of the essence of this right that the properties that may be subject to it must belong to a person to whom the holder has an obligation to remit or return them[4].

[3] M.Afrasinie, M.-L. Belu-Magdo, s.a., New Civil Code – Comments, doctrine and case law, Vol. 1, Ed. Hamangiu, Bucharest, 2012, p. 487.

[4] PhD. Habil T. Bodoaşcă, *Family Law – University Course,* 5th edition, revised and added, Ed. Universul Juridic, Bucharest, 2021, p. 243.

2.2.2. With reference to Article 365 of the Civil Code

On termination of the regime of separation of property, each spouse has a right of retention over the property of the other party until the debts they owe to each other are paid in full.

When the regime of separation of property ceases, the rule recognizes each spouse's right to retain the other spouse's property until the debts owed by the spouses to each other are paid.

Unlike the right of retention of the common law, which supposes the existence of a link between the thing and the debt, a condition without which the right of retention cannot be granted, in the case of spouses, the retention can be established whenever there are debts of any kind between the spouses, even if they are not related to the retained thing[5].

For the sake of consistency of reasoning, we show that, therefore, in the common law, the right of retention is specialized, whereas in the case of spouses, it is general[6].

3. Legal consequences of the right of retention of one spouse over the property of the other spouse in the event of inheritance devolution

The right of retention established by Article 352(2) of the Civil Code by way of security for the benefit of the spouse who has paid the joint debt relates to the other spouse's own property until the debts owed by the latter to the former have been paid in full. We therefore note that the scope of the object of this right of retention with a special nature is broader than that of the right of retention governed by the provisions of Articles 2495-2499 of the Civil Code – the common law on the subject), since it is no longer necessary to establish a link between the property on which the right of retention is established and the debt that generates this right.

The same is the case with regard to the right of retention provided by the special regulation of Article 365 of the Civil Code.

In both cases, the death of the spouse, prior to the settlement of the debts for which the right of retention provided by the two legal texts mentioned above has been established, may have important consequences for the inheritance devolution.

Thus, Article 972 of the Civil Code provides the surviving spouse's share of the inheritance, and Articles 973-974 of the Civil Code provide the surviving spouse's right of habitation, i.e. the surviving spouse's right to the furniture and household goods, which have been allocated to the joint use of the spouses.

If the deceased spouse was a debtor of the surviving spouse, and if the surviving spouse comes alone to his or her *de cuius*inheritance, the right of retention arising under the special rules (Article 352(2) and Article 365 of the Civil Code) is to be extinguished by the confusion of property rights, as long as the property of the deceased spouse, debtor of the surviving spouse, is to become part of the estate of the surviving spouse by way of inheritance devolution.

Where the surviving spouse comes to the estate jointly with other heirs and the right of retention arising under the same circumstances of the special rules relates to properties that, following partition, will become the property of other categories of heirs, this right of retention will prevent the transfer of these properties to the heirs until the surviving spouse

[5] M.Afrasinie, *op. cit.*, p. 500.

[6] PhD. Habil T. Bodoaşcă, *op. cit.,* p. 267.

obtains satisfaction of the debts owed to him by *de cuius* and arising during the community of property or after the payment of the joint debts by the surviving spouse alone.

Where the deceased spouse was a creditor and holder of the right of retention, the surviving debtor spouse, when he or she comes alone to the inheritance, acquires the whole of his or her *de cuius* estate*,* so that the right of retention will be extinguished as a result of the confusion of property on the debtor's status with that of creditor in the person of the surviving spouse.

If the surviving debtor spouse does not come alone to the inheritance, and the right of retention is on properties that would be his or her own property at the time of devolution, the other heirs could challenge the transfer of properties until the surviving spouse pays the debts he or she owed to the deceased spouse. This way, the role of special guarantee of the right of retention continues even after the death of the holder, in which case this property right will be transferred to the heirs, their interest being to obtain the payment of all debts on the active side of the deceased's estate at the date of death, even if they are owed by the surviving spouse.

4. Case law issues on the right of retention

In the case law[7], it has been noted that „*although the law recognizes the owner of an asset all the attributes of the property right, possession, use and disposal, it is noted that their exercise may be limited by law, one of the limitations being the right of retention of the debtor on the obligation to deliver, when he is at the same time creditor of an obligation arising from the same legal relationship*".

In a decision[8] on the right of retention, the court held that „*in order for a right of retention to be recognized, the claim of the plaintiff would have to result from the same legal relationship, in which case the property in respect of which the plaintiff seeks the establishment of a right of retention was the subject matter of an agreement (...), and the debt (...) arises as a result of the defendant's tort liability (...*)*; for these reasons, the Court will dismiss the application as unfounded".*

In another decision[9], the court held with regard to „*the fact that the respondent has a right of retention on the aforementioned property, the Court states that from the analysis of Art. 2495 of the Civil Code, it appears that the right of retention is that subjective right that confers on its holder the power to withhold and refuse the return of a property, until the person entitled to hand over the property does not perform the obligation incumbent upon him, arising from the same legal relationship, or, as the case may be, until he compensates the retainer for the necessary and useful expenses he has incurred for that property, or for the damage the property has caused him. It has been pointed out in the doctrine that in the current legislation the right of retention is regarded as an imperfect security interest, together with mortgage and pledge, but the right of retention is not a genuine security interest, since the right of retention does not confer on its holder any right of preference nor a genuine right of pursuit. The right of retention confers on its holder a single prerogative, namely that of refusing to deliver the encumbered property, the retaining creditor not having the right to use the encumbered property, nor to appropriate its fruits [see in this regard – L. Pop, I,-F Popa, S.I. Vidu, Civil Law Course. Obligations, Ed. Universul Juridic,*

[7] Civil judgment no. 8440/2017 of Cluj-Napoca Court, final on 07.02.2020, unpublished.
[8] Civil judgment no. 4302/2019 of Cluj-Napoca Court, final on 13.09.2021, unpublished.
[9] Civil judgment no. 1837/2020 of Cluj-Napoca Court, final on 22.12.2020, unpublished.

Bucharest, 2015, p. 649-655]. Therefore, taking into account the fact that the right of retention does not confer any other prerogatives on the retainer than that of preservation and maintenance of the property, and not the prerogative to legally seize the property, the respondent's defence that he can legally seize the property under the right of retention has no legal support".

The High Court of Cassation and Justice has ruled[10] that „*the right of retention can only be granted if the retainer has a pre-existing obligation to return the property in relation to which he claims and proves that certain expenses have been incurred. This is also the reason why it is accepted that the debtor of an obligation to return a property, even in the context of a challenge to enforcement, may oppose the holder of the right over the property, a right of retention until he pays the expenses that the debtor made for the maintenance, preservation or improvement of property (debt that is uncontested, liquid, and enforceable). By virtue of the right of retention, the retainers will not have the right to use the property that they are obliged to return, but will only be able to refuse to hand it over by retaining it, until their debt is fully paid".*

From a procedural point of view, in another decision[11], it was held that „*if at the time of establishing the right of retention, this right was considered to be non-assessable in money, at the time of the request for annulment of the right of retention, this right cannot be considered to be assessable in money*".

5. Conclusions

In view of all the foregoing, we are entitled to state firmly that the legislator has chosen to regulate the right of retention as an imperfect real security right, a purely passive, indivisible, non-monetary security interest, which confers the holder a precarious possession of the property. The holder of the right of retention may not seize or proceed to forced execution of the property over which he exercises the right of retention.

In the family law matters – Article 352(2) of the Civil Code, Article 365 of the Civil Code, the right of retention has a special regime. Thus, as pointed out, unlike the right of retention under common law, which supposes the existence of a link between the thing and the debt, a condition without which the right of retention cannot be granted, in the case of spouses, retention may be instituted whenever there are debts of any kind between the spouses, even if they are not related to the retained thing.

The legal consequences of a spouse's right of retention over the other spouse's property, in the event of inheritance devolution, are varied and complex, depending primarily on the status of the creditor or debtor of the right of retention, and on the various factual situations that may arise in practice, for example, it may be extinguished by confusion of assets, it may block the transfer of assets to heirs, or it may be extinguished as a result of confusion between the status of debtor and creditor, or it may simply be transferred by continuity to the heirs.

[10] Civil sentence no. 2131 of October 9th, 2015 delivered on the second appeal by the First Civil Section of the High Court of Cassation and Justice, Bucharest, available online at *http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128546.*

[11] Civil judgment no. 13262/2021 of Cluj-Napoca Court, regarding the request for review of the stamp duty, final on 10.12.2021, unpublished.

References

1. M.Afrasinie, M.-L. Belu-Magdo etc., *New Civil Code – Comments, doctrine and case law (Noul Cod civil – Comentarii, doctrina si jurisprudenta)*, Vol. 1, Ed. Hamangiu, Bucharest, 2012, p. 487.

2. PhD. Habil T. Bodoaşcă*, Family Law – University Course, 5th edition, revised and added*, Ed. Universul Juridic, Bucharest, 2021, p. 243.

3. A., Augustin, *Le droit de retention,* Ed. Economica, Paris, 2005.

4. V., Paul, *On the legal nature of the right of retention* (*Privire asupra naturii juridice a dreptului de retentie*), in S.U.U.B., no. 2/1993.

5. V., Stelian I., *Right of Retention in Civil Legal Relations (Dreptul de retentie in raporturile juridice civile)*, Ed. Universul Juridic, Bucharest, 2010.

6. V., Stelian I., *The right of retention in the case of legal connexity, a form of manifestation of the exception of non-execution* (*Dreptul de retentie in cazul conexitatii juridice, forma de manifestare a excepţtiei de neexecutare*), in Dreptul Magazine no. 11/2016.

7. V., Marin, *Right of retention, applications in civil, commercial and maritime matters*, Ed. Lumina Lex, 2001.

8. M. Afrasinie, *op. cit.*, p. 500.

9. PhD. Habil T. Bodoaşcă*, op. cit.*, p. 267.

10. Civil judgment no. 8440/2017 of Cluj-Napoca Court, final on 07.02.2020, unpublished.

11. Civil judgment no. 4302/2019 of Cluj-Napoca Court, final on 13.09.2021, unpublished.

12. Civil judgment no. 1837/2020 of Cluj-Napoca Court, final on 22.12.2020, unpublished.

13. Civil sentence no. 2131 of October 9th, 2015 delivered on the second appeal by the First Civil Section of the High Court of Cassation and Justice, Bucharest, available online at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128546.

14. Court judgment no. 13262/2021 of Cluj-Napoca Court, regarding the request for review of the stamp duty, final on 10.12.2021, unpublished.

ASPECTS REGARDING EXERCISING SUCCESSION RIGHTS BY MONKS ACCORDING TO STATE LAWS AND ECCLESIAL RULES

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Abstract

The importance of succession in the Church has been preserved up to the present. Today, basing its Status and regulations of organization and functioning on the canonical principles and according to the present civil legislation, the Romanian Orthodox Church may succeed both lay people and hierarchs or other members of the clergy, using its legal right to succession guaranteed by the State.

In the present research I shall attempt a concrete juridical analysis regarding the exercise of the succession rights by monks and nuns, starting the analysis from the present legislative norms regarding the institution of succession in Romania and I will also research the Christian-Orthodox tradition regarding monastic life, especially the canonical and ecclesial stipulations that address the juridical situation of the assets after the decease of the monks and nuns.

Keywords*: church legislation; canonical right; monastic vows; the monks and nuns succession rights*

Introduction

The New Civil Code [1] (henceforth called the *Civil code*) comprises in Book V the general legal frame in force regarding inheritance and bestowal/bequeath. Among others the above-mentioned normative act regulates the following aspects: the general conditions of the right to inheritance (art. 957 – art. 962), legal inheritance (art. 963 – art. 983), testament (art. 1034 – art. 1053), disinheritance (art. 1074 – art. 1076), succession reserve and available quota and reduction of excessive bestowal (art. 1086 – art. 1099), transmission and distribution of inheritance (art. 1100 – art. 1163). In art. 953, the Civil code establishes that: „inheritance is the transmission of the patrimony of a deceased physical person to one or more living persons". At the same time article 955 paragraph. (1) stipulates that „the patrimony of the deceased is transmitted through legal inheritance unless the person that is inherited has not established otherwise in their will". And in article 963, the Civil code specifies that „(1) In the order and according to the rules established under the present title, inheritance is bequeathed firstly to the surviving spouse and to the relatives of the deceased, to the descendants, ascendants and collateral heirs, as the case may be. (2) Descendants and ascendants are entitled to the inheritance, irrespective of the degree of relation with the deceased and collateral heirs only up to the fourth degree inclusively.

(3) In the absence of legal or tested heirs, the patrimony of the deceased is bequeathed to the village, town, or, as the case may be, to the city in the area of which the assets were located at the date of the opening of the inheritance".

Among others, the three legal texts that I have presented are important also because they establish a series of principal legal criteria regarding succession applicable in Romania,

at present. Practically, the mentioned regulations define succession, specify its types and mention the categories of persons that may have the quality of successors, with the specification that, in the absence of heirs, the patrimony of the deceased is bequeathed to the territorial administrative unit that is jurisdictionally competent.

According to art. 8 par.(1) and (3) of the *Law of cults* [2], „(1) The acknowledged cults are juridical persons of public utility. They organize and function autonomously, based on constitutional provisions and on the present law, according to their own status and canonical codes", respectively „(3) The cults function according to legal provisions and to their own status and canonical codes, whose provisions are applicable to their own faithful". The *Status for the Organization and Functioning of the Romanian Orthodox Church* (henceforth called the *Status*) was republished in the Official Monitor of Romania (henceforth *M. Of.*), part I, nr. 97 of February 10th 2020. I have to mention that, according to art. 49 par.(2) and (3) of the *Law of cults*, the *Status* was approved by Gov. Decision nr. 53/2008 (M. Of., part I, nr. 50 of 22nd of January 2018), and its republication was done according to art. II of the Order of the Secretary of State for the Cults nr. 116/2019 (*M. Of.*, part I, nr. 13 and 13 b of January the 10th 2020), and observing art. 50 par.(1) of the Law of cults. An important aspect regulated by the *Status* regards the hierarchs' and monks' right to succession; accordingly, with art. 195 – art. 197 establishing the following: „art. 195 – The eparchies have vocation over all the succession assets of their hierarchs; art. 196 – The assets belonging to the nuns and monks which were brought by them or donated to the monastery at their entrance as well as the assets acquired in any way during their life in the monastery are totally bequeathed to the monastery they belong to and cannot be the object of future claims; art. 197 – The Holy Synod will regulate the rights of retired or withdrawn hierarchs according to statutory provisions and church regulations". These provisions are to be found in unchanged form in the old Status.

Two situations emerge from the regulations mentioned above regarding the institution of succession in Romania. The first has a general character and is regulated by the Civil code.

The second situation has a special character and regards the succession of the assets that once belonged to monks, nuns and hierarchs of the Romanian Orthodox Church.

In the context of the changes occurred in civil legislation, which Romanian society experienced after December 1989 and especially after 2007, when Romania became a member state of the European Union, there has been an obvious preoccupation of the Romanian legislators for the specification, regulation and guarantee of the fundamental human rights [3], among which is the right to property. At present in Romania, according to art. 44 of the Constitution [4], „(1) the right to property is guaranteed", „(3) nobody can be expropriated for a cause of public utility established according to the law unless they receive appropriate compensation in advance", and respectively „(4) nationalization and any other form of forced transfer of certain assets to public property based on criteria of race, ethnicity, politics or other kind of discrimination against the entitled persons are forbidden".

Starting from the remarks above we notice that the regulations comprised in the *Status* of the Romanian Orthodox Church regarding the succession of monks and nuns not only have a special nature, but, through the lenses of the civil legislator they raise some questions: doesn't the inheritance by the monastery of the assets of a monk or nun after their death represent a form of limitation of the right to property or of the liberty to bequeath? What happens if before entering the monastic life they had children or a family? Taking into

account that such regulations regarding the succession of monks are rooted especially in the first Christian millennium, isn't their application in the 21st century an outdated practice, which contravenes the legislative tendencies in matters of succession?

The clarification of such a point cannot be made by exclusive reference to written rules and norms, but by exploring the Christian Orthodox doctrine and tradition and understanding the religious context in which such regulations were established.

1. The monks' right to property in the Romanian Orthodox Church

Towards the end of the 19th century and the beginning of the 20th, the recognition of the autocephaly of the Church (April the 25th 1885) and the organization as a Patriarchy (starting with February the 4th 1925) of the Romanian Orthodox Church has also led to the establishment of certain general provisions regarding the organization of the monastic life in Romanian monasteries. These regulations have been and are comprised both in the *Status regarding the organization and functioning of the Romanian Orthodox Church*, and in the various church regulations and decisions of the Holy Synod.

Regarding the monks' right to property we shall present the following church regulations chronologically:

- In the year 1925, the Law for the Organization of the Romanian Orthodox Church [5] established in art. 15 that „the monks' and nuns' assets, brought into the monastery as well as those acquired in any way during their monastic life are wholly bequeathed to the monastery they belong to". During the discussions that preceded the adoption of this text it was stressed that the church canons have legal authority regarding the assets of the monks and nuns. This specification has been completed with the following clarifications: „The canonical right is not abrogated in the civil code. The regulations regarding the inheritance of monks is made according to canonical law, which stipulates that the monk cannot be succeeded by his/her relatives, no matter the degree of relation according to which they claim the inheritance, and the assets shall be totally bequeathed to the monastery. The establishment of the status of a monk or nun is a matter of fact, which does not fall under the control of the Court of Cassation" [6]. The same document contains regulations regarding the personal assets of the hierarchs. [7].
- In the Status for the Organization of the Romanian Orthodox Church [8], adopted in 1925, articles 84-114 contain regulations regarding the organization of monasteries. Among these provisions, art. 84 stipulates that: „The monastery is a religious community of monks and nuns who decide through a celebratory vow to lead an ascetic life in poverty and unconditional submission". Art. 85 completes this definition, calling the monastery a „moral person". It is noteworthy to remember the procedure through which a person can enter the monastic life, described in art. 90. In the end of this article it is stipulated that: „Before taking the vows the one admitted must solve all his or her family or asset references to his or her natural or adopted descendants. The one who enters the monastic life can no longer possess a personal fortune, all that was his shall be bequeathed to the monastery". Art. 108 also establishes the following: „According to canon 6 of the II Synod, which says that „the monks must not own any personal property and everything that was theirs is to be bequeathed to the monastery", they must lead a communal monastic life and where such a life is missing the head of the monastery must introduce it".
- The Status for the Organization of the Romanian Orthodox Church [9], approved by the Holy Synod in 1948 contains regulations regarding the monastic life in articles 74 – 86.

Art. 74 reiterates the fact that the monastery is a community of monks and nuns who have decided, among other things, to live a life of poverty. Art. 83 restates their obligation to respect the vow of poverty and to live a monastic life according to art. 6 of the Second Synod of Constantinople. In addition to the previous Status of organization the present document adds in art. 86 the fact that the „organization of the monastic life and the administrative and disciplinary functioning of the monasteries are achieved through an interior set of regulations made by the Holy Synod".

- Regarding the monks' and nuns' right to property, the Rules for the organization of monastic life and administrative and disciplinary functioning of Monasteries [10] establish in art. 1 that it is the community of monks and nuns who have solemnly vowed to lead their lives without amassing assets, who lives in the monasteries. Their confirmation to the monastic life (problem regulated art. 10-25) implies firstly the preparation of a folder which states, among other things, if the person who wishes to enter the monastic life has children or duties towards his or her parents, as well as unpaid debts. The documents comprised in the folder must include the will that stipulates the bequeath of the personal assets of the future monk or nun, with art. 11 establishing that „the person who enters the monastic life does no longer own personal assets". The vow of poverty which must be taken by the future monk is reiterated at the end of art. 18 [11], as well as in art. 23, which provides that:"through the holy vows the monk has made himself a gift for God, for his whole life". Art. 66 and 67 also mention the importance of the vow of poverty, by underlining the fact that communal monastic life in itself requires that the monks should own nothing personal, and shall consider the fruits of their work an asset of their community, while receiving the necessary things in exchange.

- The Regulation regarding the administration of church assets [12] establishes in art. 1 that the assets belonging to the Patriarchy, Eparchies (Bishops and Archbishops), Protopriests' parishes, parishes, monasteries and the other institutions which are juridical persons of the Romanian Orthodox Church constitute church assets."

- The form of the Regulation of the monastic organization published in 2003 [13][14] contains several amendments to the text adopted in 1953. Among these we especially remark the regulations of art. 16, which stipulates that „he who wishes to enter the monastery must present, among others, a civil status certificate, which should state he has not familial obligation and also a declaration that he gives up his fortune and leaves it to the relatives or to the monastery".

- In The Status for the Organization of the Romanian Orthodox Church which is in force today reference is made to the organization of monastic life in art. 74-83, which reiterate the fact that monks and nuns who make up the community of a monastery „have freely decided to lead their life in poverty" [art. 74 par. (1)]. Procedure of confirmation to the monastic order is presented in art. 78 [15] par. (1), (2) and (3), where it is underlined that the minimal age for confirmation is 18 and those who intend to enter the monastery must submit a written application, which expresses their free will.

Judging from the presented references we can notice that Romanian monastic orders have adopted and followed the orthodox tradition regarding the monastic vow of poverty. In this regard, starting with 1925, together with the writing and adoption of the Status for the Organization of the Romanian Orthodox Church, it was repeatedly stated that in the statuses and regulations of the Romanian Orthodox Church the monks and nuns have to give away the assets that make up their patrimony and to respect the monastic vow of poverty.

Moreover, regarding the assets acquired by them after taking their monastic vows, assets obtained either through inheritance, or through the payment for the various tasks that they have been given, the monks must establish their juridical status, in order to prevent the litigation of these assets. All these aspects indicate the fidelity and responsibility with which the monastic rules have been observed ever since the first Christian centuries, along with the canonical regulations that have been applied and observed in the Romanian orthodox tradition.

2. THE INSTITUTION OF SUCCESSION IN CHURCH LAW. CHURCH AND CANONICAL REGULATIONS

2.1 Church regulations

Regarding the relations between political authority and religious structures in Romania, „ever since the creation of the modern state a regime of religious freedom has been promoted, the origins of which can be traced back to both the canonical doctrine of the Orthodox Church and to the liberal political doctrine" [16]. At present, the situation of the religious cults in our country is regulated by *Law nr. 489/2006 regarding religious liberty and the general regime of the cults.*

In succession law, the mentioned normative act tacitly acknowledges the rights of the cults to enhance their patrimony through succession: „The assets that constitute any kind of bequest – contributions, donations, *successions* – as well as any other assets that legally entered the patrimony of a cult, cannot be the object of ulterior claims" (art. 31 par.1). By the expression ***lawfully*** we understand the incidence of the common law on any kind of enhancement of patrimony by a cult, including that achieved by succession. This does not limit the right of any acknowledged cult to „make use of its mobile and immobile assets according to its own status" (art. 27 par. 1).

In the presented legislative context the main church regulations regarding the institution of succession in the *Status for the organization and functioning of the Romanian Orthodox Church* are the following:

- The patrimony of a closed cult unit (a foundational church) becomes the property of its hierarchically superior cult unit, which „shall make use of it as owner of the respective church patrimony" (art. 172);
- "Eparchies have a right over all the succession assets of their hierarchs" (art. 195);
- The assets donated to the monastery, those acquired after entering the monastic order as well as the assets the monks and nuns have brought with themselves do not constitute the object of ulterior claims (art. 196).
- Regarding the retired or withdrawn hierarchs, the Holy Synod will regulate their rights according to the statutory regulations and canonical rules (art. 197).

It is important to note that, compared to the *Status for the organization and functioning of the Romanian Orthodox Church* of 1948, the present Status has two omissions: a) in case the Eparchies compete with the hierarch's beneficiaries or heirs, the eparchies are entitled to half of his assets. The rights of the beneficiaries and heirs shall be exercised only over the half that is not reserved to the Eparchies and are regulated according to the civil regulations in force; b) the libraries, vestments and objects of cult that belong to the hierarchs are not included in the succession assets and they rightfully belong to the Eparchy.

Along with the Status of the Romanian Orthodox Church, regulations regarding succession in the case of monks and nuns are also comprised in the *Regulations for the*

organization of monastic life and administrative and disciplinary functioning of monasteries, which stipulates, regarding the persons that are to enter the monastic life: „he who intends to become a monk is compelled [...] to present the will regarding the distribution of his fortune, because he who takes the vows of monastic life cannot possess personal assets" [17].

2.2 Canonical provisions

The Church, as any society with an internal order, has organized itself according to its canons and the legislation of the society in which it is organized and functions. Having philanthropy as one of its aims, from the beginning the Church will administer various goods, which were acquired in different ways, and use them to develop multiple social, educational and catechetical activities. Gradually, nevertheless, the existence of such patrimonial assets, together with the acts of administration, enhancement, usage and distribution related to these assets have led to the establishment of a set of ecclesial regulations, in order to ensure a correct utilization of the assets in the Church.

To this end specific canons regarding the administration and role of the patrimony of the Church have been established.

These canons are the following:

- *Apostolic canon 38* – stipulates the complete competence of the bishop regarding the management and utilization of the church assets as if „God were his own supervisor". The motivation of this fact resides in „the tight bond between the bishops and the Church entrusted to them according to their authority as successors of the Apostles" [18].
- *Apostolic canon 41* – confirms the right of the bishop as „the supreme ruler of the administrative business of his eparchy" [19]. It indicates the destination of the church assets, as well as the role of the presbyters and the deacons, as persons who help the bishop in the administration of these assets. The canon stipulates the fact that „all those who serve at the altar should feed from the altar".
- *Canon 26 of the IVth Ecumenical Synod* – stipulates that, in the administration of the Church assets, every bishop should employ and be helped by specially designated priests or lay people, who may help bring more transparency to the administration of the Church. The reason is the fact that the bishop may manage the church assets according to his own conscience, and he cannot manage them according to „his whims, without any responsibility, he must be in agreement with his clergy" [20]. The canon thus obliges the bishop to „necessarily have a person, who is part of the clergy, specially designated to help him in the management of the eparchial assets," [21].
- *Canons 11 and 12 of the VIIth Ecumenical Synod* – strengthen the dispositions of the above-mentioned canons. Thus, canon 11 reminds of the obligation of employing a steward by each bishop and establishes the right of devolution. Canon 12 reminds that the bishop cannot, as manager of the church patrimony, use the assets of the Church to other aims than those linked to the business and necessities of the church.
- *Canon 15 of the local Synod of Ancyra* – regulates the juridical status of the Church assets. In other words, estranging the assets of the Church is not allowed without the permission of the bishop. In case the presbyter should conclude such a document, it shall be deemed null and the bishop has the right to reclaim the asset or to retain the payment, depending on the interest and profit of the concluded document.

- *Canons 7 and 8 of the local Synod of Gangra* – underline the disposition that the church assets are managed by the bishop and condemns the eustacians [22], who did not follow this rule [23].

- *Canon 25 of the local Synod of Antioch* – regulates in its turn the fact that the bishop is the first manager of the church assets in the eparchy. He is the one who takes care of the Church assets, being helped by a specially designated member of the clergy.

- *Canons 22, 26 and 33 of the local Synod of Cartagena* – stipulate, in turn, that it is forbidden for the clergy and the faithful to make donations to the non-Christians and heretics; the estrangement of the church assets can be made only by the synod assembly, but it is admitted nevertheless, by derogation, in case of urgent necessity; canon 33 also forbids the estrangement and any kind of abuse regarding the church assets that the presbyters or bishop may be culpable of.

- *Canon 7 of the local Synod of Constantinople* (861) – forbids the bishops to build monasteries as they please and without taking into account the church regulations. In such case everything that was built is transferred to the property of the eparchy.

- *Canons 10 and 11 of Theophilus of Alexandria* – specify the fact that the steward of the church shall see that the church revenues be used for the necessities of the clergy and to help the widows, the poor and the strangers.

- *Canon 2 of Cyril of Alexandria* – confirms the dispositions of apostolic canon 38, by which the bishop has to manage and take care of the church assets according to his conscience. The text is part of a letter written by Saint Cyril to Domnus, archbishop of Antioch, who had asked for advice regarding a certain bishop Peter, who had accused the fact he had been removed from office illegally, his assets taken and he had been forced to resign.

In the context of such an increasing interest for the regulations of its patrimony, it is self-evident that the Church has made regulations regarding succession. It was not only the management and supervision of the patrimony, as deeds concerning the church assets, which required the implementation of some strict canonical regulations, but also the way in which the church assets could be increased and multiplied. Whether it was the voluntary contributions of the Christians, through donations, or gifts from emperors, acquisitions or inheritance, all these acts and means of acquisition regarding the church patrimony have been canonically regulated by the Church. Canonical succession, as a means to acquire Church patrimony, was regulated and „legally enforced by emperors Diocletian and Maximian, through a law issued in the year 290" [24]. From a canonical point of view, this institution has been regulated by the following canonical dispositions:

- *Apostolic canon 40* – stipulates that the bishop shall keep his own assets separate from those of the Church. The reason is simple: to avoid confusion and arguments that could arise at the distribution of the assets after the bishop's death.

- *Canon 22 of the IVth Ecumenical Synod* – admits the old church norm according to which the bishop may use his own fortune and bequeath it as he may please after his death.

- *Canon 35 of the Trullan Council* – combats an abuse of those times, when the bishops, who were more subordinated to their metropolitans than they are today, could have their assets or those of their church taken away after their demise [25].

- *Canon 19 of the VIIth Ecumenical Synod* – the last part of the canon is of interest here. It reminds of the case of possible inheritance legally received by the monks from their parents or other relatives, which they bequeath to the monastery, and thus to God. In case

the respective monk retires from the monastery, is moved or dies, he can no longer use the respective assets, because they now belong to the Church. The exception, mentioned in the dispositions of the canon, refers to the cases when the monk's departure would be caused by the fault of the abbot [26]. Guilt in the Church is established by the competent authority.

- *Canon 24 of Antioch* – partially repeats the dispositions of apostolic canons 38 and 40. The rule that the personal assets of the bishop must be kept separate from those of the Church is reasserted, in order to avoid misunderstanding in case of the distributions of the assets at the bishop's death.

- *Canon 32 of the local Synod of Cartagena* – clearly establishes the assets that a bishop may bequeath and those which he may not. He may bequeath those assets which he owned before becoming a bishop and those he acquired while being a bishop, but with no connection to his status. The assets acquired during his service, which are linked to his activity as a bishop, and those he bestowed to the Church, remain in the Church patrimony and cannot be estranged. Once again „there is a difference between the Church assets and the clergy's personal assets, as well as between the personal inherited assets and those accumulated during the service" [27]. The assets gained as a result of revenue for their service [28] must be bestowed on the Church in order to dissipate the suspicion they may have made „God's goods" their own. [29].

- *Canon 81 of the local Synod of Cartagena* – regulates in detail the content of canon 22 [30], of the same synod. In other words, the dispositions of the canonical text stipulate that the bishop's personal assets shall not be bestowed to non-orthodox persons. The church punishment for such situations is anathema, i.e. the exclusion from the Church. The measure is all the more serious, as it may be taken also after the bishop's death.

CONCLUSIONS

The numerous and diverse canonical regulations regarding succession in the church clearly indicate the fact that inheritance has played an important role in Church life and represented a favourable way of enhancing the its patrimony. This conclusion can be drawn from the favourable position the Roman emperors had towards it. The Church may inherit, it has the right to, and the State, through its laws, protects this right of the Church.

The importance of succession in the Church has been preserved to our days. Today, founding its *Status* and regulations for its organization and functioning on the canonical principles, and in accord with the civil legislation in force, the Romanian Orthodox Church may succeed both lay people and hierarchs or other members of the clergy, using its legal right of inheritance guaranteed by the State. *Law 489/2006* clearly admits the fact that, besides donation and bequeath of assets, the Church may also come into possession of assets from its faithful; the Status of the Romanian Orthodox Church stipulates that the mobile and immobile assets that entered the patrimony of the Church cannot be subject to ulterior claims, respectively, it is admitted that the eparchies are entitled to inherit all succession assets of their hierarchs. Regarding the monks, it is stipulated that the assets donated to the monastery, those acquired after they entered the monastic life and those brought with them in the monastery cannot be subject to ulterior claims.

Thus we may conclude that in the Romanian Orthodox Church, the juridical regime of the assets is regulated by a series of normative and ecclesiastic documents. Among these dispositions is the right of the Church to inherit the assets of the faithful and so inheritance becomes a legal way of acquiring a person's patrimony by the Church. The rules applicable

to the succession procedure are part of the Romanian civil law, while the statutory norms regarding succession, in accord with the canonical principles, organize and regulate the relations between the bequeathed, his assets and heirs (in this case the Church). In this symphony of dispositions and regulations, the church principle regarding succession continues to underline the legal right of the Church to possess goods, to use and dispose of them, as well as the right to inherit assets belonging to other persons.

Nevertheless, while being compared to the legislation in force, it is very important that the practice of succession in the Church in general and that of the monks' succession in particular, should be seen and analyzed only in the context of the bi-millennial Christian tradition. A monk's vow of poverty and the problem of his right to property may be fully understood in the spirit of his moral and spiritual commitment. Through the fact that he wilfully renounces his assets (both those that form his patrimony before entering the monastery and those he acquires after that moment), the monk makes the proof of his commitment to the purpose he has.

When reduced exclusively to the legislative regulations, the monk's renunciation to his assets has been interpreted, in time, as a civil death or civil interdiction, manifested in one form or another. But all these conclusions, which are part of an exclusively juridical conception, cannot but confirm the moral altitude of the monastic life.

References

[1] *Legea nr. 287/2009 privind Codul civil*,, with ulterior modifications and completion, republished in *M. Of.*, part I, nr. 505 July 15th 2011. I mention that, for the purpose of this present research, I have used the application *Lex Expert* for access to the updated form of normative acts.

[2] *Legea nr. 489/2006 privind libertatea religioasă și regimul general al cultelor*, with the ulterior modifications and completion, republished *M. Of.*, part I, nr. 201 March the 21st 2014.

[3] The syntagma/concept of the fundamental rights of man, brought to the public attention in the socio-juridical domains, refers to the category of subjective as well as universally valid rights and liberties – mentioned, as a rule, in the context of the constitutional laws or in declarations of the rights (international documents) – acknowledged as being essential and indispensable to a person for their free development in a certain society. Regarding the syntagma fundamental liberties, the European Convention for the Rights of Man (known also as the Convention for the Protection of the Fundamental Rights and Liberties of Man), signed in Rome on November the 4th 1950 and being enforced starting September the 3rd 1953) reminds in the preamble the following: „those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend". To understand the role that the fundamental rights of man have in modern society it is necessary to make the distinction between this category of rights, the absolute rights and the natural rights. The category of the absolute rights is familiar especially to the doctrine of civil law and is used to classify the subjective civil rights (into absolute and real). According to it, the right that is considered absolute, as opposed to *erga omnes,* is that for which the one entitled to it does not need the assistance of another person. T|his category of rights comprises the non-patrimonial rights (the right to a name, the right to honour etc.) and the

real rights (rights of property and use etc.) Gabriel BOROI, *Drept Civil. Partea Generală*, 2nd edition, AllBech Publishers, Bucharest, 1999, p. 54; E. LUPAN, *Introducere în dreptul civil*, Argonaut Publishers, Cluj-Napoca, 2003, p. 99; Henry Campbell Black, *Black's law dictionary*, 4th edition, West Publishing Co., 1968, pp. 22-23; Susan ELLIS Wild (ed.), *Websters's law dictionary, Wiley Publishing*, Inc., 2006, p. 5.

In specialized papers the attribute *absolute* is used in the case of the fundamental rights, to underline the idea that the person entitled is not conditioned by the contribution/intervention of another person in exercising that right. Also see: H. Campbell Black, *Black's law dictionary*, p. 23; Elizabeth A. MARTIN, *A dictionary of law*, 5th edition, Oxford University Press, 2002, p. 3.

By natural rights (*jus naturale*), juridical philosophy designates the rights that are ascribed to a person through the intrinsic quality of being human. At the core of the doctrine of natural rights is the idea that beginning with his birth, man is the beneficiary of rights through the simple fact he is a human being. Natural rights are obligatory for the whole humanity, at any time or place, and for any legislative system; the conformity of these rights is founded on the ontological identity of humans, and not on their cultural or social identity. The natural right is an ideal one, unchangeable and universal, it does not belong to the state and it has its origin in human nature. Also see: Alain GRAF, Christine le BIHAN, *Lexic de filozofie*, translated by Elena Bondor, Institutul European, 2000, pp. 32-33; Reinhard BECK, *Sachwörterbuch der Politik*, Kröner Verlag, Stuttgart, 1986, p. 637; David ROBERTSON, *A dictionary of human rights*, Europa Publications Limited, 2004, pp. 121-122; Emil DERȘIDAN, *Dicționar de termeni juridici uzuali*, Ed. Proteus, București, 2006, p. 150.

From afore-mentioned arguments it results that the fundamental rights have their source in the natural rights; in other words, the fundamental rights are the concretization (on a legislative plane) of the natural rights. The relation between these two categories of rights, natural and fundamental, was analyzed also by the German philosopher Georg Wilhelm Friedrich Hegel, who reminds us the following: „there are two kinds of law: the laws of nature and the juridical laws; the laws of nature are self-sufficient and valid as they are; they do not undergo any alteration, irrespective of the particular cases in which we may interpret them incorrectly. The measure of these laws is beyond us, and our knowledge does not add anything to them [...] while the juridical laws are established and created by people. Man does not stop at what really exists, but affirms that he has found the measure of what is just in himself; he can be subordinated to necessity and the force of external activity, but never to natural necessity, because his interior always tells him how he must be and he finds the confirmation or disproof of what is real in himself. The highest truth exists in nature, that a law exists in reality is not applicable to the juridical laws because they exist, but because everybody pretends they should be in accord with their own criterion." G.W.F. Hegel, *Principiile filosofiei dreptului sau Compendiu de drept natural și știință a statului, trad. Ioana Ungureanu și Mădălina Lazăr*, Paideia Publishers, București, 1998, p. 11.

In conclusion, the importance and the role of the fundamental rights in society are given both by their dependency on the natural rights and on the absolute character that the legislator has acknowledged to them. For this theme also see: Antony Flew, *Equality in liberty and justice*, Routledge, 1989, pp. 28-35; Charles Taliaferro, Elsa J. Marty (ed.), *A dictionary of Philosophy of religion*, Continuum, 2010, p. 186.

[4] *Constituția României* republished in *M. Of.* nr. 767 October the 31st 2003.

[5] *Legea pentru organizarea Bisericii Ortodoxe Române*, voted by the Senate of Romania on March the 24th 1925 and by the Chamber of Deputies on April the 3rd 1925 and sanctioned with *Decretul Regal nr. 1402* of May the 4th 1925, published in *Monitorul Oficial*, nr. 97 of May 6th 1925. (The legislative text above-mentioned is found in the paper: *Legea și Statutul pentru Organizarea Bisericii Ortodoxe Române din 6 mai 1925*, to which were added the parliamentary discussions and the pertaining jurisprudence, Tipografia Curții Regale, București, 1925, pp. 1-66)

[6] *Legea și Statutul pentru Organizarea Bisericii Ortodoxe Române din 6 mai 1925*, p. 21.

[7] art. 13: „Through derogation from the Civil Code, the entire fortune left by metropolitans, bishops and hierarchs after their death, if they don't have compulsory heirs (parents or children) or if they don't have a will, is transferred as rightful succession to the Metropolis, Episcopate or Eparchy where they functioned. If they have compulsory heirs, ascendants, descendants or both, these are entitled only to half of their fortune, with the other half being inherited by the Metropolis, Episcopate or Eparchy. If there are both ascendants and descendants, the half of inheritance shall be divided into two parts, one for the ascendant branch and one for the descendant branch. If there are either descendants or ascendants, they will inherit the whole half of the reserved portion. If they have a will and they have compulsory heirs, they have to leave them half of their fortune. If there are no compulsory heirs, they can leave half of their fortune to anyone they please. For the other half, to which the Metropolis, Episcopate or Eparchy is heir, they can indicate the ecclesial, cultural, philanthropic and communal purposes for which this half of inheritance is to be used."

art. 14: „The libraries belonging to metropolitans, bishops and hierarchs are inherited by the eparchial library in case they have not bequeathed it to a certain ecclesial cultural institution. Their vestments and all the objects of cult that belonged to them or which they used are left to the eparchy they last led."

[8] *Legea și Statutul pentru Organizarea Bisericii Ortodoxe Române din 6 mai 1925*, pp. 67-116.

[9] *Statutul pentru organizarea și funcționarea Bisericii Ortodoxe Române* was written by Patriarch Justinian, approved and voted by the Holy Synod in the session of October 19-20th 1948 and approved through Dec*retul Prezidiului Marii Adunări Naționale a Republicii Populare Române* of February 29th 1949. It was published in *Monitorul Oficial al României*, nr. 47 of February 25th 1949. The text of the Status can be consulted also in the volume: *Legiuirile Bisericii Ortodoxe Române sub Înalt Prea Sfințitul Patriarh Justinian* 1948-1953, Ed. Institutului Biblic și de Misiune Ortodoxă, București, 1953, pp. 5-50.

[10] *Regulamentul pentru organizarea vieții monahale și funcționarea administrativă și disciplinară a Mănăstirilor* was approved through *Decizia ministrului cultelor nr. 4928* of March 26th 1953. The text of the *Regulament* may be consulted also in the volume *Legiuirile Bisericii Ortodoxe Române sub Înalt Prea Sfințitul Patriarh Justinian 1948-1953*, pp. 385-423. For the text of this *Regulament* also see *Biserica Ortodoxă Română* magazine, year LXVIII (1950), nr. 1.

[11] The referenced text is the following: „During the examination the candidate will have to prove he or she realizes the purpose of being a monk, that he/she has judiciously

acquired the knowledge of the monastic regulations and especially the rules set by Saint Basil (the Great) and that he is knowledgeable about the founded institutions and about the past of the monastery he lives in."

[12] *Regulamentul pentru administrarea averilor bisericeşti*, approved and voted at the Church National Assembly in the session of February the 26th 1950 and approved through the *Decizia Ministrului Cultelor* nr. 32-234 regarding the approval of the *Regulamentul pentru administrarea averilor bisericeşti din Patriarhia Română,* of September 29th 1950. The text of the *Regulament* may be consulted also in the volume: *Legiuirile Bisericii Ortodoxe Române sub Înalt Prea Sfinţitul Patriarh Justinian 1948-1953*, pp. 345-362.

[13] *Regulamentul pentru organizarea vieții monahale și funcționarea administrativă și disciplinară a mănăstirilor*, Ed. Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 2003, pp. 99-136.

[14] The text of art. 78 par. (1), (2) and (3) of the present *Statut de Organizare și Funcționare a Bisericii Ortodoxe Române* has the following content: „(1) The confirmation in the monastery of those who want to become monks is made through written application by the candidate with recommendation from his/her confessor and abbot/abbess and with the approval of the hierarch. (2) The minimum age allowed for acceptance in a monastery is 18. The parents' or legal tutors' written agreement is necessary if the candidate is under this age, but at least 16.

Acceptance and promotion in the monastic life are also forbidden for those who have family obligations and responsibilities or those who are under legal accusation. (3) Monastic tonsuring is made with the approval of the hierarch after at least 3 years of canonical examination and life in the monastery. Derogation from this rule may be decided only by the hierarch for urgent missionary reasons".

[15] G. GRIGORIȚĂ, „Legea nr. 489/2006...", pp. 169-170.

[16] Art. 11, *Regulamentului pentru organizarea vieţii monahale şi funcţionarea administrativă şi disciplinară a mănăstirilor*.

[17] N. MILAŞ, *Canoanele Bisericii Ortodoxe*, vol. I, p. 246.

[18] I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 33.

[19] N. MILAŞ, *Canoanele Bisericii Ortodoxe*, vol. I, partea II, p. 251.

[20] C. DRON, *Canoanele*, vol. II, p. 205.

[21] *Eustaţienii* – group of extremist christians, who opposed the regulations of the Church bishops, defamed the Church and produced dissensions among the faithful.

[22] I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 221.

[23] I. D. IVAN, *Bunurile bisericeşti...*, p. 115.

[24] C. DRON, *Canoanele*, p. 284.

[25] C. DRON, *Canoanele*, p. 428.

[26] I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 282.

[27] Regarding the categories of assets gained as a result of revenues from services, apostolic canons 2, 3 and 4 stipulate: „*If a bishop or priest, brings something else to the altar of God that is not established as sacrifice for God, for example honey, milk or, refined drinks – instead of wine – or birds, or animals, or vegetables, which are not accepted in the regulations, let him be defrocked.*"; „*Except for fresh wheat ears or grapes at the appropriate time, let them not bring anything else to the altar, except also for oil for the*

vigil lamp and incense at the time of the divine sacrifice"; „Let them sent any other fruits as gift to the bishop's and priests' house, not at the altar and it is understood that the bishops and priests will share them with the deacons and the other clergy". I. MIHĂLCESCU, *Scrierile Părinţilor Apostolici dimpreună cu aşezămintele şi canoanele apostolice*, p. 269).

[28] I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 282.

[29] *"Bishops or the clergy, as it was said, shall not bequeath those anything through donations from their own assets*." I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 277.

[30] I. N. FLOCA, *Canoanele Bisericii Ortodoxe*, p. 307.

SUCCESSORAL CAPACITY OF THE LEGAL ENTITY EXISTING ON THE DATE OF OPENING THE SUCCESSION.

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Abstract

The successoral capacity of the legal person has some peculiarities as opposed to the successoral capacity of the natural person, especially regarding the type of inheritance to which the legal person is effectively entitled, namely the testamentary inheritance of the deceased, as well as the date from when is effective the succession liberality in case of the capacity of anticipated use, respectively from the date of the deed of establishment or, in case of testamentary matters, from the date of opening the testator's inheritance. The successoral capacity of the legal person is also distinguished by its limited / specialized nature: the legal person can have only those rights and can only undertake hose obligations that are not reserved by law to individuals, and i case of legal persons for non-profit – patrimonial purposes, the successoral capacity is limited only to acquiring by bequest hose rights and obligations that are necessary for the achievement of the purpose established by law, the deed of incorporation or the statute. Finally, we also point out that regarding the legal persons of public law, respectively the Romanian State and the Territorial Administrative Units, their successoral capacity, unlike the other legal persons, is not limited only to the modality of testamentary liberality by legacy, but they have the legal right to collect vacant inheritances.

Keywords: *successoral capacity; anticipated capacity; the principle of the specialty of succesoral capacity*

1. The notion of succesoral capacity

Any person, whether natural or legal, in order to collect an inheritance, legal or testamentary, must meet the condition provided by the Civil Code to have succesoral capacity. Succesoral capacity is a general condition of the right to inherit, along with the vocation to inheritance and the indignity of succession.

The capacity to inherit is expressly regulated by the provisions of art. 957 para. (1) of the Civil Code, which states that „A person may inherit if he exists at the time of opening the inheritance. The provisions of art. 36, 53 and 208 shall apply. '

It follows, therefore, that any person who exists at the time of opening the inheritance (namely at the time of the death of the deceased) has the capacity to inherit, which implies the ability to inherit, to collect an inheritance, namely the person's ability to acquire civil rights and obligations. regarding a succession [1].

Characteristic for legal entities is the fact that they can acquire the inheritance exclusively through a bequest contained in the will, so exclusively through testamentary inheritance. Legal entities do not fall into the category of legal heirs, only the spouse and relatives of the deceased being part of this category and having a vocation to the legal inheritance of the deceased [2].

Basically, the succession capacity of legal entities is not full it being limited only to the method of testamentary devolution, by bequest, of the deceased's inheritance. However, a

clarification must be made regarding the legal persons of public law – the Romanian state and the territorial administrative units, which successoral capacity includes the special right to collect vacant inheritance as heir, in which case the devolution of the deceased's inheritance is a legal one.

Successoral capacity is a part of the legal person's capacity to use, which is the general ability of a person to have rights and obligations. Even if, as we will see below, the anticipated capacity of the testamentary foundation is prior to its capacity for use, this cannot lead us to the wrong conclusion that the succesoral capacity is considered to be something different from the capacity to use and exercise of the person, because it cannot have an independent existence and all the rights as well as the obligations of a person, regardless of their source, outline the contents of the capacity to use.

2. **General rule – successoral capacity of legal persons**

As a general rule, legal persons must exist at the time of the opening the inheritance of the deceased in order to be able to collect the inheritance or part of the inheritance left by the deceased. The issue of the existence of the legal person at the moment of opening the inheritance is intimately related to the capacity to use of the legal person and the moment of its acquisition, in accordance with the law.

Thus, legal entities have the capacity to acquire – by virtue of the will left by the deceased – the assets of the inheritance from the date of acquiring the legal status, under the law, namely from the date of registration, if they are subject to registration, and in case of other legal entities of the act of establishment or from the date of authorization of their establishment or from the date of fulfilling any other condition provided by law. (art. 205 paragraphs 1 and 2 of the new Civil Code)

Thus, the beginning of the capacity of the legal entity subject to registration is the moment from when this registration was made, and in case of legal entities not subject to registration, from the moment of the establishment document, namely from the date of authorization of their establishment or from the date of fulfilling any other conditions provided by law.

The legal characteristics of the legal person's capacity to use have been identified in the doctrine [3] as legality (that character which consists in the fact that only by law are regulated all aspects related to the establishment, beginning, contents and termination of this capacity); inalienability (cannot be alienated or assigned and cannot be waived, not even in part); intangibility (the characteristic of the legal person that it could not be limited only in the cases and conditions expressly provided by law); generality (this capacity expresses the abstract ability of the legal person to have subjective civil rights and civil obligations in general, without a limiting listing of them).

3. Anticipated succesoral capacity of legal persons

Legal entities, as well as individuals, have, according to the law, the capacity for early use. Article 205 of the Civil Code. para. (3) stipulates that the legal persons provided by par. (1) may, even from the date of the establishment document, acquire rights and undertake obligations, but only to the extent necessary for the legal person to be validly established.

By this legal text, the legislator acknowledges only the legal person that is subject to registration for acquiring the legal status, the capacity for early use from the date of the

establishment docuent, but only given that the rights and obligations acquired are necessary for the valid establishment of the legal entity.

According to art. 208 of the new Civil Code, „by exception from the provisions of art. 205 para. (3) and unless otherwise provided by law, any legal person may receive liberalities under common law, from the date of the incorporation document or, in case of testamentary matters, from the moment of opening the testator's inheritance, even if the liberalities are not necessary for the legal person to be legally established.

Article 957 para. (1) C.civ. expressly refers to art. 208 of the Civil Code, as follows: A person can inherit if it exists at the time of opening the inheritance. The provisions of art. 36, 53 and 208 are applicable.

The legal norms set out above establish the contents of the anticipated successoral capacity. In order to clarify the legal status of the anticipated succesoral capacity of legal persons, it is necessary to highlight the elements of differentiation according to the specifics of each legal person.

Thus, in case of the legal entity subject to registration for acquiring the legal status, the anticipated succesoral capacity coincides, from a temporal point of view, with the beginning of the anticipated capacity to use, respectively the date of the establishment document. The difference is that in case of anticipated successoral capacity, the legal person can acquire any kind of testamentary liberality, not only those that are necessary for the valid establishment of the legal person.

In case of testamentary matters, legal entities that are part of the category of those provided by par. (2) of art. 205 of the Civil Code, the capacity to use is acquired by registering in the Register of associations and foundations located at the registry of the court in which territorial jurisdiction it has its headquarters, according to art. 17 para. (1) of GEO. no. 26/2000 regarding associations and foundations, the legislator acknowledges only an anticipated successoral capacity, which is acquired right from the moment of the testator's death, namely before the beginning of acquiring the legal status by registration in the special register, even in the case where the assets that make the scope of the liberality are not necessary for the legal person to be validly established.

Also, art. 19 para. (3) of GEO no. 26/2000 on associations and foundations stipulates that „If the foundation acquires legal status after the death of the founder, the effects of the liberalities made in favor of the foundation before its establishment will occur from the date of the statute, for matters established by living acts and for matters established by will, from the date of the testator's death „.

Therefore, by acknowledging a capacity for early use of the legal person, the legislator also acknowledges a capacity for early succcession, the essential difference between the two types of anticipated capacity lies in the fact that while in the case of capacity for early use, the legal person may acquire rights and undertake obligations, but only to the extent necessary for the legal person to be validly established, in case of early successoral capacity, the legal person may receive liberalities even if they are not necessary for the legal person to be legally established.

The provisions of art. 208 of the Civil Code, introduced a novelty regarding the liberalities that legal entities can receive, in the meaning that they can receive other liberalities, besides those that are strictly necessary for the valid establishment of the legal person, as opposed to the former regulation, provided by art. 33 of the Decree no. 31/1954 which acknowledged for the legal persons the capacity of anticipated use, therefore also the

capacity of anticipated successoral capacity, from the date of the establishment document, but only insofar as the successor assets were necessary for the legal person to be validly established.

The current solution is clearly preferable because, assuming that the goods which are the subject of liberalities would be sufficient for the legal person to be valid, it is not clear why other liberalities would not be valid, having as their object other goods, that would favor the proper operation of the legal person [4].

4. The principle of the specialty of the capacity to use and of the successoral capacity of the legal person

In the literature [5] it was stated that unlike the natural person, who can enjoy all the rights and can undertake all the obligations from birth (and in some cases even before birth), having, therefore, a capacity to unlimited use, the legal person has a limited capacity for use: it can only have those rights and can only undertake those obligations that are not reserved by law to individuals.

For the legal person – the company regarding the commercial activity -, an essential role is played by the rights and obligations deriving from the legal acts regarding the activities of production, trade or provision of services. Although, as a vocation, the company's capacity for use is generally characterized, it is still limited to the company's object of activity [6]

Legal persons with a non-patrimonial purpose may have only those rights and obligations that correspond to their statutory purpose of activity.

All these outline the contents of the principle of the specialty of the capacity to use, enshrined by art. 206 C.civ. [„(1) The legal person may have any civil rights and obligations, except those which, by their nature or according to the law, can belong only to the natural person.

(2) Non-profit legal entities may have only those civil rights and obligations that are necessary for the achievement of the purpose established by law, the deed of incorporation or the statute.

(3) The legal act concluded in violation of the provisions of par. (1) and (2) is struck by absolute nullity.”].

Practically, the principle of the specialty of the legal person's capacity to use implies that in the patrimony of the legal person can be found any kind of civil rights and obligations, except those which by their nature or according to the law, can only belong to the natural person.

From the principle of the specialty of the capacity to use of the legal person derives also the specialty of the successoral capacity of the legal person.

In this regard, the succesoral capacity of the non-profit legal entity is limited to the purpose for which it was established, so that the bequest that does not correspond to the purpose for which the legal person was established will be null or void, depending on whether the incapacity existed at the time of the drawing up of the will or occurred later, but before the opening of the inheritance.

Any act that violates these limits is void. In civil law theory, this rule is called the principle of the specialty of the legal person's capacity to use and its violation is analyzed as a case of absolute nullity of the civil legal document.

The legal person does not have its own organic will and, therefore, cannot have an unlimited capacity to use [7].

It does not fall under the principle of the specialty of the capacity to use legal facts (stricto sensu) and material operations, nor the civil rights and obligations that are grounded on the law. Their nullity, moreover, cannot even be conceived [8].

The successoral capacity of legal persons does not depend on the duration of the existence of the legal person after the date of opening the succession. Thus, if the legal entity ceases, but after the date of opening the succession, the succession rights acquired by virtue of the will will pass on to the legal persons who will acquire the patrimony of the legatee legal entity in reorganization, respectively will enter the patrimonial assets subject to liquidation, in case of dissolution.

5. Successoral capacity of legal entities under public law – Romanian State and Territorial Administrative Units

Unlike the rest of the legal entities that have successoral capacity that entitles them to collect by will the inheritance of the deceased, the Romanian State and the Territorial Administrative Units have the special right granted by law to collect vacant inheritances.

Inheritance is vacant, in whole or in part, in cases where there are either no heirs (legal or testamentary), or – even if they exist – their effective successoral vocation does not extend to the entire estate [9].

According to the provisions of art. 963 para. (3) of the Civil Code, „In the absence of legal or testamentary heirs, the deceased's patrimony is transferred to the commune, city or, as the case may be, to the municipality in which territorial area the assets were located at the date of opening the inheritance". The normative text establishes the legal right of ATUs to collect vacant inheritances containing assets remaining within their territorial area.

The right of the Romanian State to collect a vacant inheritance is regulated by the provisions of art. 553 para. (3) of the Civil Code, which establishes that the vacant inheritances from abroad belong to the Romanian state.

Regarding the legal nature of the right of the state and of the territorial administrative units over the vacant inheritance, the issue was controversial, receiving several interpretations in the specialized doctrine, under the rule of the old civil code.

Thus, in a first opinion [10], the state collected the goods of the vacant inheritance (viewed ut singuli) under the right of sovereignty, as it collected any property without a master located on its territory.

In a second opinion [11], the state acquired the vacant inheritance (as universality) on the basis of a right to legal inheritance.

In the judicial practice under the rule of the old regulation, the solution of this issue was that the state collects the vacant inheritance as heir, according to art. 652 Civil Code from 1864.

In the current legislative context, together with other authors [12], we believe that the thesis embraced by the judicial practice according to which the state and the territorial administrative units collect the vacant succession as heir, is the correct one.

In support of those above, the following arguments can be put forward:

a) Article 653 para. (3) of the Civil Code, which regulates the right of the territorial administrative units to collect the vacant inheritance is located in Title II entitled Legal inheritance, and the marginal name of art. 963 is „Legal Heirs".

b) The state or territorial administrative units acquire the vacant inheritance not with a private capacity, but with a universal capacity.

c) The state or territorial administrative units are obliged to apply for entry in possession because they are not inheritors, which contradicts the idea of sovereignty of the state or of the territorial administrative units, as it would no longer have been necessary to apply for entry in possession [12].

d) The state and the territorial administrative units do not differ from the other legal heirs, because they will collect the inheritance only if there are no heirs from the 4 classes of legal heirs or they have waived the inheritance or are unworthy [13].

Regarding these legal persons of public law – the Romanian state and the territorial administrative units, their successoral capacity is full, meaning that they have a vocation both to a testamentary inheritance and to the legal inheritance of a deceased who has no heirs of the 4 classes of heirs who could claim rights over the inheritance, in which case they will collect the inheritance of the deceased as legal heir, based on this special right granted by law.

2. Conclusions

The legal entities in force at the time of opening the succession have the capacity to inherit. However, the legislator also acknowledges an early successoral capacity from the date of the deed of incorporation or, in case of testamentary matters, from the moment of opening the testator's inheritance. An element of novelty brought by the provisions of the civil code is the one related to the object of liberality received by legal persons, meaning that it is no longer limited only to those rights and obligations that are necessary for the valid establishment of the legal person, but refers to any of rights and obligations. Of course, in the latter case, however, the principle of the specialty of the legal capacity of legal persons must be observed, which implies that the legal person may have any civil rights and obligations, except those which, by their nature or according to law, may belong only to the natural person, and with reference to non-profit legal entities, they may have only those civil rights and obligations necessary for the achievement of the purpose established by law, the articles of association or the statute. This principle of the specialty of the capacity to use of legal persons also directly affects their capacity for succession, in the sense that testamentary liberalities must comply with these legal provisions, otherwise the bequest is null or void. Specific to the successoral capacity of legal entities is the fact that they have a vocation only to the testamentary inheritance, and not to the legal one, except for the legal persons of public law, the Romanian state and the territorial administrative units, which benefit from a special inheritance right over the vacant inheritance. In the latter case, the return of the vacant inheritance is legal, but it is specific only to those subjects of law expressly individualized by the legislator.

Bibliography

[1] Ion Dogaru., *Drept civil. Succesiunile.* All Beck Publishing House, Bucharest 2003, p. 37;

[2] Ioana Nicolae, *Devoluțiunea legală și testamentară a moștenirii*, Hamangiu Publishing House 2016, p. 56;

[3] Gabriel Boroi, Mona-Maria Pivniceru, *Fișe de drept civil*, Hamangiu Publishing House Bucharest, 2016, p. 206;

[4] F. Deak, R. Popescu, *op. cit.*, p. 87; Apud. M.S.Croitoru, *Aplicarea legii civile în timp din perspectiva noului Cod civil*, in RRDP nr. 6/2011, p. 35;

[5] Gheorghe Piperea, *Drept comercial. Întreprinderea. în reglementarea noului Cod civil*, C.H. Beck Publishing House Bucharest, 2012, p. 116;

[6] Stanciu D. Cărpenaru, *Tratat de drept comercial*, IVth edition updated, Universul Juridic Publishing House, Bucharest, 2014, p. 187;

[7] G. Piperea, *cited document*., p. 116;

[8] *Ibidem;*

[9] F. Deak, R. Popescu, *cited document*., p. 279;

[10] Mircea Eliescu, *Moștenirea și devoluțiunea ei.* RSR. Academiei Publishing House, Bucharest 1966, p. 146-148; Eugeniu Safta-Romano, *Dreptul de moștenire.* Grafix Publishing House, Iași, 1995, vol II, p. 148-149;

[11] Fr. Deak, *Tratat de drept succesoral,* Iind edition, Universul Juridic Publishing House, Bucharest 2002, p. 144-145; F. Deak, R. Popescu, *cited document,* p. 282-283;

[12] Ion Dogaru. *cited document.,* p. 159;

[13] *Ibidem.*

COMPARATIVE ASPECTS BETWEEN THE CERTIFICATE OF SUCCESSION IN THE ROMANIAN LEGISLATION AND THE EUROPEAN CERTIFICATE OF SUCCESSION

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Abstract

The Certificate of Succession shall provide proof of the capacity of heir and of the right of ownership of the universal heirs and of the universal right of ownership over the share due to each of them, namely that of the legatee in a particular capacity over the single assets. A succession with a foreign element in the European Union may be resolved in an effective manner if the heirs, legatees, executors of the will or administrators of the estate prove their status and/or powers in another Member State, for example in a Member State in which the succession property is situated. In the doctrine it was mentioned that it is possible that the foreign element, being an essential condition, should not be present from the date of the initiation of the succession procedure, but should appear later, which means that a European certificate of inheritance can be issued in a succession file in which a certificate of national inheritance has already been issued. This communication aims to highlight the comparative aspects between the two certificates regarding: competence, determination of the applicable law, duration and their purpose.

Keywords: *Civil Code, Romania, inheritance, Certificate of Succession in Romanian Law, European Certificate of Succession, Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, an element of alienity*

1. General Considerations

According to art. 953 of the Civil Code, inheritance means the transfer of the patrimony of a natural person deceased to one or more persons in being (natural persons, legal persons, administrative-territorial units – commune, city, municipality, as the case may be – or the state). Instead of the notion of „inheritance", the notion of „succession" is also used.[1]

According to art. Article 3 (1) (a) of Regulation (EU) No [../..]650/2012, succession means „any form of transfer of goods, rights and obligations for the cause of death, whether it is a voluntary act of transfer, in the form of a disposition of death, or a transfer in the form of succession „ab intestate". The definition of succession demonstrates to us a broad scope of Regulation (EU) No. 650/2012 (RES). [2]

The certificate of heir in the Romanian legislation is the document issued by the notary public which contains findings regarding the movable and immovable assets inherited, the number and quality of the heirs and their shares in these assets, as well as mentions regarding the possible assemblers and other formalities provided by law.

It shall be drawn up on the basis of the final conclusion and shall have the same date as the final conclusion and number from the register of succession terms. It shall include the

findings of the Ruling regarding the succession estate, the number and quality of the heirs and their shares in the estate of the deceased, as well as mentions regarding the manner in which the extent of the rights of the successors was established, as well as any mention that justifies its issuance. One copy is issued to each heir or legatee, upon completion of the notarial succession procedure, as the case may be, after the payment of the succession fees and the fees, as regulated by Article 116 of Law no. 36/1995 of notaries public and notary activity, republished.

With the entry into force of the New Civil Code on 1 October 2011, the Certificate of Succession has the legal nature and the proving power of an ownership title for the accepting heirs over the assets from the estate, in the quota that is due to each.

The notion of a European Certificate of Succession is introduced by Article 62 [3], art. 63 [4] and recital 67 [5] of Regulation (EU) No […]650/2012. This uniform document is to circulate alongside the documents that were traditionally issued by notaries or other competent authorities in successions with foreign elements. [6]

Regulation (EU) No650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, which has been in force since 17 August 2015, facilitates the management by citizens of the legal aspects of an international succession by ensuring that cross-border successions are discussed in a coherent manner under a single law and by a single authority.

The Regulation shall apply between all Member States except Denmark and Ireland.

The regulation introduced the European Certificate of Succession, a document which is issued by the authority dealing with the succession and which can be used by heirs, legatees, executors of wills or administrators of the succession to prove their capacity and exercise their rights or powers in other Member States. Once issued, the European Certificate of Succession shall be recognised in all Member States without any special procedure being required. [7]

2. Comparative aspects

For the issuance of a European Certificate of Succession, the rules of competence laid down in Regulation (EU) No […]650/2012 are not applicable to the notary public in Romania when issuing a certificate of national heir.

The competence for issuing the Certificate of Succession in the Romanian legislation is determined based on art. 374 Civil Code. 15 letter a) and b) and art. 103 of Law no. 36/1995 on notaries public and notarial activities, republished. As regards the European Certificate of Succession, each Member State will determine which authorities are competent to issue it. The issuing authority may be a court as defined in Article 3 (2) of the Regulation or another authority, which under its domestic law is competent in matters of succession. The rules of territorial jurisdiction of these authorities are established by art. 64 of the Regulation. [8] As the Notary Public of Romania is a competent authority in matters of succession, the rules of jurisdiction are applicable to him in issuing the European Certificate of Succession.

Once the competence has been established, the Romanian notary will also determine the applicable law. As a rule, „the law applicable to the succession is the law of the country in which the deceased habitually resided at the time of death. It may be a country within the

European Union or outside the European Union. However, before death occurs, a person may choose to apply the law of the country of which he is a national. Where such a person is a national of a country of the European Union, the parties to the succession may agree that the courts of that country of the European Union should deal with the succession case and not with the courts of the country in which the deceased was habitually resident. The same law shall apply to the succession as a whole, irrespective of the type of property (tangible or intangible) concerned or the country in which it is located.' [9] A person may therefore choose that the law applicable to the succession shall be the law of the State of nationality which possesses him at the time of choice of law or at the time of death as provided for in Article 22 of Regulation (EU) No […]650/2012 or by way of exception, if the circumstances of the case clearly indicate that, at the time of death, the deceased had a closer connection with a State other than the State in which he was habitually resident at the time of death, the Romanian Notary Public shall apply the law of that State. A difference would be the legal basis depending on the date of death. For persons deceased before the date of entry into force of Regulation (EU) No 650/2012, the law applicable to the succession is established according to the conflicting rules of art. 2633 Civil Code, accompanied by the resubmission provided by art. Civil Code. [10] If the person died after the entry into force, the applicable law shall be determined in accordance with the provisions of the Regulation.

Unlike the Certificate of Succession in the Romanian legislation which has no validity term, the European Certificate of Succession is valid for a limited period of six months, term indicated in the certified copy in the form of an expiry date. Under Article 70 (3), „in exceptional and duly justified cases, the issuing authority may decide, by way of derogation, that the period of validity be longer. Once this period has elapsed, any person in possession of a certified copy must, in order to be able to use the Certificate for the purposes indicated in Article 63, apply for an extension of the period of validity of the certified copy or request a new certified copy from the issuing authority.

The purpose of the European Certificate of Succession is set out in Article 63 of Regulation (EU) No [../..]Commission Implementing Regulation (EU) No 648/2012 [11] is amended as Its existence does not replace the certificate of inheritance issued in the Romanian legislation, the purposes of the two certificates being similar. Although the Notary Public of Romania finds that he is competent and the applicable law is established, the use of the European Certificate of Succession is not mandatory, having a probative character and produces effects in each Member State according to Article 69 of the Regulation. [12]

3. Conclusions

In conclusion, in addition to the above, I emphasize the fact that under the provisions of the New Civil Code, the certificate of heir issued under the Romanian legislation constitutes a property title unlike the European certificate of heir attesting to a recognition of the right established according to the national legislation where the asset subject to the estate is included.

References

[1] Romeo Popescu, Francisc Deak, (2019), Treaty of Succession. 3rd edition, updated and supplemented. Volume I. Legal Heritage, Universul Juridic Publishing House, p. 19.

[2] Ioana Olaru, (2019), Succession-related reserve in domestic law and in private international law, Solomon Publishing House, p. 261.

[3] Article 62 of Regulation (EU) No […]650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession:

Creation of a European Certificate of Succession

1. This Regulation creates a European Certificate of Succession (hereinafter referred to as „the Certificate"), which is issued for use in another Member State and produces the effects listed in Article 69.

The use of the Certificate shall not be mandatory.

The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.

[4] Article 63 of Regulation (EU) No […] 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession:

Purpose of the Certificate

The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

The Certificate may be used, in particular, to demonstrate one or more of the following:

the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;

the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;

the powers of the person mentioned in the Certificate to execute the will or administer the estate.

[5] Article 67 of Regulation (EU) No […] 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession:

Issue of the certificate

The issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the succession or under any other law applicable to specific elements. It shall use the form established in accordance with the advisory procedure referred to in Article 81(2). The issuing authority shall not issue the Certificate in particular if:

the elements to be certified are being challenged; or

the Certificate would not be in conformity with a decision covering the same elements.

The issuing authority shall take all necessary steps to inform the beneficiaries of the issue of the Certificate.

[6] Ioana Olaru, (2014), European Law of International Succession, Practical Guide, National Union of Notaries Public of Romania, Notarom Publishing House, p. 151.

[7] https://e-justice.europa.eu/478/EN/european_certificate_of_succession, accessed on 12 April 2022.

[8] Ioana Olaru, (2014), European Law of International Succession, Practical Guide, National Union of Notaries Public in Romania, Notarom Publishing House, p. 155.

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM: jl0070, accessed on 12 April 2022.

[10] Ioana Olaru, (2014), European Law of International Succession, Practical Guide, National Union of Notaries Public in Romania, Notarom Publishing House, p. 70.

[11] Article 63 of Regulation (EU) No […] 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession:

Purpose of the Certificate

The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

The Certificate may be used, in particular, to demonstrate one or more of the following:

the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;

the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;

the powers of the person mentioned in the Certificate to execute the will or administer the estate.

[12] Article 69 of Regulation (EU) No […] 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession:

Effects of the certificate

The Certificate shall produce its effects in all Member States, without any special procedure being required.

The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.

Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence. L 201/130 Official Journal of the European Union 27.7.2012 RO

Where a person mentioned in the Certificate as authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).

Subsection 2

THE UNITED KINGDOM'S WITHDRAWAL FROM THE EUROPEAN UNION: SUCCESSION ISSUES

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Abstract

Following the referendum held in the United Kingdom (UK) on 23 June 2016 and once Article 50 TEU had been activated, negotiations on the withdrawal of this European State from the European Union began on 19 June 2017. After many months of negotiation, on 15 November 2018, the draft text of the future withdrawal agreement of the UK from the EU was known and was officially formalised at the extraordinary EU summit held on 25 November 2018. The same day, the EU adopted its draft political declaration on the future relations between the EU and the UK. As of 1 February 2020, the UK is no longer an EU Member State. This has raised numerous challenges, also from the point of view of succession to membership in international organizations other than the EU, as well as succession to international treaties. These issues will be the main focus of this article.

Keywords: *European Union; United Kingdom; succession; international organizations; international treaties*

1. Introduction

On February 1, 2020, the United Kingdom (UK) ceased to be an European Union (EU) Member State[1]. This date marked the end of a legal process, which had begun on March 19, 2017 when this country had decided to invoke Article 50 of the Treaty on European Union (TEU)[2], as a consequence of the results in the referendum on June 23, 2016[3].

As is well known, withdrawal from an international organisation represents one of the four possible ways of termination of membership in an international organisation, along with expulsion from that organisation, termination of membership, and disappearance or

* This article is a short version of the chapter 5(1) of the book: Oanta, G.A. (2020). La sucesión de Estados en las Organizaciones internacionales: Examen de la práctica internacional. Bosch Editor, Barcelona, pp. 269-284.

[1] Brexit was thus completed, and the UK withdrew from the EU at midnight CET (11 p.m. in London) on January 31, 2020. See: Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29/7, 31.01.2020.

[2] General Secretariat of the Council, „United Kingdom notification under Article 50 TEU," XT 20001/17, Brussels, March 19, 2017.

[3] In this regard, see: Biondi, A.; Birkinshaw, P.J.; and Kendrick, M. (eds.) (2019). Brexit: the legal implications, Wolters Kluwer; Bradley, K. (2019). On the Cusp: Brexit and Public International Law. In Govaere, I. and Garben, S. (eds.). The Interface between European Union and International Law: Contemporary Reflections, Hart Publishing, pp. 203-227; Sobrino Heredia, J.M. (2019). Unité de l'État, sécession et construction européenne. Revue du droit de l'Union Européenne 3, pp. 101-113.

dissolution of the organisation[4]. Until now, the doctrine has focused above all on studying and analysing these modalities of termination of a State's membership of an international organisation, but without linking this issue to the situation in which the State and the organisation might find themselves with respect to the international organisation of which they both are members. In the author's view, this perspective has hardly been addressed by the doctrine so far.

The withdrawal of a State from an international organisation is a relatively common fact in the life of international organisations, as most of the constitutive treaties of secondary international legal subjects allow their members to withdraw after a period of notification, the duration of which varies from one organisation to another. For example, the UK withdrew from the European Free Trade Association after a period of twelve months from the notification made in accordance with Article 42 of the Convention of this Organisation, the United States withdrew from the International Labour Organization after two years from the notification made on the basis of Article I(5) of the Constitution of this Organisation etc. In fact, this practice already existed within the framework of the League of Nations under Article 1(3) of its Covenant[5]. It is interesting to note that it is estimated that, to date, there have been over 200 country withdrawals from various international organisations[6].

In the author's view, such a withdrawal could be even more significant from the perspective of international law if one adds the specificities of an international organisation such as the EU, which is a member of various international organisations to which, in certain cases, the withdrawing State is also a party. In relation to this, mentioned can be made to the Food and Agriculture Organization (FAO), the World Trade Organization (WTO), the *Commission for the Conservation of Antarctic Marine Living Resources* (CCAMLR) etc.[7].

The UK's withdrawal from the EU gave rise to many unknowns as well as introduced more uncertainties regarding its possible legal effects from the perspective of the succession theory. It is worth mentioning that this historical moment in the existence of the European integration process opened up a number of questions in relation to membership to international organizations, on the one hand, and in respect of treaties, on the other hand.

[4] Schermers, H.G. and Blokker, N.M. (2008). International Organizations or Institutions, Membership. In Oxford Public International Law, Oxford, paras. 15-23. In general on the termination of a State's membership in an international organisation, see also: Magliveras, K.D. (2011). Membership in international organizations. In Klabbers, J. and Wallendahl, A. (eds.). Research Handbook on the Law of International Organizations, Edward Elgar, Cheltenham/Northampton, pp. 98-102.

[5] For more details, see: Akehurst, M. (1979). Withdrawal from International Organisations. Current Legal Problems, pp. 143 and 189-219.

[6] In relation to it, see: Borzyskowski, I. von and Vabulas, F. (2018). The Costs of Membership Withdrawal from Intergovernmental Organizations. Paper prepared for the Political Economy of International Organizations Conference, 8-10 February 2018 at the University of Wiscosin, Madison, February 2018, pp. 4-7. To give a few more examples, we would like to mention Morocco's withdrawal from the Organization of African Unity in 1984 following the admission of the Sahrawi GDR as a member in 1982; Uzbekistan's withdrawal from the Organisation for Democracy and Economic Development (GUAM) on 5 May 2005; the exits of Ecuador on 8 August 2018 and Bolivia on 15 November 2019 from the Bolivarian Alliance for the Peoples of Our America (ALBA); the withdrawal of Chile in 1976 and Venezuela in 2006 from the Andean Community; the exits from UNASUR of Colombia in August 2018, of Ecuador in March 2019, of Argentina, Brazil, Chile and Paraguay in April 2019, and also of Uruguay in March 2020; and the withdrawal from UNASUR of the Bolivarian Alliance for the Peoples of Our America (ALBA) on 15 November 2019.

[7] For an overview of this issue, see: Frid de Vries, R. (2014). European Community, Membership in International Organizations or Institutions. Oxford Public International Law, paras. 62-65(8).

Thus, depending on the type of membership in an international organisation (unique to the EU/shared by the Union with its Member States) and the type of competences existing between the EU and its Member States (by virtue of Articles 3-6 TFEU), the withdrawal of a Member State from the EU will have different consequences. On the one hand, it was about the UK's relations with another international organisation in which it participated directly or indirectly *(2)*. And, on the other hand, it referred to the treaties signed and ratified by the EU with a third international legal subject (State or international organisation) to which only the EU was a party or to which the State and the EU were ratifying (the case of mixed EU agreements) *(3)*. In relation to the latter case, the question of the succession of States – international organisations in terms of treaties would arise.

2. The participation of the European Union and of the United Kingdom in other international organizations: An approach from the succession perspective

From the very beginning, it is worth mentioning that a distinction should be made between international organisations in which only the EU had been a member, on the one hand, and other international organisations in which both the EU and its Member States had been members, on the other hand.

Once the „divorce" between the EU and its former Member State had materialised, the UK became a third State for the EU. The same situation was for its relations with the international organisations in which the Union was the beneficiary of a single membership. If the former EU's Member State was interested in retaining its relations with these international organisations, it would now have to apply for membership in each of them, going through the full accession process required in each case. As for the EU, the principle of continuity in international organisations will undoubtedly apply to it, and it will therefore remain a member of the organisations concerned, without its membership being questioned at any time.

It is also considered that it will be very difficult for a State that has just left the EU to join certain international organisations. Special mention should be made on those cases in which the unanimity of the members is required for the admission of new States, although this situation could be eased somewhat in the case of those international organisations in which it had been a member prior to its accession to the EU.

On the other hand, the situation would be quite different for a State that has separated from the EU and retained its membership in another international organisation during its membership of the Union, and thus there would have been joint membership of the EU and its Member States. On ceasing to be a member of the EU, the State in question would remain a member of the other international organisation in which it would share that status with the EU, but would now no longer be able to work with the other EU member states. Against this background, it is also possible that the State that withdraws from the EU might consider that it is interested in the position held by the Union on a given issue and therefore decide to vote the same as the EU. Or, on the contrary, that it disagrees with the EU and is therefore interested in adopting a totally different position from that of the Union.

In any case, the membership of the EU in other international organisations would not be affected. Although perhaps in relation to the issue of the EU's financial contribution to such an organisation there may be some tension, although this would not be the rule, but the exception. Suffice it to mention now that the EU, being a member organisation of the FAO, does not participate in the FAO's annual budget like the member states of this international

organization, but its financial contribution is established annually. According to Article XVIII(6) of the FAO Constitution, this amount of money has been traditionally used for covering *„administrative and other expenses arising out of its membership in the Organization. A Member Organization shall not vote on the budget"*.

This is a consequence of the agreement reached by the EU with the FAO on accession to the FAO[8], which implied, among other things, that the EU would not make any additional contribution to the FAO's regular budget. It is precisely for this reason that in FAO audit reports one finds references only to State contributions, without any reference to the EU. However, the EU's financial contribution to FAO has been fixed annually since 1992; in fact, the EU is the main contributor to FAO programmes and actions[9].

In the author's view, it will have to be studied on a case-by-case basis to know to what extent the withdrawal of a Member State from the EU will affect its respective relations within another international organisation. We consider the State that has recently left the Union will, for a relative period of time, be under-represented on the international stage, as it will have to reactivate some aspects of its international representativeness, which during its membership of the Union had been exercised by the EU. On the other hand, the Union itself will have to adapt to this new situation, although in its case, given that it has a consolidated system of European civil service and a highly qualified diplomatic corps, we do not see the same tension as in the case of the withdrawing State.

3. The succession of States – international organizations on treaties: The case of the United Kingdom's withdrawal from the European Union

With regard to treaties ratified by the EU with a third international subject (State or international organisation), which would bring us closer to the problem of the succession of States – international organisations in terms of treaties, a distinction can be made between treaties to which only the EU is a party and those to which the EU and its Member States have ratified – this would be the case of mixed EU agreement –[10].

Depending on each case, the enforcement of international treaties will undergo significant and immediate changes, since, from the date of withdrawal, the former EU Member State will become a third country both for the Union itself and for relations with

[8] On the EU's accession to the FAO, see among others: Marchisio, S. (1993). Lo status della CEE quale membro della FAO. Rivista di Diritto Internazionale 2, pp. 321-350; Pons Rafóls, F-X. (1994). La admission de la Comunidad Económica Europea como miembro de la Organización de las Naciones Unidas para la Agricultura y la Alimentación. Revista de Istituciones Europeas 21(2), pp. 419-460; Schwob, J. (1993). L'amendement á l'acte constitutif de la FAO visant á permettre l'admission en qualité de membre d'organisations d'intégration économique régionale et la Communauté économique européenne. Revue trimestrielle de Droit europeen 29(1), pp. 1-16; Tovares de Pinho, A. (1993). L'admission de la Communauté Économique Européenne comme membre de l'Organisation des Nations Unies pour l'Alimentation et l'Agriculture (FAO). Revue du Marché Commun et de l'Union européenne 370, pp. 656-673.

[9] See as an example and among many other documents: „Notes on the Meeting with the European Commission held in Rome on 3 and 4 September 1998", 14 September 1998, pp. 1-2. Updated data on the EU financial contribution to FAO can be see at: http://www.fao.org/europeanunion/eu-figures/en/; https://ec.europa.eu/europeaid/funding/procedures-beneficiary-countries-and-partners/fafa-united-nations_en

[10] For a detailed study of the effects of a Member State's withdrawal from the EU on the mixed treaties, see Vezzani, S. (2019). Gli effeti del recesso dall'Unione Europea sui trattati conclusi dall'Unione Europea e dallo Stato recedente. Rivista di Diritto Internazionale 4, pp. 1040-1070.

other subjects of international law[11]. In the case of EU law, the latter also ceases to apply in the territory of that State, albeit with a nuance. Thus, any national act adopted for the application or transposition of EU law would remain valid until the national authorities of that State decide to amend or repeal it.

In relation to this, it should be mentioned that Article 216(2) TEU sets out that „*[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States"*. Hence, in principle, from the moment of withdrawal, the agreements that have been concluded by the EU will no longer bind the withdrawing State, as they will become *res inter alios acta* with respect to that State. However, despite the clear wording of this provision, it seems easier said than done, given the complexity of international agreements, each of which has its own specificities[12].

However, in the case of the UK's withdrawal from the EU, we are faced with an exceptional situation that is undoubtedly in line with contemporary international law. We are referring to the transitional period agreed by the two parties until 31 December 2020. During that transitional period, the EU law – including international treaties concluded by the EU (or EURATOM) or by Member States acting on behalf of the EU (or EURATOM) or jointly by the EU and its members – were enforced in the UK. Therefore, the UK had to respect them as if it were still a EU Member State[13]. Obviously, the end of this transitional period coincided with the non-application of the EU's international treaties to the UK, bur without prejudice to the status of the UK in relation to multilateral agreements to which it is a party in its own right.

In relation to it, it should be added that in recent years the EU has signed several international treaties that expressly contain a territorial application clause[14]. This means that the application of the provisions of a treaty is limited to only those territories in which the TEU and the TFEU apply, unless explicitly provided otherwise[15].

In the author's view, given the variety of issues raised and the very large number of treaties signed by the EU and the vast majority of which have been ratified to date – more than 1,000[16] – it will be impossible to have a single rule that applies to every case that arises

[11] On the relation and the possible jerarqui between the public international law and the EU law in the light of Brexit as well as the relationship between the EU and its former members, see: Garcia, T. (2018). Le Brexit au regard des droits des traités et des organisations internationales. Revue québécoise de droit international 38(1), pp. 81-86.

[12] In this regard, see also Wessel, R.A (2017). Consequences of Brexit for international agreements concluded by the EU and its Member States. Draft paper – presented at the 60th anniversary conference of the Europa Institute, Brexit and the Future of the European Union, University of Leiden, p. 2.

[13] On this, see COM(2018) 841 final, Cover letter and Note verbale on the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 5.12.2018, paras. 4-9.

[14] This category may include, e.g., Article 360 of Agreement establishing an association between the European Union and its Member States, on the one hand, and Central America on the other (OJ L 346, 15.12.2012, p. 3). According to this provision, „*1. For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties. 2. Notwithstanding paragraph 1, to the extent that the European Union customs territory includes areas not covered by the preceding territorial definition, this Agreement shall likewise apply to the European Union customs territory"*.

[15] See: Van Der Loo, G. and Blockmans, S. (2016). The Impact of Brexit on the EU's International Agreements. In Thinking ahead for Europe, CEPS Publications.

[16] According to the information available at: http://ec.europa.eu/world/agreements/SimpleSearch.do, it is about almost 1,300 international agreements.

in this area. Perhaps the most comprehensive criterion that could be taken into account would be the type of EU competences in each specific area.

Indeed, in the case of international treaties affecting the EU's exclusive competences, perhaps a simple notification of third parties by the EU is sufficient to inform them that the EU has undergone changes in its membership[17]. At the time the withdrawal becomes effective, the provisions of these treaties will no longer apply to the withdrawing State.

We understand that this scenario is quite prejudicial for the State withdrawing from the EU in relation to those treaties that are of particular interest to it. Prior to its effective exit from the Union, it would not be competent to negotiate international treaties on its own with third international subjects, as it is still bound by EU law, by the principle of attribution of competences, as well as by the principle of loyal cooperation. Faced with this scenario, we consider that the exiting State must have contingency plans to cover the legal vacuum it might face when its exit actually becomes effective. It will undoubtedly be necessary for the withdrawing State to enact substantial legislation to fill the legal vacuum when EU law no longer applies[18]. However, there will also be agreements that were binding on the withdrawing State while it was part of the EU, but whose national interests were negatively affected; in this scenario, disengagement from the Union will undoubtedly be a very positive change for that State.

As for mixed agreements, if the withdrawing State so wished, it could still be bound by the provisions of this agreement, having ratified it when it was within the EU and thus having committed itself as a primary subject of international law by not having transferred the exercise of its sovereign rights to the EU institutions at the time. This is no doubt not an easy task given that normally mixed agreements do not expressly foresee which of their elements are mixed and which are not by nature mixed[19]. In relation to it, it is worth adding the particular case of the Association Agreement signed by the EU with Kosovo. As is well known, traditionally, association agreements signed by the EU with a third country are considered mixed agreements. However, in the case of this entity, the Association Agreement has been signed only on behalf of the EU, as several of its Member States considered that the signing of an Association Agreement with Kosovo under the traditional formula could mean a *de facto* recognition of Kosovo, through their respective ratification procedures of such an agreement[20].

On the other hand, it could also be the case that the withdrawal of an EU Member State would cause the other subject of international law with which an international agreement has been signed to no longer be interested in continuing to be bound by that agreement. In this case, the third State may consider that there has been a fundamental change in the circumstances existing at the time the agreement was concluded, i.e. the *pacta sunt servanda rebus sic standibus clause* provided for in Article 62 of the 1969 Vienna Convention on the Law of Treaties could be invoked[21].

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[17] In this regard, see Van Der Loo and Blockmans, *op. cit.*

[18] For a detailed overview of this senstive and complex situation, see Poptcheva, E-M. (2016). Briefing. Article 50 TEU: Withdrawal of a Member State from the EU. European Parliament, PE 577.971, p. 3.

[19] For a presentation of the possible scenarios on mixed agreements, see: Van Der Loo and Blockmans, *op. cit.*

[20] See: Wessel, *op. cit.*, pp. 3-4.

[21] Professor José Manuel Sobrino Heredia was one of the first authors to advance this scenario in relation to the possible withdrawal of the UK from the EU and its possible consequences on some international fisheries agreements signed by the Union, which affect waters where the UK has sovereignty or jurisdiction. In this

As regards the specific case of the withdrawal of the UK from the EU, we would like to mention that these issues have been addressed by the two international subjects in the most relevant legal texts adopted in relation to the „disconnection" of this State from the Union and the negotiation of the future relationship between them.

Indeed, in addition to Article 129(1) of the Withdrawal Agreement, which provided that during the transitional period the UK was bound by the obligations arising from international agreements. The same provision sets out that, during that period, representatives of the UK may not take part in the work of the bodies set up under those agreements, unless it participates either in its own right or at the invitation of the Union itself to be part of its delegation. This would allow the UK to attend „*meetings or parts of meetings of such bodies, where the Union considers that the presence of the United Kingdom is necessary and in the interests of the Union, in particular for the effective implementation of such agreements during the transitional period"* (Article 129(2)(a-b)). However, the UK's presence was possible in this second scenario as long as the participation of EU Member States was allowed „*under the applicable agreements"*. In return, the UK had to respect the principle of loyal cooperation, in the sense of refraining „*from any action or initiative which could be detrimental to the interests of the Union, in particular in the framework of any international organisation, agency, conference or forum to which the United Kingdom is a party in its own right"* (Article 129(3)).

In relation to this issue, it seems significant to point out the possibility for the UK during the transitional period to negotiate, sign and ratify international treaties on its own behalf even in those areas in which the EU has exclusive competence. However, such treaties would enter into force or start to apply after the end of the transitional period, „*unless the Union so authorises"* (Article 129(4)).

To these specific provisions relating to the EU's external action should be added what has been decided in relation to the international agreements concluded by EURATOM on nuclear equipment, nuclear materials or other nuclear items located on the territory of the UK after the end of the transitional period. In this respect, Article 82 of the Withdrawal Agreement provided the UK's duty to ensure that all specific obligations arising from these agreements were fulfilled.

4. Conclusions

After nearly half a century of European integration, four and a half years of talks initiated once the result of the referendum held on June 23, 2016 was known, and the activating of Article 50 TEU, the UK ceased to be an EU Member State.

The international law of international organizations is dynamic and in constant movement. Proof of this has been, in recent decades, the cases in which an international organization participates in another international organization within the framework of the competences assigned to it by its member States, and does so in representation of the interests of each and every one of its member states, without the latter being members of that organization. The EU is an excellent example of this specific legal scenario. From the practice, we may affirm that the consequences will vary from one international organization to another, depending on the requirements for membership and whether if there is an

regard, see: Sobrino Heredia, J.M. (2017). Research for PECH Committee – Common Fisheries Policy and BREXIT – Legal framework for governance. European Parliament (Policy Department for Structural and Cohesion Policies), Brussels, p. 16.

international organization that require unanimity – for example, if one takes account of Article 49 TEU in the case of the accession to the EU.

As shown throughout this article, the specific case of the UK's withdrawal from the EU has posed and still posing today numerous challenges in terms of succession. One scenario has been opened in relation to the succession to membership of an international organization where the UK shared membership or not with the EU before February 1st, 2020. Additionally, other legal challenged have arisen from this context in relation to those international treaties that were signed by the EU on behalf of its Member States or together with its Member States before February 1st, 2020.

References

Akehurst, M. (1979). Withdrawal from International Organisations. Current Legal Problems.

Biondi, A.; Birkinshaw, P.J.; and Kendrick, M. (eds.) (2019). Brexit: the legal implications, Wolters Kluwer.

Borzyskowski, I. von and Vabulas, F. (2018). The Costs of Membership Withdrawal from Intergovernmental Organizations. Paper prepared for the Political Economy of International Organizations Conference, 8-10 February 2018 at the University of Wiscosin, Madison, February 2018.

Bradley, K. (2019). On the Cusp: Brexit and Public International Law. In Govaere, I. and Garben, S. (eds.). The Interface between European Union and International Law: Contemporary Reflections, Hart Publishing.

Frid de Vries, R. (2014). European Community, Membership in International Organizations or Institutions. Oxford Public International Law.

Garcia, T. (2018). Le Brexit au regard des droits des traités et des organisations internationales. Revue québécoise de droit international 38(1).

Magliveras, K.D. (2011). Membership in international organizations. In Klabbers, J. and Wallendahl, A. (eds.). Research Handbook on the Law of International Organizations, Edward Elgar, Cheltenham/Northampton.

Marchisio, S. (1993). Lo status della CEE quale membro della FAO. Rivista di Diritto Internazionale 2.

Oanta, G.A. (2020). La sucesión de Estados en las Organizaciones internacionales: Examen de la práctica internacional. Bosch Editor, Barcelona.

Pons Rafóls, F-X. (1994). La admission de la Comunidad Económica Europea como miembro de la Organización de las Naciones Unidas para la Agricultura y la Alimentación. Revista de Istituciones Europeas 21(2).

Poptcheva, E-M. (2016). Briefing. Article 50 TEU: Withdrawal of a Member State from the EU. European Parliament, PE 577.971.

Schermers, H.G. and Blokker, N.M. (2008). International Organizations or Institutions, Membership. Oxford Public International Law.

Schwob, J. (1993). L'amendement á l'acte constitutif de la FAO visant á permettre l'admission en qualité de membre d'organisations d'intégration économique régionale et la Communauté économique européenne. Revue trimestrielle de Droit europeen 29(1).

Sobrino Heredia, J.M. (2017). Research for PECH Committee – Common Fisheries Policy and BREXIT – Legal framework for governance. European Parliament (Policy Department for Structural and Cohesion Policies), Brussels.

Sobrino Heredia, J.M. (2019). Unité de l'État, sécession et construction européenne. Revue du droit de l'Union Européenne 3.

Tovares de Pinho, A. (1993). L'admission de la Communauté Économique Européenne comme membre de l'Organisation des Nations Unies pour l'Alimentation et l'Agriculture (FAO). Revue du Marché Commun et de l'Union européenne 370.

Van Der Loo, G. and Blockmans, S. (2016). The Impact of Brexit on the EU's International Agreements. In Thinking ahead for Europe, CEPS Publications.

Vezzani, S. (2019). Gli effeti del recesso dall'Unione Europea sui trattati conclusi dall'Unione Europea e dallo Stato recedente. Rivista di Diritto Internazionale 4.

Wessel, R.A (2017). Consequences of Brexit for international agreements concluded by the EU and its Member States. Draft paper – presented at the 60th anniversary conference of the Europa Institute, Brexit and the Future of the European Union, University of Leiden.

QUESTIONS CLÉS CONCERNANT LA RECONNAISSANCE ET L'EXÉCUTION DES ACTES AUTHENTIQUES ET DES TRANSACTIONS JUDICIAIRES EN MATIÈRE DE SUCCESSIONS DANS LA PERSPECTIVE DU RÈGLEMENT (UE) N° 650/2012[1]

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Résumé

Le règlement (UE) n°650/2012 du Parlement européen et du Conseil du 4 juillet 2012 sur les successions transfrontières organise notamment la reconnaissance et l'exécution des actes authentiques et des transactions judiciaires. La circulation de ces titres entre les États membres de l'Union européenne se fait en application d'une procédure de déclaration constatant la force exécutoire élaborée sur le modèle retenu par exemple dans l'ancien règlement (CE) n°44/2001 du Conseil du 22 décembre 2000 « Bruxelles I ». L'analyse de cette procédure révèle deux traits caractéristiques principaux. Il s'agit d'une procédure très classique et partiellement uniforme.

Mots-clefs: *Coopération judiciaire civile; Successions transfrontières; Reconnaissance et exécution: Transaction judiciaire: Acte authentique; Procédure d'exequatur allégée*

1. Comme son intitulé l'indique, le règlement (UE) n°650/2012 du Parlement européen et du Conseil du 4 juillet 2012 « relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen »[2], couvrent les trois volets traditionnels du droit international privé européen: la compétence internationale, la loi applicable ainsi que la reconnaissance et l'exécution transfrontières des décisions de justice et autres titres exécutoires[3]. Seules les dispositions relatives au troisième élément de ce triptyque concernent la présente étude. Avant d'aller plus loin, on peut ajouter que si le règlement (UE) n°650/2012 transpose, dans le domaine des successions transfrontières, certaines règles de droit international privé européen figurant dans d'autres règlements, il innove, en revanche, en créant le « certificat successoral européen »[4].

REFERENCES

[1] Contribution à la 10e édition du Colloque international sur le Droit, les Études européennes et les Relations internationales sur le thème « L'universalité patente du droit des successions – *Lex successionis*: entre tradition législative et valeurs modernes », organisé par la Faculté de droit de l'Université « Titu Maiorescu » de Bucarest, à Bucarest (Roumanie), les 12 et 13 mai 2022.

[2] *JOUE* n° L 201, 27 juillet 2012, p. 107.

[3] La même solution a été privilégiée dans d'autres matières, telles que celles des obligations alimentaires (règlement (CE) n°4/2009 du Conseil du 18 décembre 2008: *JOUE* n° L 7, 10 janvier 2009, p. 1) et des procédures d'insolvabilité (règlement (UE) n°2015/848 du Parlement européen et du Conseil du 20 mai 2015: *JOUE* n° L 141, 5 juin 2015, p. 19). Ce choix s'explique par la volonté de réunir, dans un même instrument législatif, l'ensemble des règles de droit international privé applicables dans un domaine donné. C'est une source de simplification de l'Espace judiciaire civil européen émergent.

[4] Le « certificat successoral européen » a pour finalité de faciliter les démarches des héritiers, des légataires, des exécuteurs testamentaires ou encore des administrateurs d'une succession ayant des incidences

2. Création d'une procédure de déclaration constatant la force exécutoire. Dans son champ d'application, ce règlement permet aux décisions de justice (chapitre IV du règlement) et à certains actes extrajudiciaires (chapitre V du règlement) d'être exécutoires dans un État membre différent de celui dans lequel ils ont été obtenus.

À ce sujet, le règlement prévoit une procédure de déclaration constatant la force exécutoire. Avant d'en examiner la substance, quelques remarques liminaires s'imposent quant aux champs d'application matériel, spatial et temporel de cette procédure.

3. Champ d'application matériel de la procédure. S'agissant tout d'abord du domaine matériel de la procédure de déclaration constatant la force exécutoire, il convient de souligner qu'il n'est pas ici question de l'exécution proprement dite des titres exécutoires, laquelle demeure aujourd'hui largement abandonnée aux législations nationales des États membres. Seule est envisagée, la circulation transfrontière desdits titres exécutoires, aux fins d'exécution dans l'État membre requis. Plus précisément, trois catégories de titres sont concernées: les « décisions de justice », les « actes authentiques » et les « transactions judiciaires ». Chacun de ces titres doit être entendu dans un sens « européen », tel que défini dans le règlement.

Dans le cadre de cette étude, l'attention sera particulièrement portée sur les articles 60 et 61 du règlement, qui concernent respectivement la force exécutoire des « actes authentiques » et des « transactions judiciaires ». Conformément à l'article 3 du règlement, une transaction judiciaire est entendue au sens d'une « transaction en matière de successions approuvée par une juridiction ou conclue devant une juridiction au cours d'une procédure ». De même, un acte authentique est défini comme un « acte en matière de succession dressé ou enregistré formellement en tant qu'acte authentique dans un État membre et dont l'authenticité: […] porte sur la signature et le contenu de l'acte authentique; et […] a été établie par une autorité publique ou toute autre autorité habilitée à le faire par l'État membre d'origine »[5]. Ces définitions sont similaires à celles que l'on retrouve dans les autres règlements adoptés dans le domaine de la coopération judiciaire civile[6]. Cela participe de la création d'une véritable culture judiciaire européenne et doit être approuvé. Il est en effet souhaitable que les définitions données à ce type de termes – que l'on retrouve dans plusieurs instruments européens – soient identiques.

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transfrontières, en leur permettant de prouver leurs statuts respectifs et d'exercer leurs droits et/ou pouvoirs dans un autre État membre (Règl. (UE) n°650/2012, art. 63).

[5] Pour une illustration à l'égard de certificats nationaux d'hérédité délivrés par les notaires polonais et les notaires lituaniens, voir respectivement CJUE (1re ch.), 23 mai 2019, *W.B.*, aff. C-658/17, ECLI:EU:C:2019:444 ainsi que CJUE (1re ch.), 16 juillet 2020, *E.E.*, aff. C-80/19, ECLI:EU:C:2020:569. Pour savoir si un acte rédigé par un notaire peut être qualifié d'« acte authentique » au sens du règlement (UE) n°650/2012, la Cour de justice contrôle si le notaire peut être qualifié de « juridiction ». En effet, s'ils sont qualifiés de juridictions, on doit considérer qu'ils rendent des « décisions » et non des « actes authentiques ». La distinction est importante car les motifs de refus de reconnaissance et d'exécution sont plus nombreux à l'égard des décisions judiciaires. Les notaires seront considérés comme des « juridictions » dans le cas où ils « agissent par délégation ou sous le contrôle d'une autorité judiciaire » (arrêt *E.E.*) et sous réserve du respect des dispositions de l'article 3, § 2, du règlement (UE) n°650/2012.

[6] Domaine actuellement couvert par l'article 81 du Traité sur le fonctionnement de l'Union européenne (TFUE). Pour des définitions semblables, voir notamment celles présentes dans l'article 2 du règlement (CE) n°4/2009 sur le recouvrement des obligations alimentaires (*JOUE* n° L 7, 10 janv. 2009, p. 1).

De même, pour être éligibles à cette procédure de déclaration constatant la force exécutoire, ces actes authentiques et transactions judiciaires doivent être exécutoires dans l'État membre d'origine. Là encore, il s'agit de la traduction du principe traditionnel suivant lequel un titre ne peut pas avoir plus d'effets à l'étranger, que dans l'État dans lequel il a été obtenu.

4. Champ d'application spatial de la procédure. Le règlement s'applique à tous les États membres de l'Union européenne, à l'exception du Danemark et de l'Irlande. Avant son départ de l'Union (Brexit), le Royaume-Uni n'était pas non plus concerné par ce règlement.

5. Champ d'application temporel de la procédure. S'agissant enfin du domaine d'application temporel, sont concernés les actes authentiques formellement dressés ou enregistrés ainsi que les transactions judiciaires approuvées ou conclues à compter du 17 août 2015[7].

6. Contenu de la procédure de déclaration constatant la force exécutoire. À la lumière de ces précisions liminaires, la procédure de déclaration constatant la force exécutoire peut être appréciée dans son contenu. Afin de l'analyser, deux angles d'analyse peuvent être retenus: celui offert par l'environnement législatif européen dans lequel s'inscrit le règlement (UE) n°650/2012 « Successions » ainsi que celui portant sur les rapports que ce règlement entretient avec les droits nationaux. Ainsi, tout d'abord, replacées dans le contexte de l'action de l'Union européenne menée depuis l'entrée en vigueur du traité d'Amsterdam en 1999[8], les solutions retenues n'apparaissent guère originales et innovantes. Bien au contraire, la procédure se révèle être très classique **(Section 1)**. À ce premier trait caractéristique, vient s'ajouter un second. En effet, envisagée à l'aune de son articulation avec les droits nationaux, la procédure de déclaration constatant la force exécutoire s'analyse ensuite comme une procédure « partiellement uniforme » **(Section 2)**.

Section 1. Une procédure très classique

7. La procédure de déclaration constatant la force exécutoire, telle que définie dans le règlement (UE) n°650/2012, est une procédure dont l'analyse révèle un alignement sur le modèle de l'ancien règlement (CE) n°44/2001 du 22 décembre 2000 dit « Bruxelles I »[9] **(1.1.)**. Reprendre, dans des nouveaux instruments législatifs européens – en substance ou expressément –, certaines dispositions d'un instrument législatif préexistant n'est pas critiquable en soi. Au contraire, on peut légitimement penser que cela a facilité la maîtrise du règlement « Successions » par les professionnels chargés de les mettre en œuvre. Le choix de la source d'inspiration pose en revanche question et engendre une certaine confusion à l'échelle de la coopération judiciaire civile **(1.2.)**.

[7] Règl. (UE) n°650/2012, art. 84.

[8] Ce traité fait entrer le domaine de la coopération judiciaire civile (aujourd'hui visé à l'article 81 TFUE) dans la compétence du législateur de l'Union européenne, rendant ainsi possible l'adoption de directives et de règlements européens en la matière.

[9] *JOCE* n° L 12, 16 janvier 2001, p. 1.

1.1. L'alignement sur le modèle du règlement « Bruxelles I »

8. Procédure d'*exequatur* allégée. Le législateur de l'Union européenne n'a pas choisi de consacrer le principe d'une libre circulation des titres exécutoires dans le domaine des successions transfrontières. Son choix s'est au contraire porté sur une procédure d'*exequatur* allégée, telle que définie en matière civile et commerciale dans l'ancien règlement (CE) n°44/2001 dit « Bruxelles I »[10] et déclinée ensuite, en matière familiale, dans les règlements (UE) n°2016/1103 « Régimes matrimoniaux »[11] et (UE) n°2016/1104 « Partenariats enregistrés »[12].

Cette procédure est déclenchée à la demande « de toute partie intéressée » – c'est-à-dire en pratique par celle qui a obtenu gain de cause – et comporte deux phases: celle du dépôt et de l'examen sommaire de la requête ainsi que celle des éventuels recours. Alors que la première est unilatérale **(1.1.1)**, la seconde est contradictoire **(1.1.2)**.

1.1.1. Première phase procédurale unilatérale: Dépôt et examen sommaire de la demande

9. Cette première phase procédurale, décrite aux articles 45 à 58 du règlement[13], obéit à des règles relatives non seulement à l'autorité compétente et aux modalités de représentation du demandeur, mais également aux documents à fournir ainsi qu'à l'étendue et aux suites du contrôle qui en est fait.

10. Autorité compétente. La demande de déclaration constatant la force exécutoire doit être soumise à la « juridiction » ou à l'« autorité compétente »[14] de l'État membre d'exécution.

Pour ce qui est de la compétence matérielle, les États membres devaient communiquer, au plus tard le 16 janvier 2014, à la Commission européenne, toutes informations utiles sur les entités désignées[15]. En droit français, il s'agit du directeur de greffe du tribunal judiciaire (concernant la reconnaissance et l'exécution des décisions de justice et des transactions judiciaires)[16] et du président de la chambre des notaires ou, en cas d'absence ou d'empêchement, son suppléant désigné parmi les membres de la chambre (concernant les actes authentiques notariés)[17].

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[10] Règlement (CE) n°44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *JOCE* n° L 12, 16 janvier 2001, p. 1. À compter du 10 janvier 2015, ce règlement a été remplacé par le règlement (UE) n°1215/2012 dit « Bruxelles I *bis* ».

[11] Règlement (UE) n°2016/1103 du Conseil du 24 juin 2016 mettant en œuvre une coopération renforcée dans le domaine de la compétence, de la loi applicable, de la reconnaissance et de l'exécution des décisions en matière de régimes matrimoniaux, *JOUE* n° L. 183, 8 juillet 2016, p. 1.

[12] Règlement (UE) n°2016/1104 du Conseil du 24 juin 2016 mettant en œuvre une coopération renforcée dans le domaine de la compétence, de la loi applicable, de la reconnaissance et de l'exécution des décisions en matière d'effets patrimoniaux des partenariats enregistrés, *JOUE* n° L. 183, 8 juillet 2016, p. 30.

[13] Ces articles s'appliquent quelle que soit la nature du titre à exécuter (décision de justice, acte authentique ou transaction judiciaire).

[14] Règl. (UE) n°650/2012, art. 45, § 1er.

[15] *Ibid*, art. 78, § 1er, point a).

[16] Code de procédure civile français, art. 509-2.

[17] Code de procédure civile français, art. 509-3.

S'agissant de la compétence territoriale, une option de compétence est prévue. Le demandeur peut s'adresser à l'entité compétente du lieu du domicile de son adversaire ou à celle du lieu de l'exécution[18]. On peut penser que, dans de nombreuses affaires, l'un et l'autre de ces critères conduisent à saisir la même entité.

11. Représentation du demandeur. Contrairement à ce qui est prévu dans l'ancien règlement (CE) n°44/2000 dit « Bruxelles I »[19], il n'est pas exigé que le demandeur ait une adresse postale ou un représentant autorisé dans l'État membre d'exécution[20]. Ce choix est de nature à simplifier et à réduire le coût de la procédure.

12. Documents à fournir. Sauf exception, le demandeur doit compléter sa requête au moyen de deux documents: la copie du titre[21] à exécuter – qui doit réunir les conditions nécessaires pour en établir l'authenticité – ainsi qu'une « attestation » rédigée sur la base d'un formulaire type multilingue annexé au règlement « Successions »[22]. Plus précisément, il s'agit des formulaires II (actes authentiques) et III (transactions judiciaires) qui ont été établis par la Commission européenne dans le règlement d'exécution (UE) n°1329/2014 du 9 décembre 2004.

Cette attestation est délivrée par l'entité compétente de l'État membre d'origine, à savoir l'autorité qui a établi l'acte authentique[23] (en pratique, un notaire) ou la juridiction ayant approuvé la transaction ou devant laquelle la transaction a été conclue[24]. Cette attestation s'analyse en une sorte de « passeport judiciaire européen » permettant au titre de voyager sur le territoire des États membres. Elle précise l'État membre d'origine, l'identité et les coordonnées des parties et de l'entité – juridiction ou autre autorité – qui a établi la transaction judiciaire ou l'acte authentique. De même, sont ajoutées des précisions sur le titre concerné. À titre d'exemple, il faut préciser sa date, son numéro, son caractère exécutoire dans l'État membre d'origine, les obligations pesant sur les parties en vue de l'exécution, le montant et le calcul des intérêts *etc*.

Le règlement (UE) n°650/2012 reconnait une certaine latitude à l'entité compétente de l'État membre d'exécution quant à la réception de cette attestation. En ce sens, cette entité peut dispenser le demandeur de produire l'attestation quand elle « s'estime suffisamment éclairée »[25]. Cette solution permet une plus grande efficacité procédurale, en ce qu'elle contribue à réduire les coûts de procédure liés à l'éventuelle traduction. En revanche, la possibilité d'accepter un « document équivalent » à l'attestation est davantage critiquable. À quoi bon prévoir un formulaire type, si l'on n'en exige pas l'usage ? Ce type de formulaire – dont l'usage rythme le déroulement de plusieurs procédures européennes élaborées dans le

[18] Règl. (UE) n°650/2012, art. 45, § 2.
[19] Règl. (CE) n°44/2001, art. 40, § 2.
[20] Règl. (UE) n°650/2012, art. 46, § 2.
[21] Règl. (UE) n°650/2012, art. 46, § 3.
[22] *Adde*, RÈGLEMENT D'EXÉCUTION (UE) N°1329/2014 DE LA COMMISSION du 9 décembre 2014 établissant les formulaires mentionnés dans le règlement (UE) n°650/2012 du Parlement européen et du Conseil relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen, *JOUE* n° L 359, 16 décembre 2014, p. 30.
[23] Règl. (UE) n°650/2012, art. 60, § 2.
[24] Règl. (UE) n°650/2012, art. 61, § 2.
[25] Règl. (UE) n°650/2012, art. 47, § 1er.

domaine de la coopération judiciaire civile[26] – présente de réels avantages, tels que celui de limiter les effets négatifs du plurilinguisme au sein de l'Union européenne. Tout en simplifiant la compréhension de l'acte transmis, par son destinataire, ces formulaires facilitent – dans une certaine mesure – le contrôle de la régularité de cet acte, par l'autorité en charge de son examen. De même, de tels formulaires permettent de réduire les coûts de traduction. Par définition, seules les mentions figurant dans les champs de texte libre de ces formulaires devront être traduites.

L'obligation de traduire les documents – attestation ou documents équivalents – transmis fait d'ailleurs l'objet de précisions complémentaires. Il est prévu que cette traduction – ou translitération – soit produite lorsque l'exigent les juridictions ou autorités saisies de la demande de déclaration constatant la force exécutoire[27]. Rien n'empêche cependant aux demandeurs d'anticiper cette demande et de faire traduire systématiquement lesdits documents par des personnes habilitées à effectuer des traductions dans l'un des États membres.

13. Contrôle de la demande. Le contrôle de la demande est particulièrement succinct[28]. Il ne s'agit aucunement, à ce stade, d'examiner le motif de refus de reconnaissance et d'exécution mentionné aux articles 60, § 3 (à l'égard des actes authentiques) et 61, § 3 (à l'égard des transactions judiciaires). Seule est vérifiée la régularité formelle de la demande. En pratique, l'entité compétente s'assure que les pièces exigées ont bien été communiquées.

14. Information des protagonistes. Une fois ce contrôle effectué, il faut informer les protagonistes. Fort logiquement, le demandeur est tenu informé quel que soit le sens de la décision, en application de la procédure définie par la loi de l'État membre d'exécution[29]. À l'inverse, la personne contre qui l'exécution est poursuivie n'est prévenue qu'en cas d'accueil de la demande, c'est-à-dire seulement lorsque la force exécutoire de l'acte authentique ou de la transaction judiciaire a été déclarée. Concrètement, la déclaration constatant cette force exécutoire lui est notifiée, accompagnée le cas échéant de l'acte à exécuter[30]. Aussitôt cette notification réalisée, la procédure entre dans sa – seconde – phase contradictoire.

1.1.2. Seconde phase procédurale contradictoire: Éventuels recours

15. Cette seconde phase procédurale se matérialise lorsqu'un recours est formé contre la décision relative à la demande de déclaration constatant la force exécutoire. Sauf à être rejeté, ce recours doit être exercé dans le délai imparti et être fondé sur un motif prévu dans le règlement.

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[26] C'est le cas notamment de la procédure européenne d'injonction de payer (Règl. (CE) n°1896/2006: *JOUE* n° L 399, 30 décembre 2016, p. 1), de la procédure européenne de règlement des petits litiges (Règl. (CE) n°861/2007: *JOUE* n° L 199, 31 juillet 2007, p. 1) ou encore de la procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires (Règl. (UE) n°655/2014, *JOUE* n° L 189, 27 juin 2014, p. 59).

[27] Règl. (UE) n°650/2012, art. 47, § 2.

[28] Règl. (UE) n°650/2012, art. 48.

[29] Règl. (UE) n°650/2012, art. 49, § 1.

[30] Règl. (UE) n°650/2012, art. 49, § 2.

16. Possibilité d'exercer un recours[31]. La décision relative à la demande de déclaration constatant la force exécutoire peut faire l'objet d'un recours aussi bien du demandeur (s'il a été débouté), que de la personne visée par l'exécution (si la demande de déclaration constatant la force exécutoire a été couronnée de succès). Ce recours entre dans la compétence des juridictions de l'État membre d'exécution[32]. De même, la décision rendue sur ce recours peut, à son tour, faire l'objet d'un pourvoi, dans les conditions définies à l'article 51 du règlement.

L'effectivité du droit d'exercer un recours contre la décision relative à la demande de déclaration constatant la force exécutoire, ainsi reconnu aux parties, dépend grandement de l'efficacité des modes de notification employés pour informer ces dernières du prononcé de la décision litigieuse. Plus généralement, les modalités de remise de cette décision à ses destinataires doivent offrir toutes les garanties de sécurité juridique. À cet égard, lorsque la personne contre laquelle l'exécution est demandée ne comparaît pas, la juridiction saisie du recours doit sursoir à statuer aussi longtemps qu'il n'est pas établi qu'elle a été à même de recevoir l'acte introductif d'instance en temps utile afin de pouvoir organiser sa défense ou bien que toute diligence a été accomplie à cette fin[33]. Une telle solution est bienvenue, en ce qu'elle protège les intérêts de la personne visée par l'exécution. Notons, que les intérêts du demandeur ne sont pas ignorés. Afin de contrebalancer les conséquences négatives que pourrait avoir une telle solution sur sa situation, le demandeur peut faire procéder à des mesures provisoires ou conservatoires conformément au droit de l'État membre d'exécution. D'ailleurs, la déclaration constatant la force exécutoire « emporte de plein droit l'autorisation de procéder » à de telles mesures provisoires ou conservatoires[34].

17. Délai pour exercer un recours. L'exigence de célérité est au cœur du dispositif de reconnaissance et d'exécution transfrontières mis en place dans le règlement « Successions ». Elle se concrétise notamment par la prévision d'un délai à l'intérieur duquel doit être exercé le recours contre la déclaration constatant la force exécutoire du titre litigieux. Ce délai – non prorogeable pour raisons de distance – est de 30 ou de 60 jours, selon que l'auteur du recours[35] est domicilié dans l'État membre d'exécution ou dans un autre État membre[36]. Ce délai est suspensif d'exécution, en ce sens où pendant ce délai – et, si le recours a été formé, jusqu'à ce qu'il ait été statué – il n'est pas permis à la partie poursuivant l'exécution de faire pratiquer une mesure d'exécution forcée sur le patrimoine de son adversaire. Là encore, le demandeur n'est pas totalement démuni, dès lors qu'il peut faire procéder à des mesures conservatoires[37].

18. Motif de refus de reconnaissance et d'exécution du titre étranger. Sans surprise, le législateur de l'Union européenne a strictement défini les motifs pouvant être avancés pour bloquer la reconnaissance ou l'exécution transfrontière des titres étrangers.

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[31] Règl. (UE) n°650/2012, art. 50, §§ 1 à 4.

[32] En droit français, ce recours est soumis au président du tribunal judiciaire, qui statue en dernier ressort sur requête, conformément à l'article 509-9 du code de procédure civile.

[33] Règl. (UE) n°650/2012, art. 50, § 4.

[34] Règl. (UE) n°650/2012, art. 54, § 2.

[35] C'est-à-dire, la personne contre qui l'exécution est demandée.

[36] Règl. (UE) n°650/2012, art. 50, § 5.

[37] Règl. (UE) n°650/2012, art. 54, § 3.

Lorsque le titre est un acte authentique ou une transaction judiciaire, en toute logique, un seul motif de refus peut être invoqué. Il s'agit du motif fondé sur la contrariété manifeste à l'ordre public international de l'État membre d'exécution[38].

À titre de comparaison, lorsque ce titre est une décision de justice, les motifs de refus sont plus nombreux[39]. En plus de la contrariété manifeste à l'ordre public de l'État membre d'exécution, la déclaration constatant la force exécutoire peut être refusée ou révoquée en raison de la violation des droits de la défense du défendeur défaillant[40] ou de l'inconciliabilité des décisions[41]. Cette liste de motifs de refus est limitative.

En outre, il est précisé que le contrôle de la régularité internationale du titre étranger ne doit pas servir de prétexte à sa révision quant au fond[42].

19. Une procédure potentiellement efficace. En somme, envisagée dans ses deux phases, la procédure de déclaration constatant la force exécutoire – totale ou partielle[43] – des titres étrangers apparaît efficace, en ce sens où elle est simplifiée, potentiellement rapide et peu coûteuse. Le demandeur peut d'ailleurs bénéficier de l'aide juridictionnelle ou d'une exemption de frais[44] et ne peut se voir imposer la constitution d'une caution motivée par sa qualité d'étranger ou son absence de domicile ou de résidence dans l'État membre requis[45]. Dans un ordre d'idées voisin, à l'occasion de cette procédure, il ne saurait être perçu aucun impôt, droit ou taxe proportionnel à la valeur de l'affaire[46].

De telles règles ne sont pas inédites en droit international privé européen. Néanmoins, de façon quelque peu paradoxale, le classicisme des solutions retenues se révèle être une source de confusion, lorsque l'on prend du recul et que l'on envisage la procédure de déclaration constatant la force exécutoire à l'échelle de la coopération judiciaire civile.

1.2. La confusion à l'échelle de la coopération judiciaire civile

20. Le fait que les rédacteurs du règlement (UE) n°650/2012 « Successions » aient souhaité s'inspirer du dispositif d'exécution transfrontière mis en place dans l'ancien règlement (CE) n°44/2001 « Bruxelles I » conduit à se pencher sur la stratégie législative européenne déployée dans le domaine de la coopération judiciaire civile. Plus précisément,

[38] Règl. (UE) n°650/2012, art. 60, § 3 (actes authentiques) et art. 61, § 3 (transactions judiciaires).

[39] Règl. (UE) n°650/2012, art. 40.

[40] Plus précisément, une décision étrangère rendue par défaut n'est pas exécutée « si l'acte introductif d'instance ou un acte équivalent n'a pas été signifié ou notifié au défendeur en temps utile et de telle manière qu'il puisse se défendre, à moins qu'il n'ait pas exercé de recours à l'encontre de la décision alors qu'il était en mesure de le faire ».

[41] Le motif de l'inconciliabilité tient compte du lieu d'obtention des décisions concernées. Deux situations sont envisagées. D'une part, l'exécution transfrontière d'une décision sera bloquée si ce titre est inconciliable avec une autre décision prononcée, dans l'État membre d'exécution, à l'issue d'une procédure opposant les mêmes parties. D'autre part, il en sera de même en présence d'une décision « rendue antérieurement dans un autre État membre ou dans un État tiers entre les mêmes parties dans une procédure ayant le même objet et la même cause, lorsque la décision rendue antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État membre dans lequel la reconnaissance est demandée ». On le voit, dans cette seconde situation, il est tenu compte de la chronologie de l'obtention des décisions de justice.

[42] Règl. (UE) n°650/2012, art. 41.

[43] Règl. (UE) n°650/2012, art. 55.

[44] Règl. (UE) n°650/2012, art. 56.

[45] Règl. (UE) n°650/2012, art. 57.

[46] Règl. (UE) n°650/2012, art. 58.

ce choix invite à s'interroger sur la cohérence de la législation européenne adoptée dans ce domaine **(1.2.1)** ainsi que sur la pérennité de cette solution **(1.2.2)**.

1.2.1. Incohérence de la législation européenne ?

21. Pragmatisme du législateur européen ou incohérence législative ? Dans le domaine de la coopération judiciaire civile *lato sensu*, la disparité des régimes juridiques privilégiés en matière d'exécution transfrontière est aujourd'hui une réalité indéniable. Cette disparité laisse la place à une certaine unité, si l'on se concentre sur le domaine plus restreint du « droit patrimonial européen de la famille ».

22. À l'échelle de la coopération judiciaire civile *lato sensu*. Au fil de l'adoption des règlements européens depuis le début des années 2000, différents types de dispositifs d'exécution transfrontière des titres exécutoires ont été élaborés.

De façon schématique, on perçoit trois grands modèles de procédure d'*exequatur*.

En premier lieu, il existe le modèle de la procédure d'*exequatur* allégée, qui a donc été privilégié dans le règlement (UE) n°650/2012 « Successions ». Il a également été appliqué dans les règlements (UE) n°2016/1103 et (UE) n°2016/1104, adoptés par le Conseil le 24 juin 2016 et mettant en œuvre une coopération renforcée respectivement en matière de « régimes matrimoniaux »[47] et d'« effets patrimoniaux des partenariats enregistrés »[48].

En deuxième lieu, il existe le modèle de la procédure d'*exequatur* supprimée. C'est la solution retenue dans l'ancien règlement (UE) n°1215/2012 du 12 décembre 2012 « Bruxelles I *bis* »[49]. Ce modèle se caractérise par la disparité de la procédure de déclaration constatant la force exécutoire du titre étranger. En pratique, cela signifie que l'on supprime l'examen sommaire de la demande d'exécution dans l'État membre requis (correspondant à la première phase – unilatérale – de la procédure d'*exequatur* allégée[50]). Ce régime est décliné dans d'autres règlements, mais des tempéraments sont généralement prévus. On le retrouve dans le règlement (CE) n°2201/2003 « Bruxelles II *bis* »[51], pour les décisions accordant un droit de visite et certaines relatives au retour d'un enfant[52]. Il en va de même dans le règlement (CE) n°4/2009 « Obligations alimentaires », mais seulement lorsque l'État membre d'origine est lié par le protocole de La Haye de 2007 sur la loi applicable aux obligations alimentaires[53]. Le règlement (UE) n°606/2013 « Mesure de protection civile » constitue une autre illustration de ce modèle, cependant, de façon très originale, le législateur de l'Union y limite à 12 mois – reconductibles – les effets de la reconnaissance

[47] *JOUE* n° L. 183, 8 juillet 2016, p. 1.

[48] *JOUE* n° L. 183, 8 juillet 2016, p. 30.

[4949] Règlement (UE) n°1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (refonte), *JOUE* n° L 351, 20 décembre 2012, p. 1.

[50] Voir *supra*.

[51] Règlement (CE) n°2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, *JOUE* n° L 338, 23 décembre 2003, p. 1.

[52] Règl. (CE) n°2201/2003, art. 40 et s.

[53] Règl. (CE) n°4/2009, art. 16 et s. Notons néanmoins que c'est aujourd'hui le cas pour tous les États membres, à l'exception du Royaume du Danemark.

transfrontière de la décision ordonnant une mesure de protection, indépendamment du fait que cette mesure ait une durée plus longue[54].

En troisième lieu, on retrouve le modèle de la procédure d'*exequatur* inversée, qui est illustré par le règlement (CE) n°805/2004 « Titre exécutoire européen »[55]. Le concernant, on peut parler d'inversement de la procédure d'*exequatur* car le contrôle de la régularité internationale s'opère avant la circulation transfrontière du titre dont l'exécution est envisagée dans un autre État membre.

De prime abord, cette diversité de modèles engendre une certaine confusion à l'échelle de la coopération judiciaire civile. En ce sens, on ne peut trouver une cohérence dans la chronologie d'adoption des règlements européens concernés. De même, les choix du législateur de l'Union européenne ne peuvent s'expliquer au regard de la distinction « matière civile et commerciale » / « matière familiale », qui se dégage de l'article 81 du TFUE.

23. À l'échelle du droit patrimonial européen de la famille. On pourrait considérer qu'il n'est pas pertinent de raisonner à l'échelle de la coopération judiciaire civile et qu'il est préférable de rechercher la cohérence de la législation européenne dans le cadre moins étendu du « droit patrimonial européen de la famille », lequel correspondrait par hypothèse au domaine couvert par le règlement (UE) n°650/2012 « Successions » ainsi que par les règlements (UE) n°2016/1103 « Régimes matrimoniaux » et (UE) n°2016/1104 « Partenariats enregistrés », précités. Pour le dire autrement, cette cohérence pourrait être recherchée dans les raisons qui expliquent l'alignement des seconds, sur le premier.

La justification des choix opérés par le législateur de l'Union européenne aurait pu opportunément être avancée dans les préambules de ces différents règlements. Il n'en est rien[56]. On peut seulement lire, dans le considérant n°59 du règlement « Successions », que ce texte « devrait fixer des règles relatives à la reconnaissance, à la force exécutoire et à l'exécution des décisions qui soient semblables à celles d'autres instruments de l'Union adoptés dans le domaine de la coopération judiciaire en matière civile ».

Au regard de ce qui précède, on peut se demander si l'objectif poursuivi demeure celui de la suppression de l'*exequatur* dans tous les aspects de la coopération judiciaire civile.

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[54] Règl. (UE) n°606/2013, art. 4, § 4. Cette limitation est seulement accompagnée d'une justification sommaire, incluse dans le considérant n°17 du règlement. Il en résulte que cette limitation « est exceptionnelle en raison de la nature particulière de l'objet [de ce] règlement » et qu'elle ne saurait « servir de précédent pour d'autres instruments en matière civile et commerciale ». Il semble donc que cette solution s'explique par les restrictions faites au droit – de la « personne à l'origine du risque » – de circuler et de séjourner librement sur le territoire des différents États membres.

[55] Règlement (CE) n°805/2004 du Parlement européen et du Conseil du 21 avril 2004 portant création d'un titre exécutoire européen pour les créances incontestées, *JOUE* n° L 143, 30 avril 2004, p. 15.

[56] À l'égard des règlements de 2016 « Régimes matrimoniaux » et « Partenariats enregistrés », quelques éléments d'explication sont apportés dans les propositions de règlement du 2 mars 2016 de la Commission européenne (COM(2016) 106 final et COM(2016) 107 final, 2 mars 2016, exposé des motifs, point 5.4.). Les raisons avancées reposent sur le fait que chacun de ces règlements « concerne le droit de la famille » et constitue une « première mesure » respectivement en matière de régimes matrimoniaux et en matière d'effets patrimoniaux des partenariats enregistrés. Cette justification n'est pas très convaincante. En raison de sa généralité, la justification avancée devrait être transposable à tous les règlements élaborés en « droit de la famille ». Or, ainsi qu'on a pu le constater, les solutions retenues en matière d'exécution transfrontière des titres exécutoires y sont très diverses.

1.2.2. Pérennité de la procédure de déclaration constatant la force exécutoire ?

24. Une solution programmée (et transitoire ?). Raisonner sur la pérennité de la procédure de déclaration constatant la force exécutoire dans le domaine des successions transfrontières – et, plus généralement, en matière de droit patrimonial européen de la famille – revient à se demander si la définition de cette procédure est une solution transitoire ou, à l'inverse, si elle est révélatrice d'un changement de paradigme ou d'une ambition revue à la baisse au niveau de l'Espace judiciaire civil européen.

Deux arguments peuvent être avancés au soutien de la première branche de l'alternative.

Tout d'abord, on peut se reporter au « programme des mesures sur la mise en œuvre du principe de reconnaissance mutuelle des décisions en matière civile et commerciale », adopté par le Conseil de l'Union européenne en 2001[57]. D'une part, on y relève avec intérêt que l'objectif de la suppression de l'*exequatur* est également annoncé dans le domaine des « testaments et successions ». D'autre part, tout comme dans les autres domaines d'action identifiés dans ce programme, la concrétisation de cet objectif est présentée comme l'aboutissement d'un processus à étapes. L'une de ces étapes étant d'appliquer « des procédures simplifiées de reconnaissance et d'exécution » du règlement (CE) n°44/2001 « Bruxelles I ».

Ensuite, on peut signaler l'adoption récente du règlement (UE) 2019/1111 du Conseil du 25 juin 2019 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale ainsi qu'à l'enlèvement international d'enfants[58]. Ce règlement – que l'on connait désormais sous le nom « Bruxelles II *ter* » et qui entre en application le 1er août 2022 – marque une évolution notable par rapport au règlement (CE) n°2201/2003 « Bruxelles II *bis* », jusque-là applicable. En effet, désormais, la procédure d'*exequatur* est supprimée pour l'ensemble des décisions de justice, actes authentiques et accords extrajudiciaires obtenus en matière matrimoniale, en matière de responsabilité parentale et en matière de déplacement illicite d'enfants. Ce choix redonne de la cohérence à l'action de l'Union européenne dans le domaine de la coopération judiciaire civile et permet au législateur de l'Union européenne de réaffirmer que l'objectif est bien celui de la disparition de la procédure d'*exequatur*, y compris dans le domaine très sensible du droit de la famille *lato sensu*. Cela est d'autant plus vrai que le règlement (UE) n°2019/1111 « Bruxelles II *ter* » a été adopté conformément à une procédure législative spéciale visée à l'article 81, § 3, du TFUE. Or, selon cet article, les « mesures relatives au droit de la famille ayant une incidence transfrontière sont établies par le Conseil, statuant conformément à une procédure législative spéciale. Celui-ci statue à l'unanimité, après consultation du Parlement européen ». Cette règle du vote à l'unanimité aurait pu constituer un obstacle à la suppression de la procédure d'*exequatur* en matière matrimoniale. Cela n'a pas été le cas. À titre de comparaison, le règlement (UE) n°650/2012 « Successions » a été adopté en application de la procédure législative ordinaire – visée à l'article 294 du TFUE – selon laquelle non seulement le rôle de législateur est donné au Conseil de l'Union et au Parlement européen, mais également le vote au sein du Conseil se

[57] PROGRAMME des mesures sur la mise en œuvre du principe de reconnaissance mutuelle des décisions en matière civile et commerciale, *JOCE* n° C 12, 15 janv. 2001, p. 1.

[58] *JOUE* n° L 178, 2 juillet 2019, p. 1; *JOUE* n° L 347, 20 octobre 2020, p. 52 (rectificatif).

fait à la majorité qualifiée[59]. On peut penser que le réexamen du règlement « Successions » (qui doit avoir lieu en 2025) se fera conformément à la procédure législative ordinaire, ce qui devrait faciliter les réformes telles que la suppression de la procédure d'*exequatur*.

En somme, il faut simplement voir, dans la création d'une procédure de déclaration constatant la force exécutoire, une étape dans le lent processus conduisant à la disparition de toutes entraves à la libre circulation des titres exécutoires au sein des États membres en matière successorale.

Section 2. Une procédure partiellement uniforme

25. Liberté des États membres. L'analyse de l'action de l'Union européenne[60] menée ces dernières années dans le domaine de la coopération judiciaire civile révèle une perte progressive d'autonomie des États membres quant à l'appréciation des motifs de refus d'exécution des titres exécutoires étrangers. Cette évolution concerne également le règlement (UE) n°650/2012 « Successions » **(2.1.)**. Néanmoins, lorsque l'on raisonne en termes de liberté laissée aux États, on constate que leur autonomie procédurale est largement respectée dans ce texte **(2.2.)**. À ce sujet, la procédure de déclaration constatant la force exécutoire prend ici les traits d'une procédure « partiellement uniforme », en raison notamment des nombreux renvois opérés aux droits nationaux.

2.1. Autonomie encadrée des États membres quant à l'appréciation des motifs de refus d'exécution

26. La perte progressive d'autonomie des États membres quant à l'appréciation des motifs de refus d'exécution n'est ni un phénomène nouveau, ni une évolution propre au domaine des successions transfrontières. Il s'agit de l'une des conséquences de la jurisprudence de la CJUE élaborée dans le domaine de la coopération judiciaire civile, en particulier à l'égard de l'exception d'ordre public **(2.1.1)**. De plus, le règlement « Successions » comporte l'affirmation expresse du nécessaire respect des principes consacrés par la Charte des droits fondamentaux de l'Union européenne, lors de l'application de ce motif de refus de reconnaissance ou d'exécution **(2.1.2)**.

2.1.1. Encadrement jurisprudentiel européen

27. Interprétation rigoureuse des motifs de refus d'exécution. Il ressort de la jurisprudence de la CJUE élaborée dans le domaine de la coopération judiciaire civile –

[59] Dans sa proposition de règlement d'octobre 2009, la Commission européenne suggérait l'application de la procédure législative ordinaire en matière de successions, en justifiant cette solution par l'existence d'une « autonomie suffisante entre ces deux branches du droit civil [droit de la famille et droit successoral] pour que ces matières puissent être traitées séparément l'une de l'autre ». La Commission européenne estimait également qu'en raison de son caractère dérogatoire, la procédure législative spéciale – applicable en droit de la famille – devait faire l'objet d'une interprétation stricte (Proposition de règlement du Parlement européen et du Conseil relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen, COM(2009) 154 final, 14 oct. 2009, spéc. point 3.1).

[60] En cela comprises non seulement la législation de l'Union européenne, mais également l'interprétation qu'en fait la Cour de justice de l'Union européenne.

notamment à l'égard de l'article 34, §1 du règlement (CE) n° 44/2001 – que le contrôle de la régularité internationale des titres exécutoires doit s'opérer, sans retard indu, au moyen d'une interprétation rigoureuse des motifs de refus d'exécution. On peut considérer que cette jurisprudence s'applique *mutatis mutandis* dans le domaine couvert par le règlement « Successions ».

On pense, en particulier, à la jurisprudence qui encadre l'exercice et la portée de l'exception d'ordre public international (qui constitue le seul motif de refus pouvant être invoqué pour bloquer la reconnaissance ou l'exécution d'un acte authentique ou d'une transaction judiciaire[61]). Pour ne citer qu'un exemple tiré de la matière civile et commerciale[62], on peut évoquer l'arrêt *Diageo Brands BV contre Simiramida-04 EOOD*[63], dans lequel la Cour, d'une part, exige une « violation manifeste d'une règle de droit considérée comme essentielle dans l'ordre juridique de **l'Union et donc dans celui de l'État membre requis ou d'un droit reconnu comme fondamental dans ces ordres juridiques** »[64] **et, d'autre part, retient le principe de l'épuisement des voies de recours dans l'État membre d'origine. Plus précisément, pour la CJUE, à l'occasion de la vérification de l'existence éventuelle d'une violation manifeste de l'ordre public international de l'État requis, le juge de l'État membre requis « doit tenir compte du fait que, sauf circonstances particulières rendant trop difficile ou impossible l'exercice des voies de recours dans l'État membre d'origine, les justiciables doivent faire usage dans cet État membre de toutes les voies de recours disponibles afin de prévenir en amont une telle violation ».**

Ainsi qu'on peut le constater, cette jurisprudence limite grandement la marge d'appréciation des juridictions nationales, dans le but de favoriser au maximum la circulation transfrontière des titres exécutoires au sein de l'Union européenne.

2.2.2. Encadrement législatif européen

28. Une précision textuelle intéressante. Selon le considérant n°58 du règlement (UE) n° 650/2012 « Successions », « les juridictions ou autres autorités compétentes ne devraient pas pouvoir appliquer l'exception d'ordre public en vue […] de refuser de reconnaître – ou, le cas échéant, d'accepter –, ou d'exécuter une décision rendue, un acte authentique ou une transaction judiciaire d'un autre État membre, lorsque ce refus serait contraire à la Charte des droits fondamentaux de l'Union européenne, en particulier à son article 21 qui interdit toute forme de discrimination ».

Les articles de la Charte des droits fondamentaux de l'Union européenne[65] sont trop connus pour être détaillés ici. Néanmoins, il paraît utile de rappeler qu'y sont garantis non seulement des droits procéduraux – tels que le « droit à un recours effectif et à accéder à un tribunal impartial »[66] –, mais également des droits substantiels, à l'image du droit au «

[61] Voir *supra*.

[62] En matière familiale, telle que couverte par le règlement (CE) n°2201/2003 « Bruxelles II *bis* », voir not. CJUE (4e ch.) 19 novembre 2015, *P. contre Q.*, aff. C-455/15 PPU, ECLI:EU:C:2015:763.

[63] CJUE, 16 juill. 2015, *Diageo Brands BV c. Simiramida-04 EOOD*, aff. C-681/13, ECLI:EU:C:2015:471.

[64] *Adde*, CJUE, 28 mars 2000, *Dieter Krombach contre André Bamberski*, aff. C-7/98, ECLI:EU:C:2000:164, *Rec*. 2000 I-01935.

[65] *JOUE* n° C 202, 7 juin 2016, p. 389 (version consolidée).

[66] Charte, art. 47. Cet article est, d'une certaine façon, le pendant de l'article 6§ 1 de la Convention européenne des droits de l'homme, en ce qu'il protège les garanties du droit à un procès équitable.

respect de la vie privée et familiale »[67], du « droit de se marier et […] de fonder une famille »[68] ou encore de l'« égalité entre femmes et hommes »[69]. Les rédacteurs du règlement « Successions » ont donc choisi de mettre l'accent sur le nécessaire respect de l'article 21 de cette Charte.

29. Une portée incertaine. Il résulte du considérant n° 58 du règlement (UE) n°650/2012 « Successions », que le motif de refus de reconnaissance et d'exécution doit être appliqué dans le respect des principes fondamentaux qui viennent d'être évoqués. En conséquence, cela semble réduire la liberté des autorités de l'État membre d'exécution, au moment du contrôle de la régularité internationale des actes authentiques ou des transactions judiciaires prononcés dans un autre État membre.

À vrai dire, la portée exacte de cette affirmation est aujourd'hui incertaine. En effet, la valeur normative des considérants rédigés au début de chaque règlement européen fait aujourd'hui débat. De plus, bien que la Cour de justice de l'Union européenne ait déjà été saisie pour interpréter le règlement (UE) n° 650/2012 « Successions », elle ne s'est pas encore prononcée sur cette question.

À titre de comparaison, en matière de régimes matrimoniaux et de partenariats enregistrés, le législateur de l'Union européenne a décidé d'inclure une précision semblable dans le corps des règlements (UE) n° 2016/1103 et 2016/1104. Ainsi, en application de l'article 38 de ces règlements[70], les motifs de non-exécution doivent être appliqués, par les juridictions et autorités compétentes de l'État membre d'exécution, « dans le respect des droits et principes fondamentaux consacrés par la Charte, et notamment son article 21 relatif au principe de non-discrimination ». S'il ne répond pas à toutes les interrogations, ce choix renforce la portée d'un tel encadrement législatif européen.

2.2. Respect de l'autonomie procédurale des États membres

30. La fréquence **(2.2.1)** et l'incidence **(2.2.2)** des nombreux renvois aux droits nationaux appellent quelques observations.

2.2.1. Fréquence des renvois aux droits nationaux

31. Renvois au droit de l'État membre d'exécution. La procédure de déclaration constatant la force exécutoire comporte plusieurs renvois aux droits nationaux des États membres. Il est notamment opéré un renvoi au droit de l'État membre d'exécution pour déterminer si une partie est domiciliée sur le territoire de cet État[71]. Or, la localisation du domicile de la partie contre laquelle l'exécution est demandée constitue l'un des critères

[67] Charte, art. 7.
[68] *Ibid*, art. 9.
[69] *Ibid*, art. 23
[70] Cet article s'applique à la procédure de déclaration constatant la force exécutoire par le biais du renvoi que l'article 51 des nouveaux règlements opère à l'article 37.
[71] Règl. (UE) n°650/2012, art. 44.

permettant d'identifier la juridiction ou l'autorité territorialement compétente pour connaître de la demande de déclaration constatant la force exécutoire[72].

C'est également au droit de l'État membre d'exécution qu'il est renvoyé pour définir la procédure de dépôt de la demande[73]. Il en va de même pour ce qui est de l'identification des modalités de communication au demandeur de la décision relative à la demande de déclaration[74] ou encore de la définition des règles organisant l'exercice d'un pourvoi contre la décision rendue sur recours[75]. Dans le même ordre d'idées, sous réserve des précisions apportées au deuxième paragraphe de l'article 54 du règlement, c'est en application du droit de l'État membre d'exécution que le demandeur peut solliciter la mise en œuvre de mesures provisoires ou conservatoires[76]. Enfin, les modalités d'obtention de l'aide juridictionnelle ou d'une exemption de frais sont également définies au regard des droits nationaux[77].

2.2.2. Incidence des renvois aux droits nationaux

32. Absence de neutralité des renvois. La fréquence de ces renvois n'est pas neutre. Elle a probablement facilité l'adoption du règlement (UE) n° 650/2012 dans des États membres souhaitant bénéficier d'un mécanisme simplifié d'exécution transfrontière, tout en étant désireux de limiter l'emprise de la législation européenne dans le domaine sensible des successions transfrontières. Néanmoins, par voie de conséquence, elle peut nuire à l'application uniforme du règlement dans les États membres. De même, ces nombreux renvois rendent indispensables la diffusion d'informations – et leur actualisation permanente – sur les droits nationaux et, dans une certaine mesure, une adaptation de ces droits.

33. Informations sur les droits nationaux. Comme cela est traditionnellement le cas dans le domaine de la coopération judiciaire civile, les États membres sont invités à communiquer, à la Commission européenne, des informations relatives à leurs droits nationaux, afin que ladite Commission européenne en assure à son tour une large diffusion. Parmi les informations concernées, l'article 78 du règlement (UE) n° 650/2012 vise celles relatives aux juridictions compétentes pour connaître des demandes de déclaration constatant la force exécutoire ainsi que des recours formés à l'encontre des décisions rendues sur ces demandes. Ces informations doivent également porter sur les procédures – mentionnées à l'article 51 – à mettre en œuvre pour attaquer la décision rendue sur le recours. Pour procéder à la diffusion de ces informations, la Commission européenne dispose de plusieurs moyens, au premier rang desquels on retrouve le Portail e-justice européen.

34. Nécessaire adaptation des droits nationaux. Une certaine adaptation des droits nationaux est nécessaire pour permettre l'application des règlements européens. À titre

[72] Voir *supra*.
[73] Règl. (UE) n°650/2012, art. 46, § 1.
[74] Règl. (UE) n°650/2012, art. 49, § 1.
[75] Règl. (UE) n°650/2012, art. 51.
[76] Règl. (UE) n°650/2012, art. 54, § 1.
[77] Règl. (UE) n°650/2012, art. 56.

d'exemple, en droit français, les articles 509 et suivants du code de procédure civile apportent de très utiles informations concernant les autorités compétentes en vue de la reconnaissance ou de l'exécution des titres étrangers en France ou, inversement, concernant les autorités compétentes pour délivrer l'attestation sans laquelle il ne peut – en principe – y avoir de reconnaissance ou d'exécution des titres français dans les autres États membres.

Ainsi qu'on peut le constater, s'il est vrai que la procédure de déclaration constatant la force exécutoire est élaborée sur la base de solutions connues et éprouvées, son caractère « partiellement uniforme » rend difficile la maîtrise de sa mise en œuvre concrète dans chaque État membre de l'Union européenne.

THE *VOTUM CAPTANDAE MORTIS* AND ITS RELEVANCE IN ROMAN LAW

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Abstract
The paper focuses primarily on the votum captandae mortis: that is to say the despicable hope of death of the de cuius which – according to the traditional thinking – Roman jurists believed would have been induced by the agreements as to succession. After making a mention of the problematic profiles of this ratio today, the research dwells on the few ancient sources that associate agreements as to succession with a violation of the boni mores, trying to show that the declarations of invalidity of the agreements de hereditate viventis didn't steam from the mere 'votum corvinum'.

Keywords: *Agreements as to Succession in Roman Law, Immorality, Votum Corvinum, Votum Captandae Mortis, Contra Bonos Mores, Pacta de Hereditate Viventis*

1. Introduction

The agreements as to succession, i.e. those agreements established between the *de cuius* and future heirs or between future heirs and third parties concerning the acquisition of the inheritance, are forbidden in Italy as well as in other legal systems.

At the basis of this prohibition there are several reasons, in particular immorality, which according to the traditional thinking marks the agreements made between the *de cuius* and future heirs or legatees, and those concluded among future heirs or between future heirs and third parties.

There is a widely held view according to which in classical Roman law agreements as to succession would have been prohibited because they were considered 'immoral' [1]. This belief derives from certain ancient sources that speak of a conflict with the *boni mores* [2].

In truth, if one examines a number of ancient sources regarding the subject, one can observe that this view is incorrect. In fact, we cannot find in Roman law any indication concerning immorality as we understand it today, nor any radical closure against agreements as to succession in general, but only against those agreements that didn't meet certain requirements, which we shall discuss below.

1.1. The immorality of agreements as to succession: a historical legacy?

Before beginning our journey through the analysis of the ancient sources, it is imperative to briefly establish the essential coordinates of the subject in modern law, focusing on the systematic inconsistency of a concept: that of immorality, which is considered a residue of Roman law, but which in the ancient legal experience had a very different scope from that of today.

As mentioned above, in the Italian legal system all types of agreements are considered immoral. This immorality is said to be linked to the so-called *votum corvinum* or *votum captandae mortis*, that is to say the despicable hope of the death of the *de cuius* induced with the agreements as to succession [3].

This *ratio*, today, introduces problematic profiles: the reference to the *votum captande mortis* appears inconsistent from a systematic point of view, given that there are other lawful institutes which may be based, at least in abstract terms, on the hope or expectation of the death of another person [4]. Just think of the usufruct: a limited right in rem of enjoyment in which one could likely imagine the potential bare owner's hope of the death of the usufructuary.

In spite of these critical points, this *ratio* still continues to be invoked almost as if it were a historical legacy which cannot be discarded, because, according to the *communis opinio*, this immorality has deep roots in Roman law: precisely in those few ancient sources that associate agreements as to succession with a violation of the *boni mores* [5].

There are, however, several considerations that suggest on the one hand that the *votum corvinum* was not the reason for the breach of the *boni mores*, and on the other hand that there are various reasons which explain the breach of the *boni mores*.

Firstly, it must be said that this topic is often presented by scholars in an unclear manner: sometimes the expression '*contra bonos mores*' is intended as linked to *votum corvinum* [6]; other times, it is generically translated with 'immorality' [7]. However, equating the agreements as to succession with their immorality sounds like a bias. As Mayer-Maly points out, «it has to be stated quite categorically that no Roman jurist ever tried to describe, let alone define, the nature of the *boni mores*. Obviously they were naturally taken for granted and not subject to any doubt» [8]. So, it cannot be taken for granted that every declaration of nullity of the contracts *contra bonos mores* [9] referred to a moral code: in fact, whether the *boni mores* mentioned in ancient legal texts derived from some kind of ethics, tradition or the opinions and conceptions of society is still an open question.

2. **'Contra bonos mores' does't mean 'votum captandae mortis'.**

Having clarified this, it should be noted that no ancient source reporting a contrast with the *boni mores* appears to be concretely linked with the need to avoid reprehensible wishes of someone else's death.

The only source that more plausibly could suggest an aetiological connection between *contra bonos mores* and *votum corvinum* is C. 2.3.30. In this *constitutio* of the emperor Justinian, in fact, there are some allusions to a hypothetical hope (*spes*) placed in the death of the *de cuius* (*si duabus vel pluribus personis spes alienae fuerat hereditatis*, *de cuius hereditate sperabatur*, *acerbissima spe*). This point, together with the fact that Justinian defines the agreements as to succession as odious and harbinger of inauspicious and dangerous events (*sed nobis omnes huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus*), has led more than one scholar to see in this ancient source a textual proof of the invalidating force of the *votum corvinum*.

2.1.**The technical meaning of 'spes successionis'.**

However this question must be asked: should the references to '*spes*' in the constitution really be considered as an indicator of a particular disvalue deriving from the fact of placing 'hope' in the death of others?

First of all, it should be emphasised that terms such as *spes* or *sperare* (*sperare successionem*, *spes successionis*, *sperare se successurum* etc.), in legal texts, do not always indicate a feeling of trust in the present or future realisation of what is desired. More often,

the lemma *spes* expresses a peculiar technical-legal meaning depending on the sectors in which it is used [10]. Specifically, with reference to matters of inheritance law, since the Classical period there has been widespread use of expressions such as *spes* or *sperare*, which mostly indicates a position of simple expectation – to which, sometimes, some secondary effects are linked, for example guarantees, *missio in possessionem* etc. – or a prospect of receiving a profit mortis causa [11].

In particular, see:

C. 6.59.8 (*Diocl. et Max. AA. et CC. Iustae* a. 294): *Antequam scriptus cuiu-scumque portionis capax repudiet hereditatem vel alia ratione quaerendae facultatem amittat, ei qui testamentum reliquit intestato nemo succedit. igitur perspicis, quod testamentariae successionis spe durante intestati bona defuncti non recte vindicentur.*

C. 6.30.11 (*Diocl. et Max. AA. et CC. Philumenae* a. 294): *Renitente te pater tuus, in cuius fuisti potestate, neque spem delatae tibi legitimae quaerendae successionis absumere neque hereditarios manumittendo servos his praestare libertatem potuit.*

In C. 6.59.8 it is said that before an appointed heir of any portion of an inheritance who is capable of taking it repudiates it, or in some manner loses the right to claim it, no one succeeds the testator by right of intestacy. You perceive, therefore, that while the hope of testamentary succession exists, the property cannot legally be claimed by right of intestacy.

In C. 6.30.11 is established that a father could not deprive his son (in his power) of the hope of acquiring the future inheritance, nor give the slaves, belonging to the inheritance, liberty by manumission.

Following the reading of this two emblematic *constitutiones*, both issued in 294 by Diocletian – an emperor whose legislation was particularly attentive to the subject of agreements as to succession [12] – it is possible to confirm that: a) the *spes successionis* indicated a simple position of expectation in relation to a prospect of profit *mortis causa*; b) this position could be held by the future heir even before the opening of the succession. In no case, however, does *spes successionis* describe a feeling of confident aspiration towards the realisation of some wish expressed by the holder of the *spes*.

There is therefore no reason to doubt that the references to the *spes* in Justinian's constitution (C. 2.3.30) are also to be understood in this sense.

2.2.**The only ancient source that mentions 'votum captandae mortis': C. 2.4.11.**

In the whole *Corpus Iuris* there is only one ancient source in which the *votum corvinum* is mentioned, namely:

C. 2.4.11 (*Valer. Et Gallien. AA. Et Valerianus Nobilissimus Caesar Gaiano militi* a. 255): *De fideicommisso a patre inter te et fratrem vicissim dato, si alter vestrum sine liberis excesserit vita, interposita transactio rata est, cum fratrum concordia remoto captandae mortis alterius voto improbabili retinetur. Et non potest eo casu rescindi, tamquam circumventus sis, cum pacto tali consenseris, cum neque eam cui subveniri solet aetatem agere te proponas nec, si ageres, isdem illis de causis in integrum restitutionis auxilium impetrare deberes.*

This is the case: a deal, in particular a *transactio*, concerning a trust (the duty of which was) imposed upon you and your brother reciprocally, in case one of you should depart this life without children, is valid, since harmony among the brothers is maintained by removing the ugly wish of seeking the other's death. Nor can the pact in this case be rescinded, as though you were circumvented, since you agreed to it, and since you do not state that you are of that age when restitution of rights is customarily granted, and (even) if you were, you would not for the reason set forth be entitled to be restored to your former rights.

First of all it can be noted that, indeed, the periphrasis *captandae mortis alterius voto* which appears in C. 2.4.11 indicates here the subjective wish of the contracting parties for the death of the other: in addition to the circumstance, this can be understood from the use of the noun *votum*, the meaning of which – unlike *spes*, that can be translated as 'expectation', 'prospect', 'expectation' – is undoubtedly that of wish, hope, prayer. This notation, I believe, provides further confirmation of the above reflection on the use of expressions such as *spes successionis et similia* to indicate the simple and objective position of expectation of succession *mortis causa*.

It can also be observed that the validity of the *transactio* was primarily based on the absence, objectively and assessed a priori, of the wish for the death of the brother that an agreement, structured in this way, might have caused.

Even if one were to think that the *votum captandae mortis* had legal significance, it should not be considered that it was a fixed feature of all agreements as to succession: in fact, the only legal source that mentions it excludes it.

Then, observe the structure of the *constitutio*: the brother who wished to challenge the validity of the agreement as to succession built his argument on the *fictio* that the other had committed malice. Therefore, it can be assumed that the *votum corvinum* was a kind of rhetorical argument used by the plaintiff to terminate the agreement 'as if' (*tamquam*) there had been fraud on behalf of the other party (*tamquam circumventus sis*). One would then have to conclude that the *votum corvinum* was only a rhetorical argument utilized to draw the attention to a quid which had to be scrutinised on individual basis.

2.3.**The 'captatores hereditatis' and their reprehensible wishes: Sen. ben. 6.38.4.**

Except from C. 2.4.11, the only other sources where there are allusions to a despicable desire for the death of others demonstrated by those who not only make agreements as to succession but – more generally – speculate on future inheritances, are literary ancient sources where the subject of the so-called *heredipetae* [13] (or *captatores hereditatis*) is addressed. These are the so-called 'hunters of inheritance'. These individuals, described especially in satirical literature, have a single mission in life: to circumvent elderly people without legitimate heirs in order to obtain a heritage, or at least some kind of legacy. These abject individuals are very often equated with wicked crows [14].

It is therefore likely that the metaphor underlying the expression '*pactum corvinum*' originated precisely in the context of these reflections. However, neither in legal nor in literary sources the *captatores* are ever parties of agreements as to succession; on the contrary, the main activity of these individuals was entirely one-sided and took the shape of any form of device that might engender feelings of sincere affection in the unfortunate *testatores*.

A colourful list of these tools can be found in particular in the Vth satire of Horace's IInd book. The verses in question – which, moreover, also represent the main places where the

poet demonstrates his competence in testamentary matters – describe Tiresia's intent of instructing Ulysses on all the ignobleness typical of the *captator hereditatis*.

These individuals – who, however, it is to be repeated, do not appear to have concluded agreements as to succession – certainly had the so-called '*votum corvinum*'. There is one source in particular by Seneca which states this explicitly.

This ancient source is especially relevant for our purposes, since it is explicit evidence that this '*votum corvinum*', considered in and of itself, had no legal meaning:

Sen. *ben*. 6.38.4: *An tu Arruntium et Haterium et ceteros, qui captandorum testamentorum artem professi sunt, non putas eadem habere quae dissignatores et libitinarios vota? Illi tamen, quorum mortes optent, nesciunt, hi familiarissimum quemque, ex quo propter amicitiam spei plurimum est, mori cupiunt. Illorum damno nemo vivit, hos, quisquis differt, exhaurit; optant ergo non tantum, ut accipiant, quod turpi servitute meruerunt, sed etiam, ut tributo gravi liberentur. 5. Non est itaque dubium, quin hi magis, quod damnatum est in uno, optent, quibus, quisquis morte profuturus est, vita nocet. Omnium tamen istorum tam nota sunt vota quam impunita.*

In some states a unholy prayer was treated as a crime. At any rate, at Athens Demades won a suit against a man who sold funeral requirements, by proving that he had prayed for great gain, and that he could not have been successful unless many persons had died.

Seneca explains that the question is often raised whether he was rightly convicted. His opinion is that it is not fair to punish someone for merely desiring the misfortunes of others. otherwise, you will have to convict, too, a great part of the human race, for who does not derive, gain from another's distress?

Among the various examples given by Seneca of individuals who hope in the evil of others, the most deplorable (and emblematic) is that of the *captatores*.

The prayers of all those who have followed the profession of hunting legacies are the same that funeral directors and undertakers make. Yet these do not know whose death it is that they are praying for, while the former long for the death of their most intimate friends, from whom on account of friendship they have most hope of a legacy. No one's living causes the latter any loss, while the former are worn out if a victim is slow in dying; they pray, therefore, not only that they may receive what they have earned by base servitude, but also that they may be released from the burdensome tribute. There is no doubt, therefore, that these pray more earnestly for that which convicted the Athenian, for whoever is likely to profit them by dying injures them by living.

Yet, in Rome, the prayers of all these men, while well known, are unpunished (*omnium tamen istorum tam nota sunt vota quam impunita*).

In the light of this testimony, which must be added to that seen above, it would seem possible to conclude that the mere '*votum corvinum*', in and of itself, was not relevant to the validity of the agreements as to succession.

3. The reasons why agreements as to succession were said 'contra bonos mores'.

One can therefore now try to answer the question: why were the agreements as to succession said to be *contra bonos mores*? In my view, the question should be not so much 'why' but 'when' the agreements as to succession were said to be *contra bonos mores*.

In fact, the reading of the ancient sources makes it possible to believe that there was not a total closure, comparable with today's prohibitions, as the one enclosed in Art. 458 of the

Civil Code, but rather requirements of invalidity which, on closer inspection, are also requirements of validity.

3.1. **Agreements not known to the 'de cuius'.**

The agreement as to succession was invalid first and foremost if it was not known to the *de cuius*: in fact such an agreement, concluded without the knowledge of the testator, was feared to be accompanied by a *votum captandae mortis* so intense that it represented a real danger either to the life or to the testamentary will of the testator.

We need only to think of the Macedonian Senatusconsultum to remember that the Romans feared possible murders caused by speculative dealings in the death of others. The need to repress *parricidium* at the basis of the senatorial decree emerges in fact also from the periphrasis *et saepe materiam peccandi malis moribus praestaret* (Ulp. 29 *ad ed.* D. 14.6.1 [15]) used to indicate that those who granted loans prohibited by the SC were feeding the *mali mores*, which are nothing but the opposite of the *boni mores*. If we look at the exceptions to the legal text, we see that loans granted *sciente patre* were protected [16].

In all likelihood, moreover, clandestine agreements *de hereditate tertii* were also to be avoided for fear that they might lead the contracting parties to devise manoeuvres to influence the will of others [17].

The real concern, in short, was a concrete one: it was feared that any agreement unknown to the testator might create associations that could materialise in actual invitations *ad delinquendum*. Naturally, if the agreement as to succession had been known to the testator, it would have been valid.

3.2. **Agreements not approved by the 'de cuius'.**

This requirement, however, was not sufficient: to be valid, an agreement concluded between future heirs also had to be approved by the *de cuius*. Some sources, in fact, allow us to assume – on the one hand – that a divisional agreement concluded between brothers in compliance with a '*certa lex*' established by the father was valid [18] (the *actio praescriptis verbis* was used for its protection: Ulp. 19 *ad ed.* D. 10.2.20.3 [19]). On the other hand, that an agreement as to succession concluded between future heirs deliberately contrary to the last wishes of the *de cuius* was deplorable insofar as it reflected attitudes that were deficient in terms of those fundamental values, such as, for example, pietas, that were on several occasions subsumed under *boni mores*.

The treatment of the subject in a rhetorical key in a *Controversia* by Seneca the Rhetorician, which discusses an agreement whereby two brothers shared out their father's future inheritance, makes it possible not only to focus on the impiety of such a transaction insofar as it was intended to thwart the last will of others, but also to understand the extra-legal matrix of the matter.

It was probably seen first and foremost as a case of violation of pietas and, therefore, of the lex naturae. From this perspective, it seems possible to give new weight to the appeals to the *boni mores* and the *ius gentium* in the well-known papinian response in D.39.5.29.2:

Pap. 12 *resp*. D. 39.5.29.2: *Donationem quidem partis bonorum proximae cognatae viventis nullam fuisse constabat: verum ei, qui donavit ac postea iure praetorio successit, quoniam adversus bonos mores et ius gentium festinasset, actiones hereditarias in totum denegandas respondit*.

In particular, after an in-depth study of the Senecian *Controversia* 6.1 [20], where the agreement as to succession stipulated by the two sons of the *de cuius* before his death is discussed as a case of breach of *pietas* [21], the solution provided by the Severan jurist – who, in order to justify his proposal to deny hereditary actions to those who have donated future hereditary purchases, also refers to the *ius gentium* – immediately seems more comprehensible: precisely insofar as it expresses the link with the *lex naturae* [22] discussed by the rhetoricians, this solution could be one of the clearest proofs of the incorporation by *scientia iuris* of requests coming from the sphere of social feeling, in the sense of not allowing future heirs to deprive the *de cuius* of the only *solacium mortis*, namely the awareness of respect for his own last will [23].

4. Conclusion

In conclusion, the declarations of contrariety with the *boni mores* of agreements as to succession in Roman law should not be applied to every agreement *de hereditate viventis* and seen as a harbinger of the '*votum corvinum*'.

On the contrary, they should relate exclusively to those contracts which – being unknown to the testator and not approved by him – could be seen both as invitations to delinquency and as infringements of the testator's freedom to dispose of his property *mortis causa*. The agreements as to succession known and approved by him would therefore have been permitted [24].

References

[1] BONFANTE, P., Corso di diritto romano, VI, Le successioni. Parte generale, Milano, 1974 (rist. Milano, 1930), p. 215 f.; SOLAZZI, S., Diritto ereditario romano. (Anno accademico 1931-32), I, Napoli, 1932, p. 245; PEROZZI, S., Istituzioni di diritto romano, II^2, Roma, 1928, p. 491, nt. 5; FADDA, C., Concetti fondamentali del diritto ereditario romano, I, Milano, 1949, p. 329; BIONDI, B., Istituzioni di diritto romano^4, Milano, 1965, p. 632, nt. 18; VISMARA, G., Storia dei patti successori, Milano, 1941, p. 85 f.; MESSINA VITRANO, F., La disciplina romana dei negozi giuridici invalidi, I, I negozi 'iuris civilis' sotto condizione illecita, Perugia, 1922, p. 59; ZIMMERMANN, R., The Law of Obligations. Roman Foundations of the Civilian Tradition, Cape Town, 1990, p. 249, nt. 92; MANFREDINI, A.D., La volontà oltre la morte. Profili di diritto ereditario romano, Torino, 1991, p. 20; LO IACONO, S., Convenzioni circa eredità non devolute, in Willkür und Freiheit im römischen und schweizerischen Erbrecht, herausgegeben von I. Fargnoli und U. Fasel, Bern, 2017, p. 164; LO IACONO, S., 'Ambulatoria est voluntas defuncti'? Ricerche sui 'patti successori' istitutivi, Milano, 2019, p. 203 ff.

[2] Iul. 2 *ad Urs. Fer.* D. 45.1.61: *Stipulatio hoc modo concepta: 'si heredem me non feceris, tantum dare spondes?' inutilis est, quia contra bonos mores est haec stipulatio*; Pap. 12 *resp*. D. 39.5.29.2: *Donationem quidem partis bonorum proximae cognatae viventis nullam fuisse constabat: verum ei, qui donavit ac postea iure praetorio successit, quoniam adversus bonos mores et ius gentium festinasset, actiones hereditarias in totum denegandas respondit*; C. 8.38.4 (*Diocl. et Max. AA. et CC. Domnae* a. 293): *Ex eo instrumento nullam vos habere actionem, quia contra bonos mores de successione futura interposita fuit stipulatio, manifestum est, cum omnia, quae contra bonos mores vel in pacto vel in stipulatione deducuntur, nullius momenti sint*; Paul. Sent. 1.1.4: *Neque contra leges neque contra bonos mores pacisci possumus.* Interpretatio: *Si inter aliquos conveniat aut de*

admittendo crimine vel inferenda violentia vel faciendo, quod lex aut honestas prohibet, aut de rebus alienis aut si de bonis viventis aliquid paciscantur, haec pacta valere non possunt; CTh. 2.24.2 (*Const. ad Constantium Praefectum Praetorio* a. 327): *Nulli quidem de bonis usurpandis vivorum, nec dividendi contra bonos mores concessa licentia est: sed si praecipiente matre bona eius inter se liberi diviserunt, placuit omnifariam nobis, huiusmodi divisionem durare, si modo usque ad extremum eius vivendi spatium voluntas eadem perseverasse doceatur*; C. 2.3.30 (*Iust. A. Johanni pp.* a. 531): *De quaestione tali a Caesariensi advocatione interrogati sumus: si duabus vel pluribus personis spes alienae fuerat hereditatis ex cognatione forte ad eos devolvendae, pactaque inter eos inita sunt pro adventura hereditate, quibus specialiter declarabatur, si ille mortuus fuerit et hereditas ad eos perveniat, certos modos in eadem hereditate observari, vel si forte ad quosdam ex his hereditatis commodum pervenerit, certas pactiones evenire. et dubitabatur, si huiusmodi pacta servari oportet.* 1. *Faciebat autem eis quaestionem, quia adhuc superstite eo, de cuius hereditate sperabatur, huiusmodi pactio processit et quia non sunt ita confecta, quasi omnimodo hereditate ad eos perventura, sed sub duabus condicionibus composita sunt, si ille fuerit mortuus et si ad hereditatem vocentur hi qui pactionem fecerunt.* 2. *Sed nobis omnes huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus. quare enim quodam vivente et ignorante de rebus eius quidam paciscentes convenerunt?* 3. *Secundum veteres itaque regulas sancimus omnimodo huiusmodi pacta, quae contra bonos mores inita sunt, repelli et nihil ex his pactionibus observari, nisi ipse forte, de cuius hereditate pactum est, voluntatem suam eis accommodaverit et in ea usque ad extremum vitae spatium perseveraverit: tunc etenim sublata acerbissima spe licebit eis illo sciente et iubente huiusmodi pactiones servare.* 4. *Quod etiam anterioribus legibus et constitutionibus non est incognitum, licet a nobis clarius est introductum. iubemus etenim neque donationes talium rerum neque hypothecas penitus esse admittendas neque alium quendam contractum, cum in alienis rebus contra domini voluntatem aliquid fieri vel pacisci secta temporum meorum non patitur.*

[3] FERRI, L., Disposizioni generali sulle successioni (art. 456-511), in Commentario del codice civile Scialoja-Branca[3], a cura di F. Galgano, Bologna – Roma, 1997, p. 86; PALAZZO, A., voce Successioni (parte generale), in Dig. disc. priv. – Sez. civ., XIX, Torino, 1999, p. 137; PALAZZO, A., Le successioni, in Trattato di diritto privato[2], a cura di G. Iudica e P. Zatti, I, Milano, 2000, p. 213.

[4] ACHILLE, D., Il divieto dei patti successori. Contributo allo studio dell'autonomia privata nella successione futura, Napoli, 2012, p. 145, nt. 14; RISPOLI, G., Riflessioni in tema di patti successori, in Giur. it., 2010, p. 1556; DE GIORGI, M.V., I patti sulle successioni future, Napoli, 1976, p. 56; CACCAVALE, C., Il divieto dei patti successori, in Trattato breve delle successioni e donazioni, I, diretto da P. Rescigno, coordinato da M. Ieva, I, Le successioni 'mortis causa'. I legittimari. Le successioni legittime e testamentarie[2], Padova, 2010, p. 40.

[5] CICU, A., Il testamento, Milano, 1945, p. 21: «è nello stesso diritto romano che si forma il principio della nullità, ma limitata ai singoli patti istitutivi di erede ed obbligazioni di istituire. La nullità è giustificata dicendo che questi patti sono contra bonos mores».

[6] Così BONFANTE, P. (1974), p. 215 f.; SOLAZZI, S. (1932), p. 245; F. VASSALLI, I contratti di eredità del terzo vivente. Il motivo della 'vivi hereditas'. La vendita di eredità e la dottrina dell''emptio spei'. Fascicolo I della miscellanea critica di diritto romano, in

Miscellanea critica di diritto romano (fascicolo I), in Studi giuridici Vassalli, III, Milano, 1960, p. 353 ff.

[7] SOLAZZI, S. (1932), p. 238; MESSINA VITRANO, F. (1922), p. 59; PEROZZI, S. (1928), p. 491, nt. 5.

[8] MAYER-MALY, TH., The 'Boni Mores' in Historical Perspective, in THRHR, L.1, 1987, p. 75.

[9] About boni mores as a restriction on negotiating autonomy see DE RUGGIERO, R., Sul trattamento delle condizioni immorali e 'contra leges' nel diritto romano, in BIDR, XVI, 1904, p. 162 ff.; DE KOSCHEMBAHR-LYSKOWSKI, J., 'Conventiones contra bonos mores' dans le droit romain, in Mélanges de droit romain dédiés a G. Cornil, II, Paris, 1926, p. 15 ff.; MEZGER, H.R., Stipulationen und letztwillige Verfügungen 'contra bonos mores' im klassisch-römischen und nachklassischen Recht, Göttingen, 1930, p. 25 ff.; KASER, M., Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht, in ZSS, LX, 1940, p. 103 ff.; MAYER-MALY, TH., 'Contra bonos mores', in 'Iuris Professio'. Festgabe für M. Kaser zum 80. Geburtstag, herausgegeben von H.-P. Benhöhr, K. Hackl, R. Knütel und A. Wacke, Wien – Köln – Graz, 1986, p. 151 ff.; MAYER-MALY, TH. (1987), p. 68 ff.; PLESCIA, J., The Development of the Doctrine of 'Boni Mores' in Roman Law, in RIDA III S., XXXIV, 1987, p. 278, ntt. 43 ff., p. 280, nt. 53; CSERNE, P., DELI, G., Law and Morality in the Regulation of Contracts: Lessons from Ancient Rome (TILEC Discussion Paper No. 2009-037), in https://ssrn.com/abstract=1480685, 2009, p. 9 ff.

[10] BARTOŠEK, M., La 'spes' en droit romain, in RIDA, II, 1949, p. 19 ff., p. 23 ff. See also voce Spes, in VIR.

[11] See, for example, Ulp. 11 *ad ed.* D. 4.4.3.7; Tryph. 8 *disp*. D. 34.3.27; Ulp. 5 *fideic*. D. 40.5.24.16; Pap. 5 *quaest*. D. 46.5.8.1; Ulp. 51 *ad ed.* D. 7.9.9 pr.; Paul. 8 *ad Plaut*. D. 42.4.11.

[12] C. 8.38.4; C. 5.14.5; C. 2.4.34(33); C. 2.3.19.

[13] On this term see Thesaurus linguae Latinae, VI.3, Lipsiae, 1936-1942, 2627.

[14] See Petr. *satyr.* 116: „*Adibitis" inquit „oppidum tanquam in pestilentia campos, in quibus nihil aliud est nisi cadavera, quae lacerantur, aut corvi, qui lacerant"*; Mart. *epigr*. 6.62: *Amisit pater unicum Salanus: / cessas munera mittere, Oppiane? / heu crudele nefas malaeque Parcae! / cuius vulturis hoc erit cadaver?*; Hor. *sat*. 2.55-57: *plerumque recoctus scriba ex quinqueviro corvum deludet hiantem captatorque dabit risus Nasica Corano*; Petr. *satyr.* 141: „*Omnes, qui in testamento meo legata habent, praeter libertos meos hac condicione percipient, quae dedi, si corpus meum in partes conciderint et astante populo comederint" ... „Apud quasdam gentes scimus adhuc legem servari, ut a propinquis suis consumantur defuncti, adeo quidem, ut obiurgentur aegri frequenter, quod carnem suam faciant peiorem. His admoneo amicos meos, ne recusent quae iubeo, sed quibus animis devoverint spiritum meum, eisdem etiam corpus consumant"*; Sen. *ben*. 4.20.3: *Ingratus est, qui in referenda gratia secundum datum videt, qui sperat, cum reddit. Ingratum voco, qui aegro adsidit, quia testamentum facturus est, cui de hereditate aut de legato vacat cogitare. Faciat licet omnia, quae facere bonus amicus et memor officii debet: si animo eius obversatur spes lucri, captator est et hamum iacit. Ut aves, quae laceratione corporum aluntur, lassa morbo pecora et casura ex proximo speculantur, ita hic imminet morti et circa cadaver volat*. On theese sources, see MICHAÉLIDÈS-NOUAROS, G., Contribution à l'étude des pactes successoraux en droit byzantin (justinien et post-justinien), Paris, 1937, p. 49 ff.; TALIERCIO, A., Orazio, Petronio e gli 'heredipetae', in RCCM,

XXXII, 1990, p. 55 ff.; TRACY, A., 'Aut Captantur aut Captant', in Latomus, XXXIX, 1980, p. 399 ff.; SCHMID, D., Der Erbschleicher in der antiken Satire, Tübingen, 1951.

[15] Ulp. 29 *ad ed*. D. 14.6.1: *Verba senatus consulti Macedoniani haec sunt: 'Cum inter ceteras sceleris causas Macedo, quas illi natura administrabat, etiam aes alienum adhibuisset, et saepe materiam peccandi malis moribus praestaret, qui pecuniam, ne quid amplius diceretur incertis nominibus crederet: placere, ne cui, qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis eius, cuius in potestate fuisset, actio petitioque daretur, ut scirent, qui pessimo exemplo faenerarent, nullius posse filii familias bonum nomen exspectata patris morte fieri'.*

[16] Ulp. 11 *ad ed.* D. 4.4.3.4; Ulp. 29 *ad ed.* D. 14.6.7.11; Ulp. 29 *ad ed.* D. 14.6.9.3-4; Paul. 30 *ad ed.* D. 14.6.12; Iul. 12 *dig*. D. 14.6.14; Marcian. 14 *inst*. D. 14.6.15; Paul. 4 *resp.* D. 14.6.16; C. 4.28.2; C. 4.28.4; C. 4.28.5; C. 4.28.7 pr.

[17] MEROTTO, M.F., I patti successori dispositivi nel diritto romano, Napoli, 2020, p. 122 ff.

[18] MEROTTO, M.F. (2020), p. 216 ff.

[19] Ulp. 19 *ad ed.* D. 10.2.20.3: *Si pater inter filios sine scriptura bona divisit et onera aeris alieni pro modo possessionum distribuit, non videri simplicem donationem, sed potius supremi iudicii divisionem Papinianus ait. plane, inquit, si creditores eos pro portionibus hereditariis conveniant et unus placita detrectet, posse cum eo praescriptis verbis agi, quasi certa lege permutationem fecerint, scilicet si omnes res divisae sint.*

[20] Sen. Rhet. *contr*. 6.1: *Abdicato frater chirographum dedit dimidiam se partem daturum hereditatis si non respondisset. Ille tacuit. Abdicatur alter a patre. Tantum aeris alieni habet, quantum vivo patre non possit solvere. Vis scire cuius fidei sis? ne frater quidem tibi sine chirographo credidit. Alterius spem moror, alterius fidem. Vivo, et iam patrimonium meum divisum est. Nisi succurritis, vincet me et ille qui tacuit. Non dissimulo me hodie duos abdicare. Chirographum prode, parricidarum foedus et nefariae spei pactum, chirographum danti impium, accipienti turpe, patri periculosum. Pars altera. In omnem me fortunam, frater, comitem tibi iungam: si militandum, una militabimus, si peregrinandum, una urbes peragrabimus, si cotidianam rogavero stipem, et illam tecum dividam. Nolui recentem iram exagitari patris; malui ut tacendo patrem vinceret. Meae partis heres ero, tuae custos. Et quia de re maxima melius sibi quisque credit, do chirographum; tu da operam ut istud magis a patre accipere quam a fratre videaris. Hoc, quod honeste, quod pie gerebamus, tam palam egimus ut pater sciret. Quid enim timebam? ne, si rescisset pater, moleste ferret filium suum hominem avarum non esse, fratrem pium esse? Ita mihi contingat patrem utrique nostrum placare.*

[21] *Rhet*. *Her.* 2.19: *Natura ius est quod cognationis aut pietatis causa obseruatur, quo iure parentes a liberis et a parentibus liberi coluntur.*

[22] Cic. *off*. 3.5.23: *Neque vero hoc solum natura, id est iure gentium.*

[23] Ps. Quint. *decl. min.* 308.1; Cic. *Tusc*. 1.14.31; Ovid. *trist*. 1.2.53-56; Plaut. *Curc*. 622; Sen. *ben*. 4.11.4-6; Plin. *epist*. 2.20.10; Plin. *epist*. 8.18.1.

[24] For more details see MEROTTO, M.F. (2020), *passim*.

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PROPERTY PROTECTION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: SPECIAL ANALYSIS OF VULNERABLE GROUPS

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Abstract

The theory and practice of human rights recognize the right to property as the main premise that ensures the fulfillment of civil and political, economic, social and cultural attributes and also the fulfillment of solidarity rights, acting in the form of a legal link in favor of protecting all vulnerable categories. Unlike other human rights that are intrinsic to the individual, being claimed by the human being in order to develop human personality (we consider in this sense, human dignity, the right to life) the protection of property acts independently to give concreteness to all conditions necessary for individual manifestation. Thus, the protection of property is characterized by inherent but not in a stricto sensu manner in regard to the essence of the human being but in regard to the necessary circumstances required for the human being in order to complete its own existence. In this sense, the interpretations attached to Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms require the protection of property not in the sense of effectively guaranteeing the acquisition of property that already exists but in the sense of effectively protecting property in the event that its existence or existential vocation is configured according to legal requirements. [1]

Another aspect that integrates the argumentation provided by Article 1 of Protocol 1 to the European Convention is related to ensuring a fair balance between guaranteeing the right to property and State intervention in this matter. The state is presented under a double coordination: on the one hand, it is obliged not to carry out acts of interference in the sphere of the exercise of the right of property, on the other hand, the State is obliged to ensure substantial measures of protection of the right of property-even more so such measures are necessary to protect vulnerable groups. [2]

Succession analysis in the context of property protection guaranteed by Article 1, Protocol 1 to the European Convention is a complex exercise involving: on one hand, content issues relating to the rights and freedoms provided for in the Convention which are complementary to the issue of successions (protection of privacy and family life, right to marriage, prohibition of discrimination) and on the other hand, social circumstances that may have a concrete effect on the way in which issues related to successions are resolved (we refer in particular to some criteria such as: religion, culture, sex, disability etc.).

Taking into account as starting point the theoretical model of placing the individual at the center of scientific research in the field of succession, this paper aims to highlight, through the jurisprudence of the European Court of Human Rights developed in the matter, how individual rights and freedoms are reflected in resolving cases relating to vulnerable persons pursuant to Article 1, Protocol 1 to the European Convention.

Keywords: *property protection, women's rights, children's rights, rights of persons with disabilities, inheritance law*

Women's rights

In the case of *Molla Sali v. Greece* [3], were assessed the inheritance rights of female heirs deriving from the rules of Islamic law in relation to the European standards contained in Article 14 of the European Convention and in Article 1 of Protocol 1 to the European Convention. In the alternative, the European Court examined the relationship between the rules of religious and Islamic law and the rules of positive law in the Greek normative system in order to identify the correct legal precedence. The facts explain the relevance of relying on religious norms in establishing the surviving wife's rights of succession, bringing to the fore the following: the deceased drew up, in accordance with the rules of Greek civil law, a will expressing his desire regarding the *mortis causa* transmission of the entire estate to the surviving spouse; the sisters of the deceased attacked the will, claiming the preeminence of religious law over the rules of civil law under the Treaties of Sèvres and Lausanne. The religious factor is the fundamental element that needs to be clarified by the European Court in the conditions in which it allows the application of succession rules contrary to the positive law of a State Party to the conventional law system. At the same time, tracing the relevance of the religious factor to succession issues is an essential aspect given that religious freedom is one of the pillars of pluralist democracy and its reconciliation with the rigors of the rule of law must be done in appropriate coordinates so that it does not affect the respective freedom. Associated with the guarantee of non-discrimination – provided for in Article 14 of the Convention, religious freedom may not, in its exercise, lead to unjustified exclusion from the acquisition of succession estate on the basis of gender/sex.

Before proceeding with the merits of the case before the European Court, which relied on the provisions of Article 14 of the Convention and Article 1 of Protocol 1, the European Court must rule in regard to the incidence of Islamic regulations in the system of national law and the normative hierarchy by reference to religious and civil norms. Examining the case in the light of the above, the European Court emphasizes the idea that Islamic Sharia law is recognized and applied under the rules of protecting public order. As an example, the European Court cites the situation in the United Kingdom regarding Sharia Councils: although the religious precepts of Islamic law guide the personality of every Muslim, the jurisdiction of Sharia councils is not binding, it does not produce legally binding effects; consequently, if Islamic Courts established by Sharia law were to have effects that would exclude civil law from application, then their action would be classified as illegal. [4]

The analysis of the preliminaries on which the case is based consists in: identifying the notarized will as the foundation of the plaintiff's right to inherit the estate of the deceased spouse; in connection with this, the claims made by the sisters of the deceased, who invoke in their favor the provisions of Islamic law according to which their succession vocation takes precedence over that corresponding to the surviving wife – the latter being completely removed from the inheritance.

The determination of discrimination in the acquisition of property rights by succession must be examined in a first phase, in a fragmented manner, in relation to the substantial

aspects of the prohibition of discrimination and protection of property and in the second phase, by the dynamic reunion of the previously identified substantial elements.

According to the Court's case-law [5], the application of Article 14 on protection against discrimination *necessarily* implies the connection with another right/freedom enshrined in the Convention, given the lack of legal autonomy of this guarantee. With regard to Article 1 of Protocol 1 of the Convention, the European Court recognizes that the protection of property has an autonomous meaning which is not limited to ownership of tangible property and is independent of the formal classification which this matter entails in accordance with the requirements of national law. [6] The reunification of the two legal requirements under the dome of a single legal reasoning consists in the realization of a hypothetical exercise by the European Court, respectively it is sought to establish whether, by reference to a certain succession situation, a potential heir was discriminated; if so, it must be determined whether, in the absence of the alleged discrimination, the heir in question had a real vocation for succession. [7]

Prohibition of discrimination is a guarantee of human diversity – which leads to the identification of discriminatory aspects based on a complex test, consisting of the following premises: (1) the identification of a difference in treatment is not *per se* sufficient to qualify an act as discrimination; it is necessary that is not justified by a legitimate and reasonable purpose; (2) the subject of the alleged discrimination must be in a comparable situation to another person who has not been discriminated against. [8]

Following the *application of the discrimination test* to the situation in question, the European Court distinguishes the following conclusions: (1) the plaintiff, having the status of heiress according to the will drawn up by the deceased spouse of the Muslim religion in accordance with the rules of civil law *was treated differently* in relation to the treatment applied to another person in a similar relevant situation – that is the heiress of a non-Muslim testator who decided to transfer the estate by will drawn up on the basis of the provisions of the Civil Code; (2) the difference in treatment was made taking into account the criterion of *another status (religion of the deceased spouse*). In order to determine whether the difference in treatment was justified, the European Court examined the two requirements: *the legitimacy of the aim pursued* and *the proportionality of the difference in relation to the aim pursued*. Deciphering the factual and legal circumstances of the case lies mainly in determining the extent to which the fulfillment of international obligations under the treaties to which Greece is a party and concerning the protection of the rights of the Muslim minority in Greece is a legitimate aim in applying a different legal treatment.

The most sensitive aspect of the case is the conciliation of Greece's international obligations, the Court noting that, in deciding the case, it took into account the view of the Council of Europe Commissioner for Human Rights which indicates the distinct human rights perspective adopted by the international community according to the time gap between the Treaties of Sèvres and Lausanne and current human rights standards. In other words, the obligations assumed by Greece through the international instruments it has ratified must be updated in such a way as to allow the protection of Islamic religious minorities within the general limits of non-discrimination.

In interpreting how religious freedom and the protection of religious minorities can be reconciled with the standards of non-discrimination, the European Court clearly states that religious freedom cannot be invoked to create a particular normative system that can grant privileges or special status to religious communities. Exceptionally, the creation of such a

statute must ensure, in a correlative manner, the criteria necessary for those privileges to be applied in a non-discriminatory manner. [9]

Advancing the reasoning necessary to determine whether discrimination on the grounds of the testator's religion affected the applicant's right to property, the Court points out that by waiving the guarantees of Sharia law and by opting to draw up a will in accordance with the requirements of Greek civil law, the testator exercises his right to cultural and religious identity in its negative dimension. The exercise of the right to identity in its negative dimension is the result of the subjective perception that the right holder projects on his own person and this fact must not lead to the violation of the freedoms of other subjects of law. [10]

In assessing the situation in the present case, the Court unanimously held that the applicant's treatment violated the rules of equality and non-discrimination, leading to a difference (unjustifiably in an objective and reasonable manner) between the situation of the widow of a Muslim testator who opted for the elaboration of the will in accordance with the provisions of the Civil Code and the widow of a non-Muslim testator that is in the same situation.

Child rights

In relation to vulnerable groups, the protection of property is inextricably linked to elements related to private and family life and in terms of successions –understood as an application of the right to property – are of greater relevance aspects that depend directly on establishing family ties such as adoption [11], marriage or recognition of an illegitimate child [12]. The European Court has ruled on substantive issues concerning the protection of children's property rights and their vocation, including the determination of the status of *a child* in the event of the annulment of an adult adoption procedure for a period of 31 years from the date on which the adoption was approved. In this regard, the European Court has advanced a *suis generis* understanding of *the child* as a *holder of rights*, departing from the idea established by the United Nations Convention [13] and associating the quality of a *child* with an adult referring to which is debated the possibility of annulment of the adoption in the conditions of the pre-death of the adoptive mother [14].

In the *case of S.L. and J.L. v. Croatia* [15], is at issue the State's obligation to protect the property rights of minor applicants under the principle of *the best interests of the child*. In fact, the case mentions the situation in which the two minor applicants S.L. and J.L. were damaged by the legal transactions carried out by their legal representative under which S.L. and J.L. – as a co-owners of a villa with an estimated value of 100,000 euros – were to dispose of the villa for personal property and receive, in return, an apartment worth 55,000 euros as well as compensation resulting from the difference in value between counter-performances of 5,000 euros for each co-owner. Considering: (1) the minority of co-owners, (2) the characteristic of the exchange transactions – which had an economic, pecuniary content, representing acts of disposition – as well as (3) the exceptional parental situation (the mother being addicted to drugs and the father being detained in the execution of a custodial sentence), according to the norms of national law, it was required, as a prerequisite, the authorization of the transaction by the Social Assistance Center. The object of the case is the assessment of the degree to which the decision of the Social Assistance Center prejudiced the children's right to property.

Although from the wording of Article 1, paragraph 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [16] derive the negative obligations assumed by the States Parties to the Convention (consisting in not showing unjustified interference in the exercise of the right to property), in the reasoning formulated by the European Court both categories of obligations falling on the State (positive and negative) were taken into account. It was also noted that in the case of both categories of obligations, a fair balance must be struck between the general interest of the community and the private interest in the protection of the fundamental rights of the individual. [17]

Given that, in the present case, the owners of the property right are *children*, the court considers that the principle of the best interest of the child must become incidental in the study of the case and State obligations (positive and negative) must be subsumed to protect the vulnerability of minors.

In defining the scope of the *positive obligations*, respectively the scope of *negative obligations* of the State in correlation with the right to property and the protection of the best interests of the child, we observe a specific logic: (1) in the case of positive obligations, active steps involves a real and sustained action, by taking all necessary steps to safeguard children's property; (2) in the case of negative obligations, abstentions from any form of intervention must be carefully assessed so that it would not lead to a more serious outcome such as the violation of the fundamental rights of the child.

Returning to the overall circumstances of the case, the European Court considers that, for the proper resolution of the dispute, two aspects are crystallized as stringent: (1) the extent to which the instruments used to ensure a fair exchange between the two buildings were relevant; and (2) the degree to which the Social Assistance Center – on whose decision the exchange was directly dependent – has undertaken, with due diligence, all the requirements necessary for the protection of children's property. With regard to the first point, the European Court ruled that, although the Social Assistance Center had received information on the total value of the villa owned by the minors (the initially estimated value as well as the amounts invested by the minors' parents), it did not use technical investigation (such as an on-site visit or reporting by an expert) to verify the authenticity of the information provided. Also, during the hearing of the mother of the minors in connection with the intention to alienate their property, the Center did not corroborate the information obtained with other circumstances that had the role of describing the general family situation: the execution of a custodial sentence by the minor's father, the drug addiction of the mother of the minors, the financial difficulties of the family that determined the legal representatives of the minors to initiate, in the past, operations of alienation of the villa registered in the property of the minors. With regard to the second aspect, the European Court notes that the Center has not properly complied with its duties under the internal rules according to which, following an investigation into the facts which could endanger the interests of minors, it may appoint another person which can independently and impartially represent the interests of minors, counteracting the act of alienating property to the detriment of minors.

With regard to the decision of the national civil court in the context of challenging the act of alienation of property of minors, the European Court noted that it did not take into account the allegations of lack of validity and opportuneness of the Centre's decision to approve the transaction which proved to be detrimental to minors. At the same time, the

non-fulfillment of the Centre's obligation to protect the best interests of minors in the context of concluding the real estate transaction was not debated.

For the above mentioned reasons, the European Court unanimously assessed the violation of the protection of property, the best interests of the minors being taken into account in the subsidiary by the State authorities who had the obligation to take the necessary steps to protect children, according to domestic and international standards.

The rights of people with disabilities

As a result of the interaction between physical or mental deficiencies and the environment, disabilities are limitations (of physical or mental nature) that make people vulnerable on the one hand because of the difficulties they bring to their daily lives, on the other hand because of prejudice or stereotype images cultivated by society in relation to people with disabilities. Regarding their rights, people with disabilities suffer the consequences of discrimination given that the mental and behavioral patterns set in the collective thinking are often focused on social, medical and charitable issues to the detriment of advancing a *human rights-based approach* [18]. The social, medical or charitable perspective places the individual in a subordinate position in which he is considered a passive subject, incapable of establishing a conduct and an autonomous direction of action. In contrast, the human rights-based approach aims to present the person with disabilities as the holder of rights, as an active subject, involved in social issues.

The protection of property rights acquires a special significance in relation to persons with disabilities given the fact that the entire content of the property has a superior utility than to provide material means to persons with disabilities; guaranteeing property means to grant, in favor of persons with disabilities, a status with the adjacent effect of combating social exclusion and marginalization.

In the case of *Béláné Nagy v. Hungary* [19], the European Court is examining the specific features of the protection of property by reference to the national regulatory system which makes it possible to change the criteria for granting a disability pension and to take into account the particularities of persons with disabilities. In fact, the applicant alleged that, as a result of the application of a legislative reform amending the parameters for granting the invalidity allowance, her right to protection of property had been infringed. [20] In drawing up the general theoretical framework of the principles applicable to the case, the European Court identified the following: (1) the protection of property enshrined in Article 1 of Protocol 1 of the European Convention on Human Rights does not create, *de plano*, the right to acquire property nor does it establish a certain amount of the right to a pension /allowance; (2) conventional law does not restrict the possibility for State Parties to decide on *the type of social security system*; (3) to the extent that, at national level, the payment of a social benefit is conditional on the applicant fulfilling certain legal conditions, the relevant national legislation is capable of generating a property right falling within the scope of Article 1, Protocol 1 to the Convention. [21]

By means of case-law the Court has developed the circumstances in which the protection of private property of individuals with disabilities may be invoked in judicial courts, emphasizing that, given their mental and physical vulnerabilities, the income granted by the State in the social security system is, as a general rule, the means of their subsistence. This does not present incompatibilities with the possibility for the State to reduce the amount of social security rights to the extent that the regulatory system changes as a result

of social developments, but if a social benefit previously earned by the beneficiary is reduced or ceases to be granted – this may constitute an infringement of the right to property within the meaning of Article 1 of Protocol 1 to the Convention. [22] The right to a pension for people with disabilities is based, from a legal and social point of view, on the idea that an individual with a disability cannot continue his or her workplace commitments due to his or her state of health. The aspects that shape the state of disability that affect a person's work capacity are variable and evolving, they cannot be decided in an absolute and immutable way. [23] However, any interference with social rights due to persons with disabilities must have a clear legal source, must be legitimized by the public (general) interest and must be proportionate to the legal purpose pursued. [24]

In examining all aspects of the case, the European Court held that the applicant had a *legitimate expectation* that she would continue to claim disability pension rights in the future, given that she had complied with the administrative requirements of the law in force (the contribution due by the applicant to the social security system was collected by the authorities during the period in which the applicant was active on the labor market – until the moment of acquiring the disability); the change in the legal requirements under which the right to a disability pension is granted has led to a lack of disability benefits, without this having a concrete impact on the state of health of the applicant.

Reiterating the exceptional hypotheses – which allow interference in the exercise of the right to a disability pension – the European Court considers it necessary to refer to the element relating to *the proportionality between the interference made by national authorities in exercising the right and the general interest pursued by that interference*. If the general interest (protection of the social security system at national level) is undeniable, the requirement of proportionality must be scrutinized. The European Court builds on a complex legal argument for the recognition of a clear disproportion, which results from at least two aspects: (1) the new regulatory framework setting out the eligibility requirements of the beneficiaries of the social security system establishes conditions which impose on the applicant an obligation which is impossible to fulfill (requesting that, in the past, the applicant make a contribution to the social security fund in a higher amount than that specified in the previous regulations); (2) under the new rules, the applicant was completely (and not proportionately) deprived of the right to a disability pension which she had earned under the previous legislation. [25] Although the legislative change in the social field is in line with the protection of the general interest, with a view to ensuring the stability and efficiency of the national social security system, the European Court found the failure to meet the standard of proportionality in relation to the interference with the protection of the applicant's property and the ultimate objective of guaranteeing the public interest, thereby infringing Article 1 of Protocol 1 to the Convention.

Conclusions

The peculiarity that gives precedence to the right to property compared to other fundamental rights and freedoms of the individual is that it brings together in its content civil and political elements (the individual's vocation to own property is possible under a democratic regulatory framework) and economic, social and cultural aspects (by its essence, property has an economic, pecuniary content). In the same theoretical key, the protection of property evokes at least two directions of analysis: (1) the protection of the right holder in order to guarantee the exercise of all the attributes of the right to property (the State being

held by positive and negative obligations in order to guarantee the exercise of possession, disposition and use); (2) the protection of the object of the property, respectively the assurance of the integrity and the good use of the values that form the property.

In this paper we addressed the duality of theoretical premises associated with the study of property from the *perspective of biological, physiological or social characteristics* specific to vulnerable groups (women, children, individuals with disabilities). The vulnerabilities of the owner of the property generate, in relation to State obligations, duties of additional diligence, being exacerbated in particular the dimension of positive obligations, which imply direct action on the part of the State agents. The margin of appreciation recognized by the European Court in favor of State authorities cannot be contrary to the concern for the specific social status of vulnerable persons, the solutions put forward by the European Court are usually sensitive to the personal characteristics of the right holders.

References

[1] Aida Grgiæ, Zvonimir Mataga, Matija Longar, Ana Vilfan, *The right to property under the European Convention on Human Rights A guide to the implementation of the European Convention on Human Rights and its protocols,* Human rights handbooks, No. 10, p. 5.

[2] European Court of Human Rights, Guide on Art. 1 of Protocol no. 1 to the European Convention on Human Rights, Protection of Property Updated April 30, 2020, p. 33.

[3] Judgment of the European Court of Human Rights pronounced in the *case Molla Sali v. Greece*, case no. 20452/14, on December 19, 2018.

[4] See paragraphs 82 to 83 of the Judgment.

[5] See the judgment of the Court pronounced in the *case Fábián v. Hungary*, case no. 78117/13, paragraph 112, September 5, 2017.

[6] See the judgment of the Court pronounced in the *case Parrillo v. Italy*, no. 46470/11, paragraph 211, 27 August 2015.

[7] See paragraph 127 of the judgment of the European Court pronounced in the *case Molla Sali v. Greece*, case no. 20452/14, on December 19, 2018.

[8] See the Court's reasoning on the case-law in the judgment pronounced in the *case Škorjanec v. Croatia*, case no. 25536/14, paragraph 55, on March 28, 2017; the judgment pronounced in the *case Weller v. Hungary*, no. 44399/05, paragraph 37, on March 31, 2009; the judgment pronounced in the *case Stummer v. Austria* no. 37452/02, para. 88, 2011.

[9] See paragraphs 154 to 156 of the judgment pronounced in the *case Molla Sali v. Greece*, case no. 20452/14, on December 19, 2018.

[10] For further details, see paragraphs 34-36 of the Explanatory Report to the Council of Europe Framework Convention on the Protection of National Minorities, p. 5.

[11] For further details, see the judgment of the Court in the *case Odièvre v. France*, application no. 42326/98, dated February 13, 2013.

[12] For further details, see: the judgment of the Court in the *case Pla and Puncernau v. Andorra*, application no. 69498/01, on December 15, 2004; the judgment of the Court in the *case Marckx v. Belgium*, application no. 6833/74, dated June 13, 1979.

[13] According to Article 1 of the UN Convention on the Rights of the Child, *For the purposes of this Convention, a child shall be understood to mean any human being under*

the age of 18 years, except in cases where the law applicable to the child is limited to the age of majority.

[14] See the judgment in the *case Zaieț v. Romania*, application no. 44958/05, dated 24 March 2015. It is clear from all the circumstances of the case that the applicant's situation was analyzed by taking into account her status as a child adopted by the pre-deceased mother at the time when the applicant's sister, who also was adopted by the pre-deceased mother, – brought the action for annulment of the adoption in relation to the applicant. The legal stake in the action for annulment of the adoption (brought by the applicant's sister) was the alteration of her succession vocation on the land included in the estate of the deceased adoptive mother.

[15] The judgment pronounced by the European Court of Human Rights in the *case S.L. and J.L. v. Croatia*, application no. 13712/11, on May 7, 2015.

[16] Every natural or legal person has the right to respect for his property. No one shall be deprived of his possessions except in the public interest and under the conditions laid down by law and by the general principles of international law.

[17] Paragraph 59 of the Judgment pronounced by the European Court of Human Rights in the *case S.L. and J.L. v. Croatia.*

[18] According to The Convention on the Rights of Persons with Disabilities Training Guide Professional Training Series No. 19, United Nations, New York and Geneva, 2014, pp. 7-10: the social approach treats disability in terms of a condition that appears exclusively as as a result of the interaction between the individual and the environment; the medical approach considers that disability is a form of a chronic illness that requires ongoing therapeutic conduct while the charitable approach focuses on the difficulties people with disabilities have in procuring subsistence.

[19] Judgment of the European Court of Human Rights pronounced in the *case Béláné Nagy v. Hungary*, application no. 53080/13, on February 10, 2015, final on December 13, 2016.

[20] Paragraph 3 of the judgment in question.

[21] Paragraphs 34 to 36 of the judgment pronounced by the European Court of Human Rights in the *case Béláné Nagy v. Hungary*.

[22] See, in detail, the judgment pronounced by the European Court of Human Rights in the *case Wieczorek v. Poland*, application no. 18176/05, on December 8, 2009, final on March 8, 2010.

[23] Paragraph 67 of the judgment pronounced by the European Court of Human Rights in the *case Wieczorek v. Poland*, application no. 18176/05, on December 8, 2009, final on March 8, 2010.

[24] Paragraph 39 of the judgment pronounced by the European Court of Human Rights in the *case Béláné Nagy v. Hungary*.

[25] See paragraphs 40 to 57 of the judgment pronounced by the European Court of Human Rights in the *case Béláné Nagy v. Hungary*.

SEA/RIVER SHIP AS PROPERTY INCLUDED IN THE ESTATE

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Abstract
Although considered movable property, the ship at the time of construction of the record of this contract, the acquisition of charges on its behalf both at that time and subsequently under the conditions of voyage and commercial operation has the characteristics and is treated as immovable property. The communication shall list the situations of regulated practice as regards the legal status of the ship in relation to this position. In this capacity of movable property but under the conditions of existence and real estate treatment, we concluded the possibility of its belonging to the estate.
Keywords: *ship, nationality, registration, harbour master, naval authority, shipbuilding contract, pledge, mortgage, succession*

The sea-going or river-going ship is defined in a specialised dictionary [1] as a 'floating construction with towed or stationary own propulsion intended to fulfil, respectively, the a priori function of transport and activities specific to the aquatic environment'.

Ordinance on maritime and inland waterway transport (GO no. 42/1997) republished (Official Gazette no. 210/10.03.2004) in Article 23 does not define the term 'ship' but lists what would be in the interest of the ship „sea-going and inland waterway ship of all propelled or non-propelled types, operating on the surface or submerged, intended for the transport of goods and/or persons, fishing, towing or pushing, as well as other activities on the water. The United Nations Convention on the Conditions of Registration of Ships, 1986, and in connection with the registration operation, defines as a ship any motor ship used in the maritime trade for the carriage of goods and/or passengers, with the exception of ships of less than 500 gross tonnes. Also, the 1924 Hague Rules as well as the Hague-Visby Rules, which regulate the unification of some rules in the matter of the bill of lading, define the term „ship" any vessel used for the transport of goods by sea. In addition, the International Convention on Maritime Rescue of 1989 specifies that rescue operations shall mean any act or activity undertaken with a view to providing assistance to a ship or to any other property in distress in navigable waters, in accordance with the law on salvage, which means any ship or craft or any structure capable of navigation. [2]

From a legal point of view, the ship (the vessel) according to the Romanian Commercial Code (R.C.C.) regulating their status, defines them in Article 490 paragraph (1) as movable property considering „as part of the vessel: the boats, the tools, the instruments… the supplies and generally all the things intended for its permanent use even if they were some time separated from the vessel". Further to the regulation of art. 491, 492 and 493 of the Commercial Code shall take into account the contracts for the construction of the ships, the declarations and assignments of participation in the ownership of a vessel under construction, as well as the total or partial alienation or assignment of the owners or the use of a vessel as operations to be carried out by written act with its inscription in the nationality act of the vessel concerned; such documents shall also be mentioned in the

documents of the harbour master where the vessel is registered. Although the Commercial Code underlines these formalistic features as regards the ship, which requires at least a more careful approach to the issue of its legal state, however, an older case-law from 1901 considers the ship as a movable asset subject to the rules of common law regarding the succession: „Although for various interests of public and maritime law the ships have been treated somewhat as natural persons being granted a nationality, a name and a kind of domicile designated port d 'attache, this does not change their legal situation in terms of succession, but they remain in this regard movable assets in the estate of the deceased and subject to the same rules as the other tangible or intangible assets. – Dr. page 730"Ilfov Court of Law, 19 March 1901, published in M.a.Dumitrescu"Codu de comerciu…..", vol. II, page 505 [3]

Things are not that simple and the quoted jurisdictional solution is not correct. If we look at a ship in comparison to other movable property, it is clear that it is necessary to position the legislator towards the adoption of a special regulation on the merchant ship. Criteria have thus been established which contribute to the classification of the legal regime of the ship:

'(a) The ship is a valuable movable asset of international value; it attends foreign ports, has debts and can be seized, may be shipwrecked and may be lost both the goods found on the ship and itself in a very short period of time.

(b) the ship, although movable property, is regarded as a registered asset, not falling within the general status of the movable property;

(c) The sale or pledge of a ship with mortgage or pledge shall take effect only if certain formalities have been complied with;

d) The ship is compared with a living person, having as such a name that designates it, a nationality or a specific domicile that of the port of registration;

e) The ship is mobile by its very definition because not only can it be moved but it often travels by its own means on board. Reference can also be made to the more complex procedure established by the Romanian Commercial Code regarding the sale at auction of a pledged ship or its forced prosecution at the request of any creditor." [4]

It was not by chance that it was discussed the ownership of a ship in French literature that it was pointed out that the status of the property is very similar to that of the buildings. It is necessary to organise advertising of the rights in rem which they concern. For this reason, the transfer of ownership of the ship requires publicity by means of a public register comparable to the registration of rights in rem over a building; moreover, the mortgage institution is applicable to the ships and the rules on seizure are copied in accordance with the rules on the seizure of property.[5]

Plastically, the ownership of the maritime/river ship was characterized as having a movable nature and a real estate condition. In the case of a ship, rights in rem may also be transferred by succession or by donation where they are transferable; the transfer by legal succession or testamentary will must give rise to publicity, the reputation of the transfer of ownership being ensured only under the conditions strictly laid down by the registration and registration of ships.

The ship is distinguished by five elements: a name or registration number through the port of location of the ship, the so-called port of sidecar by nationality due to the flag it is entitled to fly, its own tonnage and its own class of register. GD42/1997 refers only to

elements: name, attachment port and tone. According to art. 53 [3] paragraph (1) maritime and inland waterway ships of any type...shall be individualized by a name proposed by the owner and approved by the Romanian Naval Authority. Ships which are not self-propelled and which are listed in that Article, as well as recreational craft, shall be identified by a number assigned by the same naval authority; if the owner so requests, he may also be given a name on a proposal from the owner and approved by the NRA. Beyond the inscription of that name and number on the hull of the ship, this data shall also be mentioned in the ship's equipment as a means of escape. The stern of the ship shall bear the name of the port of registry. The port of the ship's sidecar expresses a permanent link between it and the port of registry and is defined as the fixed point of connection where all information concerning the ship is gathered. Obviously, the port in question is located on the territory of the state whose flag the ship carries. From this rule there is the exception for ships belonging to a state without a coastline that may have a port of sidecar and registered abroad.

As regards the nationality of the ship, which is indissoluble to the right to fly the flag of that State, the provisions of the United Nations Convention on the Law of the Sea – UNCLOS of Montego Bay of 1982 ratified by Romania by Law no. 110/1996. The Convention establishes as a necessary requirement the existence of a „substantial link" between the State and the ship which allows them to carry a flag. It is combated by these provisions and the practice of so-called „flags of convenience", practice even if it is of tradition (such as the states of Panama and Liberia) but which over time have facilitated maritime frauds, the lack of effective control by the authorities that coordinated the flag with great problems and with an economic and social aspect regarding the safety of navigation.

According to Government Ordinance no. 42/1997, the right to raise the Romanian flag is granted on behalf of the Government by the Ministry of Transport through the Romanian Naval Authority; the mentioned normative act also establishing the category of ships to which this right is granted.

The right to fly the Romanian flag as a procedure is granted by the Romanian Naval Authority through the harbor captains; thus the ship is listed in the registration registers, the nationality document of the ship is issued and after its issuance, the harbour master communicates to the NRA the data for centralization in the Register of centralized records of the ships flying the Romanian flag. In other words, the right to fly the Romanian flag and the conferral of Romanian nationality is established by an act of nationality. The establishment, transmission and extinction of rights in rem over the ship shall be subject to the law of the flag of the ship. [6] The applicability of the law also covers goods that are sustainably on board (technical equipment/armaments) as well as claims relating to expenses incurred for the technical assistance, maintenance, repair or refurbishment of the ship. An essential element in relation to the subject under consideration is also the class of the ship's register and an attestation allowing the determination of the method of construction, age, degree of maintenance relating to the ship, machinery, plant and equipment. All this should be in accordance with the standards laid down in the relevant international rules. The classification proves the security status of the ship and constitutes an important identifying factor for the conclusion of chartering or transport contracts, which is why the operation itself is the responsibility of special classification societies recognized worldwide. It must be understood that in practice there is an important link between

registration, i.e. the granting of the right to fly the national flag, and the existence or otherwise of classification.

The ownership right over the merchant ship are the sale-purchase, the contract for the construction of a new ship and as a secondary way of acquiring ownership are also the acquisition of property through the dissolution of the belonging legal entity through the abandonment of the ship made by the insured to the insurer and in case of war the maritime intake; obviously the requisitions by the state, respectively the confiscation allowed in case of contraventions to the tax laws, are not excluded. Any total or partial alienation or assignment of the property of a ship must be carried out according to art. 493 by written document either authenticated or under private signature. According to Article 499 para. (2) C.com. the alienation „has no power" over the third one only from the date of its annotation on the nationality act of the ship. Proof must always be furnished that the ship is free of any claims or that there are documentary claims in which case the acceptance of the new owner to take it over under these conditions is necessary. The captain of the sidecar port shall submit to the naval authority the documents for the approval of the change of the nationality certificate if the sale-purchase operation entails the loss of the right to fly the Romanian flag.

The sale-purchase contract is a bilateral contract, for valuable, commutative, translative ownership. Beyond the conditions imposed by the Civil Code regarding the validity of a convention in the case of a maritime ship, the provisions of Article 691 of the Commercial Code regarding the notification of certain data regarding the date and type of its title, the transcription data of the title and the annotation on the act of nationality; the name of the author/seller; the identification data of the ship name (name, type, capacity), agreed price or any other task imposed on the purchaser; the list of the creditor.

Ownership of the merchant ship shall also be acquired by the contract for the construction of the merchant ship which is a document to be entered in the special record. A future sales contract is concluded between the shipbuilder/shipyard and the beneficiary customer (shipowner). The Romanian Naval Authority grants the building permit after verifying the copy of the contract and the technical approval previously issued. The provisions of art. 16 and art. 26 para. (1) of GO no. 42/1997. If a credit has been obtained for the performance of the work by pledge or mortgage, the applicant shall also submit a copy of the Articles of Association.

The bottom line is that from the point of view of the record, what characterises the ship under construction as an immovable good is that practically the captain of the port where the shipyard is located transcribes the construction contract into the registers of ships under construction and thus becomes opposable to the third party. This register shall also show any transfers of ownership and any rights in rem established or extinguished in respect of ships. Obviously, there is also a centralized record of the ships under construction and according to Article 51 para. (11) an entry is also made in the act of nationality.

GD42/1991 provides that any establishment or transfer of real rights over ships and the extinction of these rights that are not transcribed in the registers established by law at the level of chief, respectively the Romanian Naval Authority, are not opposable to third parties [(art. 51 para. (1) and art. 51 par. 7.

Finally, it should be noted that the sea/river ship as a merchant ship may be subject to pledge, the basis of the regulation being the provisions of art. 495-496 C.com. still in force and after the regulation of the legal regime of mortgages by art. 2387 et seq. of the Civil

Code. At the same time, the provisions regarding the pledge, respectively art. 2480-2494 C.civ. taking into account the specificity of the pledge on the ship which although having as object the movable goods art. 495 C. com. also applies it as a legal regime to any merchant ship even under construction.

It is a pledge different from the one governed by common law given that it is a pledge without dispossession, the debtor owner continuing to use the ship freely to exploit it. The pledge contract which must in any case be concluded in written form must meet the conditions of opposability and publicity, which is why it is entered in the registers of the chieftains of the port of registration.

As for the mortgage on the merchant ship, according to art. 2343 Civil Code, the mortgage is „a real right over the movable or immovable property affected by the execution of an obligation". The mortgage is a real accessory right; the holder may exercise a preferential right to the payment of the debt by passing ahead to the unsecured creditors, constituting at the same time a right to pursue the property in the hands of third parties. Although it is considered movable property, as we have seen above in accordance with the provisions of the Commercial Code, the ship may nevertheless form the object of a mortgage if there is an agreement to that effect between the creditor and the debtor owner. There are various situations regarding the capacity of creditor. For example, it may even be the shipbuilder in the context in which it was agreed to pay the construction price in successive instalments for the amount still due after the handover of the ship to the indebted customer shipowner. The mortgage is drawn up in authentic form under the sanction of nullity; it is opposable to third parties, which is why publicity formalities must be carried out; the publicity is ensured by the registration in the registers of the port of registration of the ship and the annotation in the nationality document (registration certificate).

It should be mentioned that Romania has ratified only the International Convention for the Unification of Certain Rules on Maritime Privileges and Mortgages Brussels 10.04.1926 ratified by Law no. 43/1937 published in the Official Gazette no. 60/13.03.1937 [7] although a more modern Convention was adopted in the meantime, namely the International Convention on Maritime Privileges and Mortgages (1993). I would point out that the 1993 Convention is not such as to make changes to the ownership or registration in procedural terms as to alter the advertising and enforceability of the transcription of the mortgage itself in the nationality document of the sea-going ship.

In view of the foregoing, I consider that there are sufficient arguments that the sea-going/river-going ship, movable property considered by commercial law, is in a position to be treated as immovable property in the course of the succession proceedings.

References

[1] Romanian Academy. The terminology commission for the hard sciences. Explanatory dictionary for science and technology. Shipping (2009), Bucharest, Agir Publishing House, p. 167.

[2] Anechitoae Constantin (2011), Introduction to International Maritime Law, 4th edition, Bucharest, Bren Publishing House, p. 179.

[3] Marin Voicu, Maria Veriotti (1887-2001) Romanian maritime case-law, Bucharest, Lumina Lex Publishing House, p. 149.

[4] Marin Voicu (2002), Institutions of maritime law, Constanța, Ex ponto Publishing House, p. 370-371.

Martine Renaurd – Gouilloud Maritime law 2nd edition, Paris A.Pedone (1993), p. 47.

[5] Rene Rodiere, Emmanuel du Pontavice, Maritime law, 10th edition, Paris D'alloz Publishing House, (1986), pp. 86-87.

[6] For details see Gh.Piperea, Transport Law, 3rd edition (2013), Bucharest, C.H. Beck, p. 155-158.

[7] Marin Voicu, Matia Veriotti, International Maritime Conventions vol. I (1999), Constanța, Ex ponto Publishing House, p. 311-315.

Section F

THE TRANSPOSITION OF DIRECTIVE (EU) 2019/1023. THE PROCEDURE OF RESTRUCTURING AGREEMENTS AND THE PROCEDURE CONCERNING PREVENTIVE ARRANGEMENTS WITH CREDITORS

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Abstract

Directive (EU) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)[1], and the transposition bill[2], aim to facilitate access to restructuring measures at the first signs of difficulty, by adopting legislative measures that allow honest entrepreneurs in a state of insolvency or over-indebted entrepreneurs to obtain a second chance, by regulating effective preventive restructuring, insolvency and debt discharge procedures.

The directive's first transposition deadline was July 17, 2021, but the member states had the possibility to extend this deadline by at most one year, a possibility also used by Romania.

Directive (EU) 2019/1023 does not impose a single restructuring procedure on the member states, and as a result Romania has chosen to regulate two preventive restructuring procedures: the restructuring agreement procedure and the preventive arrangement with creditors procedure.

Keywords: *Directive (EU) 2019/1023, financial difficulty, early warning, preventive restructuring procedures, restructuring agreement procedure, preventive arrangement with creditors, insolvency*

1. Directive (EU) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

Directive (EU) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, in short *The Directive on Restructuring and Insolvency*, emphasizes early restructuring, by means of accessible procedures, with the lowest possible costs, which allow entrepreneurs to restructure at an early stage after the emergence of difficulties, in order to prevent insolvency and to restore the viability of the business they run as soon as possible.

Implementation of Directive (EU) 2019/1023 in national legislation, by amending the provisions of Law no. 85/2014, puts the concept of prevention, as well as that of restructuring in a new light.

Pre-insolvency and insolvency procedures are regulated in national legislation currently in Law no. 85/2014, which includes both the two insolvency prevention procedures: the ad hoc mandate and the preventive arrangement with creditors procedure, as well as insolvency proceedings, after the state of insolvency has set in and the syndic judge has opened proceedings against the debtor[3].

Thus, currently, insolvency prevention procedures are *the ad hoc mandate and the preventive arrangement with creditors.* Unfortunately, neither of these two procedures is popular with debtors in difficulty and their creditors, given the extremely low number of cases registered in the courts.

If the ad hoc mandate is a confidential procedure, similar to a negotiation, in which an ad hoc trustee, appointed by the court at the request of the debtor, negotiates with creditors in order to reach an agreement between one or more of them and the debtor, in order to overcome the state of difficulty in which the debtor is found, the preventive arrangement with the creditors is an insolvency prevention procedure, which involves the negotiation of business restructuring conditions, and the conclusion of a contract between the debtor in financial difficulty and the creditors who hold at least 75% of the value of the accepted and uncontested claims, approved by the syndic judge, contract whereby the debtor proposes a recovery plan, and a plan to achieve the claims of these creditors, and the creditors agree to support the debtor's efforts to overcome the difficulty in which his company is found, in order to cover the liability and to save the debtor in financial difficulty[4].

In the context of the operations that the transposition of the *Directive on Restructuring and Insolvency* entails, an in-depth analysis of the efficiency and effectiveness of the restructuring procedures in Romania, both of the pre-insolvency ones, was carried out, as well as those of judicial reorganization, the analysis taking into account, on the one hand, judicial practice and relevant doctrine, and on the other hand, questionnaires, interviews and consultations with stakeholders from the private and institutional environment.

According to the results of this analysis, Romanian companies postpone entering into insolvency for an interval of 3-4 years, for fear of failure, of the difficulty of starting a new business, of the stigma brought by such a procedure, so that the debt recovery rate drops considerably, and the costs of these recoveries increase.

Practice has shown that insolvency prevention procedures, although they have been regulated since 2009, considering Law no. 381/2009 regarding the introduction of the preventive agreement and the ad hoc mandate, are rarely accessed[5].

If Law no. 381/2009 did not achieve its stated purpose in Article 2, namely the safeguarding of companies in difficulty, with a view to continuing their activity, preserving jobs and covering debts, through amicable procedures to renegotiate the claims or their conditions, or by concluding a preventive arrangement with creditors, subsequently, it was proven that neither the preventive procedures regulated by Law no. 85/2014 are a viable solution.

Thus, if the ad hoc mandate is extremely rarely used in practice, the number of preventive arrangements with creditor procedures is relatively higher, but still, the very small number of arrangements with creditors (between 2010 and 2019, just over 80 procedures, with a success rate of 8.75%) is an indication of the existence of structural deficiencies in the regulation of these prevention procedures.

Among the main causes that have been identified and are considered to have determined the failure of these procedures and the low level of interest, are late appeal to

these procedures, lack of negotiation culture, lack of knowledge of the procedures, and the advantages brought by the prevention procedures.

The changes that took place in 2020, against the background of the worldwide epidemiological situation, caused an important change in the perception and reactions of companies, which are increasingly turning their attention to prevention mechanisms, such as the preventive agreement or the available tax facilities for the restructuring of budgetary obligations.

As a result, the restructuring market in Romania is developing, and the entrepreneurial environment is starting to move towards non-insolvency restructuring methods, even from the first signs of difficulty.

In order to support this trend of accessing restructuring measures, it is necessary to create an appropriate regulatory framework, adapted to the specifics of the Romanian market.

Directive (EU) 2019/1023 aims to create clear, simple and efficient restructuring procedures, to encourage companies and creditors to resort to restructuring at the first signs of difficulty, to increase the chances of business recovery, to increase the efficiency of the procedures, to reduce the duration in which they take place, to decrease the costs generated by the procedures and to maximize the degree of debt recovery.

The Directive on Restructuring and Insolvency applies in all 27 member states of the European Union, in versions adapted to the socio-cultural and economic context specific to each state.

As a result, the draft Law for the amendment and completion of Law no. 85/2014 on insolvency and insolvency prevention procedures and other normative acts has as its object the transposition of Directive (EU) 2019/1023, by integrating its provisions into Law no. 85/2014, by amending GEO no. 86/2006 on the organization of the activity of insolvency practitioners[6], as well as the completion of Article 73 of the Companies Law no. 31/1990, republished, with subsequent amendments and additions[7].

2. Accessing restructuring procedures

According to the provisions of Article 5 26²), in the form proposed by ***The bill to amend Law no. 85/2014:*** „the **difficulty** is the state generated by any circumstance that determines a temporary impairment of the activity, which gives rise to a real and serious threat to the debtor's future ability to pay his debts when due, if appropriate measures are not taken; the debtor in difficulty is able to perform his obligations as they become due".

And, according to **Article 6 (1) and (2)** in the form proposed in ***The bill to amend Law no. 85/2014:***

"*(1) The insolvency prevention procedures, provided by this title, apply to debtors in difficulty, but who are not insolvent.*

(2) The debtor will prove the fact that he is in difficulty through the report drawn up by the restructuring administrator or the administrator of the arrangement with the creditors, which will include at least the following elements:

a) the nature of the state of difficulty, respectively the description of the circumstance that determines the impact of the activity and the foreseen effects;

b) the internal and external factors that determined the debtor's state of difficulty;

c) the main financial indicators justifying the existence of a threat to the debtor's future ability to pay their debts when due;

d) the reason why the difficulty cannot be considered naturally reversible by continuing the debtor's planned business without taking appropriate recovery measures".

The legal definition of difficulty shows that the debtor in difficulty is the one who is in danger of not being able to fulfill his obligations as they become due in the future, if he does not take appropriate measures.

Regarding difficulty, the draft, in accordance with the provisions of recital 28 of the preamble of Directive (EU) 2019/1023, proposes to expand the scope of situations in which a debtor can access pre-insolvency procedures by including non-financial difficulties in the broader category of difficulty.

Recital 28 of Directive (EU) 1023/2019 establishes that: „Member States should be able to extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer".

As can be seen, no term is provided to constitute a landmark relative to the relevant period. As a result, the restructuring administrator or, as the case may be, the administrator of the arrangement with the creditors has the task of analyzing and quantifying the relevant time frame from the perspective of the impact on the viability of the business.

Regarding the proof of the state of difficulty, the provisions of Article 6 establish that the proof of the state of difficulty will be made through a report drawn up by the restructuring administrator or by the administrator of the arrangement with the creditors, as the case may be, and the syndic judge is the one who is responsible for analyzing the report on the debtor's state of difficulty.

According to **recital 26 of Directive (EU) 2019/1023**, access to preventive restructuring procedures should be based on a test of the debtor's viability: „Member States should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive. Such a test should be carried out without detriment to the debtor's assets, which could take the form of, among other things, the granting of an interim stay or the carrying out without undue delay of the test. However, the absence of detriment should not prevent Member States from requiring debtors to prove their viability at their own cost".

Thus, the viability test would contribute, along with other elements provided by recital 24 of Directive (EU) 2019/1023, to avoiding the abusive use of preventive restructuring frameworks.

3. The Restructuring Agreement

According to the definition regulated by **Article 5** *431)***,** in the form proposed in the ***Draft amendment to Law no. 85/2014***, „**the procedure of the restructuring agreement** represents the insolvency prevention procedure by which the debtor submits to the syndic judge for confirmation a restructuring agreement negotiated in advance with the creditors whose claims are affected and approved under the terms of this law, on the basis of which they recover their activity and fully or partially pay their affected receivables in the period established by the restructuring agreement".

The content of the agreement must comply with the provisions of **Article 15²**, since it will be the object of the checks carried out by the syndic judge in the confirmation stage, and the possible reasons for its illegality may determine it to be rejected.

After confirming the agreement, it will be communicated under the conditions of **Article 15³ (1)**, will be negotiated with creditors, in accordance with **Article 15³ (2)**, it will be subject to the vote of the affected creditors, and later, to confirmation by the syndic judge. The next stage is implementing the agreement, monitoring the implementation with the help of the restructuring administrator, and the last stage is the conclusion of the agreement.

4. The Arrangement with Creditors

According to the definition regulated by the provisions of **Article 5 44***1) in the form proposed in the Draft amendment to Law no. 85/2014*, „**the procedure of the arrangement with the creditors** represents the judicial procedure to prevent insolvency, the opening of which suspends foreclosures under the terms of this law, with the debtor recovering their activity and fully or partially paying their affected claims based on a restructuring plan voted by the creditors whose claims are affected, as approved by the syndic judge".

Unlike the restructuring agreement procedure, the judicial stage of which only involves the confirmation of the agreement by the syndic judge, the previous negotiations being essentially extrajudicial, the arrangement with the creditors procedure knows the judicial stage both before the approval, and after the approval.

From the opening of the preventive arrangement with the creditors procedure, by the syndic judge, at the request of the debtor, and the appointment of the administrator of the arrangement with the creditors, all ongoing enforced executions are automatically suspended. The suspension is maintained for a period of 4 months or, as the case may be, less than 4 months, until the approval of the restructuring plan or, until the closure of the procedure, if it takes place in a period shorter than 4 months.

The restructuring plan must be drafted, negotiated and voted within 60 days from the opening of the arrangement with the creditors procedure. Once with the judicial decision of validation comes the *de jure* suspension of all forced executions. The validation of the restructuring plan takes place in the boardroom, with the summons of the administrator of the arrangement with the creditors, the judgment taking the form of legal proceedings. The validation request can be rejected only for legality reasons.

The legal deadline during which the restructuring plan can be implemented is of 48 months, with the possibility to extend it for another 12 months. The supervision of the implementation of the restructuring plan is made by the administrator of the arrangement with the creditors throughout its development.

From the ate of the opening of the procedure of the arrangement with the creditors and throughout the negotiations, up until the validation, all interest, late penalties, and any other expenses related to the affected receivables is suspended *de jure.*

The insolvency procedure cannot be opened while the agreement with the creditors procedure is ongoing.

IN CONCLUSION, the procedures provided by the draft law of transposing Directive (EU) 1023/2019 but also of implementing early warning solutions, will contribute to avoiding the loss of employment, limiting the negative impact on the financial sector.

Early restructuring can present certain advantages: a high degree of debt collection, a faster method of collecting debt and with a lower costs, which will allow the prevention of the entry into insolvency and the maintenance of the viability of the business. By maintaining the activity of a company, jobs are kept, taxes are generated and paid, and the cost of the probable insolvency proceedings is avoided.

Directive (EU) 1023/2019 is considered an opportunity by which the member states of the European Union will rethink and implement new restructuring mechanisms for companies experiencing financial difficulty.

According to the Directive, the viable enterprises in financial difficulty must have access, in an early stage, to national, effective mechanisms of preventive restructuring, and to early warning instruments that will allow for the detection of the circumstances that will give rise to the possibility of insolvency, and that will warn the debtors of the necessity to act without delay; honest entrepreneurs in a state of insolvency of over-indebtedness must benefit from a second chance, through debt relief after a reasonable amount of time has passed; and the proceedings of preventive restructuring, of insolvency, and of debt relief must become more efficient, especially by reducing their duration, and through digitalization[8].

Bibliography

[1] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Published in OJ L 172 of 26 June 2019, available at: https://eur-lex.europa.eu/eli/dir/2019/1023/oj.

[2] The draft law for the amendment of Law no. 85/2014 on the insolvency prevention and insolvency proceedings can be found at *http://www.just.ro/update-2-iunie-2021-proiectul-de-lege-pentru-modificarea-si-completarea-legii-nr-85-2014-privind-procedurile-de-prevenire-a-insolventei-si-de-insolventa-transpunerea-directivei-p/.*

[3] Law no. 85/2014 on the insolvency prevention and insolvency proceedings, modified, published in the Official Gazette of Romania no. 466 of 25 June 2014.

[4] In accordance with section 27 of Article 5 of Law no. 85/2014, „*a debtor in financial difficulty* is the debtor that, although performing or is capable of performing the obligations due, has a low short-term liquidity and/or a high long-term indebtedness, which may affect the fulfillment of contractual obligations in relation to the resources generated by the operational activity or with the resources attracted by the financial activity".

[5] Law no. 381/2009 was published in the Official Gazette of Romania no. 870 of 14 December 2009, with multiple subsequent modifications, at present repealed by Article 344 b) of Law no. 85/2014.

[6] GEO no. 86/2006 on the reorganization of the activity of insolvency practitioners, republished in the Official Gazette of Romania, Part I, no. 724 of 13 October 2011, with subsequent modifications.

[7] Company Law no. 31/1990, republished in the Official Gazette of Romania, Part I no. 1066 of 17 November 2004, with subsequent modifications.

[8] According to Recital 1 of Directive (EU) 2019/1023: „The objective of this Directive is to contribute to the proper functioning of the internal market and remove

obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length".

IMPLICATIONS OF INSERTING THE CLAUSE TO CONTINUE THE ACTIVITY WITH THE HEIRS OF THE DECEASED ASSOCIATE IN THE ARTICLES OF ASSOCIATION OF THE LIMITED LIABILITY COMPANY

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Abstract

The present study aims to bring to the fore the consequences of inserting in the articles of association of the limited liability company the clause regarding the possibility of continuing the activity with the heirs of the deceased associate or, on the contrary, the one concerning the explicit or implicit prohibition of the possibility of continuing the activity with the heirs, in the context of the obscurity of the text of the law that regulates the transmission of the shares by succession. As the unclear meaning of these legal provisions has generated divergent interpretations both in doctrine and in practice, the consequences of inserting the clause which is the subject of the research, are of particular importance, especially in practice, these consequences being presented and analyzed in the study.

Keywords: *succession, clause to continue the activity with the heirs, limited liability company, intuitu personae character, shares, affectio societatis*

1. Preliminaries

As is well known, in the corporate law landscape, the limited liability company is a separate figure, a type of hybrid company, which borrows features from both capital companies and associateships, but which, at the same time, has its own characteristics that justify its autonomy. Interpreting the legal provisions, the doctrine[1] highlights mainly the following features specific to the limited liability company: the *intuitu personae* character, the association being made, therefore, based on the trust of associates, limited liability of associates for social obligations to the contribution to share capital and the division of share capital into fractions called shares, which are not represented by negotiable securities. By far, the *intuitu personae* character of this type of company is one of its most important features, a feature borrowed, obviously, from associateships. The direct consequences of this character are, on the one hand, the small number of associates, the Companies Law no. 31/1990, republished, containing the express provision in the sense of limiting to a maximum of 50 the number of associates, and, on the other hand, the characteristics of the shares to be non-negotiable securities and transferable only under restrictive conditions.

[1] See S. Angheni, *Drept comercial, Tratat (Commercial law. Treatise),* C.H. Beck Publishing House, Bucharest 2019, pp. 292-303; St. D. Cărpenaru, *Tratat de drept comercial român (Romanian Commercial Law Treatise),* Universul Juridic Publishing House, Bucharest. 2018, pp. 363-388, Gh. Piperea, *Drept comercial român, Teoria generală, întreprinderea şi insolvenţa (Romanian Commercial law, General Theory, the company, and insolvency)*, C.H. Beck Publishing House, Bucharest 2020, pp. 317-323.

2. **The clause regarding the continuation of the company's activity with the heirs of the deceased associate – consequence of the *intuitu personae* character and expression of the principle of freedom of will**

Due to its dual legal nature, the contractual one, as well as the institutional one, the commercial company, as regulated by Law no. 31/1990 on companies, republished and amended, is treated in the literature both from the perspective of the contractualist conception and also from that of the institutional conception, being appreciated, in general, that the company constitutes at the same time a contract, based on the agreement of wills of the parties, as well as a legal person, a subject of law distinct from the persons of the associates, an entity that acquires legal personality according to the law. However, the contractual nature is the predominant one, because, even if with the acquisition of legal personality the importance of the will of the associates diminishes, they can still decide on the company, under the conditions established in the articles of association and in compliance with legal provisions. The will of the associates regarding the constitution, functioning, modification and termination of the company, as an expression of the theory of contractual freedom is blurred by the need to comply with the mandatory provisions of the special law, supplemented by the provisions of the Civil Code (Article 1887 of the Civil Code).

Viewed from a contractual perspective, the company is therefore based on a contract which establishes the legal relations between the associates. The principle of freedom of contractual will presupposes, *inter alia*, the right of the contracting parties – in this case, the associates – to freely determine the content of the contract. From a formal point of view, in the case of the incorporation of a limited liability company, the legislator stipulates the need to conclude a company contract and a statute, acts that can also be concluded in the form of a single document generically called a articles of incorporation.

According to the law, the articles of association of the limited liability company contain both some clauses common to all forms of company, but also clauses specific to this form. The clause to continue the activity of the company with the heirs of the deceased associate is one of the specific clauses that the associates may insert in the articles of association under the autonomy of contractual will, but especially this is the concrete expression of the *intuitu personae* nature of the limited liability company. The possibility for the heirs of the deceased associate to take his place, becoming associates can seriously affect the personal character of the company, which is the essence of this type of company. Therefore, the associates are entitled to decide in this regard from the moment of incorporation of the company by stipulating in the articles of association of the company such a clause or, conversely, by stipulating a clause to prohibit the continuation of the company's activity with the heirs of the deceased associate. Once inserted in the articles of association, the clauses in accordance with the law, public order and good morals will have binding force under the imperative principle *pacta sunt servanda*, a principle that governs the articles of constitution of the company.

3. **Ways and conditions of transmission of company shares**

In order to analyze the implications of the clause for the continuation of the company's activity with the heirs of the deceased associate, a brief characterization of the company shares is required. As mentioned above, the shares represent the fractions into which the share capital of the limited liability company is divided and, according to the legal

provisions, they belong to the associates in exchange for the contribution they have made. Consequently, the company shares are titles of participation in the share capital, which confers the quality of associate, with all the rights, both patrimonial and non-patrimonial and the subsequent obligations. As they are not negotiable securities, they can only be transferred under restrictive conditions[2]. The doctrine rightly considered that the social parts have certain particularities with consequences in terms of their transfer. In short, these features consist of: a) the indissoluble link between the social associates, as elements of the patrimony of the associate and the company within and against which the rights attached to the quality of associate are exercised and b) the vocation of the associate to receive a part of the benefits of the company, with the consequence that the social part must be considered as a title under which the associate has a special right of usufruct over the social asset which the company owns[3].

Transmission of company shares through succession is expressly regulated by the legislator in the Companies Act, mainly by the provisions of Article 202, provisions that refer to all methods of transfer of company shares, respectively by *inter vivos* legal acts concluded between associates or third parties or by legal acts *mortis causa*[4].

Thus, in article 202 of the law, the legislator provides:

(1) *The company shares may be transferred between the associates.*

(2) *Unless otherwise provided, the transfer to persons outside the company is permitted only if it has been approved by the shareholders representing at least three quarters of the share capital.*

(3) In the case of the acquisition of a shareholding by succession, the provisions of paragraph (2) shall not apply unless the articles of association provide otherwise; in the latter case, the company is obliged to pay the share to the successors, according to the last approved balance sheet.

(4) If the legal maximum of associates is exceeded due to the number of successors, they will be obliged to designate a number of incumbents that will not exceed the legal maximum.

A first remark that must be made in connection with the legal conditions under which the shares may be transferred, regardless of the manner in which this is done, is that the legislator, taking into consideration the *intuitu personae* character of the limited liability company establishes restrictive conditions in all situations in which this character could be affected.

A first hypothesis is that of transferring the shares to third parties (assignment, donation), when it is necessary the approval of associations representing at least three quarters of the share capital, and another is the acquisition by succession (legal or testamentary) of company shares.

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[2] See also E. Veress, *Discuţii privind revocarea administratorilor şi transmiterea părţilor sociale la societatea cu răspundere limitată (Discussions regarding the revocation of the directors and the transfer of the shares to the limited liability company),* in „Dreptul" no. 9/2010, p. 96.

[3] Tec, L.M., *Consideraţii asupra transferului părţilor sociale şi al acţiunilor (Considerations on the transfer of company parts and shares)*, in the „Revista Româna de Drept Privat" Magazine no. 3/ 2017.

[4] See L. Păncescu, *Transferul de părţi sociale reglementat de Article 202 din Legea nr. 31/1990 (The transfer of company shares regulated by Article 202 of Law no. 31/1990)*, in „Curierul Judiciar" no. 7-8/2011, p. 376.

Conceived in a vague way, the legal text regarding the conditions of transmission of the company's shares by succession, generated divergent interpretations both in doctrine and in practice[5], leading to non-unitary solutions.

We consider that the interpretation to be given to paragraph 3 of Article 202 is that, in the event of the transfer of the shares by succession, the rule is that the agreement of the shareholders representing at least 3/4 of the share capital is no longer necessary, **the shares being transmitted without restrictions in the absence of a clause prohibiting the continuation of the activity with the heirs of the deceased associate.** Only in this way can the phrase '*unless otherwise provided by the articles of association' be interpreted* '; that is, by express clause in the articles of association, the associates prohibited the continuation of the activity with the heirs of the deceased associate, Having regard to the second sentence of Article 202 (3), in which the legislature states that *in the latter case the company is obliged to pay the share to its successors in accordance with the latest approved balance sheet.* In other words, only if the associates have inserted a clause prohibiting the continuation of the activity with the heirs of the deceased associate, the company will be obliged to pay them the value of the shares; In this case, the heirs of the deceased associate do not acquire, therefore, the quality of associates through the inheritance of the shares, but will have only a right of claim on the value of the shares. Moreover, the associates could not even forbid the actual transmission of the shares to the heirs, the successors of the deceased associate having a vocation to acquire them from the moment of opening the succession, provided that it is accepted. Thus, according to the provisions of Article 963 of the Civil Code, the inheritance is opened on the date of death of the person. However, the shares are acquired by the heirs of the deceased associate by right, on the date of acceptance of the inheritance. In practice, the clause prohibiting further business with heirs may take various forms, such as: *stipulating the fact that, in case of the death of an associate, the company will continue its existence with the remaining associates or that the company will be transformed into an LLC with a single associate, in the hypothesis of the limited liability company with 2 associates.*

This interpretation leads to **another conclusion,** that, although, as a rule, the transfer of shares involves the transfer of the status of associate; In the particular case of the existence of a clause prohibiting the continuation of the activity with the heirs of the deceased associate, they do not acquire the quality of associate once the shares are acquired, but only a right of claim on the company, consisting in their value[6].

In the event that the articles of association provide for the continuation of the activity with the heirs, indisputably, the shares will be sent to the heirs of the deceased associate without the need for the consent of the associates. Consequently, although theoretically, it is not necessary to insert such a clause for the unrestricted transmission of the shares by succession, however, from a practical point of view, it is desirable that this clause be provided by the associates in the constitutive act, in order to avoid a possible

[5] For jurisprudential solutions, see: C.S.J., s. Com., Dec. no. 2737/1997; Craiova Court of Appeal, decision no. 444 / 03.04.2013 – civil section II; Piteşti Court of Appeal, commercial and fiscal contentious section, decision no. 12 / A-C / 19.02. 2010; Bucharest Court of Appeal, decision no. 880 / 10.06 2002 – 6th commercial section, Bucharest Court of Appeal, decision no. 374 R/04.03.2010; Cluj Court of Appeal, decision no. 1771 din 10.10.2007.

[6] See also V. Stoica, *Consecinţe ale aplicării Legii nr. 31/1990 a societăţilor comerciale în dreptul succesoral (Consequences of the application of Law no. 31/1990 of the companies in the succession law),* in „Revista de drept comercial" Magazine, no. 3/1999, p. 54 et seq.

solution in the opposite direction, a solution generated by the obscurity of the text of the law.

Of course, the associates may stipulate by an express clause in the articles of association the need for their agreement regarding the possibility of continuing the activity with the heirs of the deceased associate; for example. that, *in case of acquisition of shares by succession, the general meeting will decide whether to continue the activity of the company with the heirs.* With regard to the conditions under which this agreement must be reached, we are of the opinion that the decision of the general meeting will be taken with the agreement of the members representing at least ¾ of the share capital; only if the associates did not provide other conditions, more restrictive or, on the contrary, more permissive, through the very clause regarding the necessity of their agreement for the continuation of the activity with the heirs in case of death of one of the associates.

4. **Clause to continue the activity with the heirs – exception from the dissolution of the company**

A complete approach to the implications of inserting the clause on continuing the activity with the heirs of the deceased associate in the articles of association of the limited liability company also involves corroborating and analyzing another provision of company law, namely the provisions of Article 229 which provide for special cases of dissolution of companies.

Thus:

(1) *associateships or limited liability companies are dissolved by the bankruptcy, incapacity, exclusion, withdrawal or death of one of the associates, when, due to these causes, the number of associates has been reduced to one.*

(2) *Exceptions are the case when in the articles of association there is a clause of continuation with the heirs or when the remaining associate decides to continue the existence of the company in the form of a limited liability company with sole associate.*

The text of the law provides in the second paragraph, between the situations of non-dissolution of the company, that of the existence in the constitutive act of the company of the clause to continue the existence of the company with the heirs of the deceased associate. Therefore, **in the event that, in the articles of incorporation, the associates have inserted the clause in question, the company will not be dissolved,** *inter alia*, in the event of the death of one of the associates, when due to this cause, the number of associates has been reduced to one, but, under the law, will continue its existence in the same form as the remaining associate and the heirs of the deceased. In this case, therefore, the insertion of the clause that is the subject of this study has very important practical consequences.

Therefore, on the one hand, the company will not be dissolved, continuing its existence with the heirs of the deceased associate, who, under the clause in question, will also acquire the quality of associates together with the acquisition of the shares. Of course, the acceptance of the inheritance by the successors does not have as a consequence the obligation to accept the quality of associate, the heirs being able to choose to ask for the equivalent value of the company shares in case they do not want to become associates; in arguing this solution we have as a priority the subjective element, *affectio societatis* which is the foundation of any company contract.

On the other hand, **in the absence of this clause,** the heirs of the deceased associate will not acquire the quality of associates, but will have only a right of claim on the

company, both in case the remaining associate decides to continue the existence of the company in the form of LLC with sole associate, and in case of dissolution of the company. In support of the above opinion, we recall here that the provisions of Article 229 (2) of the Companies Act have been the subject of an objection of unconstitutionality[7], the main criticism brought by the authors is that, due to the criticized regulation, they are removed from the structure of the inheriting company; who, in the opinion of the authors of the exception, became *de jure* associates[8], among the constitutional texts considered to be violated is Article 46 on the right to inheritance. The Constitutional Court rejected this objection, ruling that, *the criticized text of law does not refer in reality not to the transmission of the social parts, but to the continuation of the company's existence with the heirs of the deceased associate and they do not contravene the right to inheritance. Such a stipulation in the articles of association of the company is allowed by the legislator, with the aim of protecting the intuitu personae character of the company, the criticized text being applied equally to all those in the hypothesis regulated by the legal norm.*

Conclusions

The inclusion in the articles of association of the limited liability company of the clause regarding the possibility of continuing the activity with the heirs of the deceased associate or, conversely, of the one regarding the explicit or implicit prohibition of the possibility of continuing the activity with the heirs has special implications, especially in practical terms. Thus, according to the law, the shares will be transferred without restrictions in the absence of a clause prohibiting the continuation of the activity with the heirs of the deceased associate, the agreement of the associates not being necessary. In the case of inserting the clause prohibiting the continuation of the company's activity with the heirs, they do not acquire the quality of associate together with the acquisition of the shares, but only a right of claim on the company, consisting in their equivalent value.

As we have shown, although theoretically, for the unrestricted transmission of the social parts by succession, it is not necessary to insert the clause to continue the activity with the heirs; however, from a practical point of view, it is desirable that this clause be provided by the associates in the constitutive act, in order to avoid a possible solution in the opposite direction, a solution generated by the obscurity of the text of the law.

Another consequence of the insertion of the clause to continue the activity with the heirs is the fact that the company will not be dissolved, *inter alia*, in the event of the death of one of the associates, when due to this cause, the number of associates was reduced to one. In this case, according to the law, the company will continue its existence in the same form as the remaining associate and the heirs of the deceased, who, under the clause in question, will acquire the status of associates together with the acquisition of shares.. In the absence of this clause, the heirs of the deceased associate will not acquire the status of

[7] CCR decision no. 387 of May 9, 2006, regarding the exception of unconstitutionality of the provisions of art. 229 para. (2) of Law no. 31/1990 regarding the commercial companies.

[8] In the present case, the author of the exception filed an appeal against the decision pronounced by the judge delegated to the Trade Register Office attached to the Galati Court, by which the application for registration in the trade register of some mentions regarding the amendment of the articles of association of „Astra Holding" – S.R.L., including the one regarding the continuation of this company with one partner, as a result of the death of the other. He claims that the other associate, in bad faith, made the request to change the company, although he knew that the role of the court in resolving the debate on the succession of the deceased associate was pending before the court.

associates, but will have only a right of claim on the company, both if the remaining associate decides to continue the existence of the company in the form of LLC with sole associate, and in case of dissolution

These are the solutions that the Romanian legislator opted for. However, it remains a matter of reflection if the solution in the sense of imposing the continuation of the activity with the heirs of the deceased associate, without the need for the explicit consent of the remaining associates, does not affect the *affectio societatis* element. Basically, if the remaining associates do not want to continue the activity with the heirs, even in the hypothesis in which in the constitutive act there is a clause of continuation with the heirs; this situation can lead in time or even can be assimilated to one of the causes of dissolution of the company, respectively the situation of the existence of serious misunderstandings between the associates.

DOCTRINAL CONSIDERATIONS AND CONTROVERSIES REGARDING THE TRUST SUBSTITUTION

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Abstract

An expression of generosity, liberalities subordinate patrimonial interests to emotional feelings, which determines the importance, interest and normative concern of the legislator towards them. As his will to dispose of his property by bequest or donation can significantly affect the right to property and restrict the free movement of goods, the trust substitution can be both a useful and hostile legal instrument.

The current regulation of the Civil Code gives the trust substitution a double nature, on the one hand recognizing mortis causa the authority of will of the disposer, with time limitation of its effects, and on the other hand, thus achieving a balance between the absolute character of the principle of freedom. Testamentary, the free movement of goods and the right of the owner to dispose freely and absolutely of his property, a right guaranteed by the Constitution

Given the historical perspective of the institution, but also its evolution within the laws of European states, this paper aims to analyze and clarify the main issues and doctrinal controversies expressed, highlighting the impact and importance of trust substitution in Romanian civil law, taking into account the fact that the current regulation offers a great freedom to the author of the patrimonial disposition for the cause of death, without, however, allowing the perpetuation of his will.

Keywords: *succession, trust substitution, trust, liberality, disposer, instituted, substituted*

I. INTRODUCTORY ASPECTS

The trust substitution – an institution of Romanian civil law restored by the regulation of the current Civil Code – is one of the forms of manifestation of the authority of the will of the natural person beyond his death.

From a historical perspective, like the trustee and the trustee substitution has its origins in Roman law, where he found the same reason to preserve property in families. In the same vein and disregarding the principle of equality between family members, France has adopted the mechanism of trust substitutions, by transferring the goods to the eldest son with his obligation to keep them for life and to return them in turn to the eldest son, in fact the transmissions perpetuating itself in this way perpetually. Although the social order has shown that it is difficult to admit that a person can determine the fate of his property, even for a generation, doing so in addition to his own will and that of a third person, the French Civil Code did not prohibit all substitutions, admitting some derogations in favor of the grandchildren of the giver or testator[1], or in favor of the children of his brothers[2], while the Romanian Civil Code of 1864 went even further, admitting no exceptions in this regard.

[1] Art. 896-897 French Civil Code, material available online at https://www.legi-internet.ro/civil/fra2_cap1.htm.

Currently, according to the normative provisions of Law 287/2009 on the Civil Code[3], the substitution of the trustee consists in a liberality that can be burdened by a task, consisting in the obligation of the institution, donee or legatee, to administer the goods that are the object of liberality and to shall forward them, on his death, to the substitute appointed by the disposer[4]. Thus, as briefly noted in the specialized doctrine[5], the legal mechanism involves a succession of two liberalities, with the same object[6] and having as beneficiaries on the one hand the established, and on the other hand the substituted. In a more explicit way, the substitution of the trustee is in fact *the provision, what involves the creation of* **strict** legal reactions between three persons, whereby the **institution** is *responsible for administering the good or goods which are the object of the liberality and for transmitting them to a third party*, called a **substitute,** appointed by the disposer.

In order to remove the main criticism brought to the trust substitution, that by the disposition of the same person, the patrimonial transmission for the cause of death of several deceased was organized, we specify that in accordance with the provisions of art. 996 C.civ. both the rights of the substitute and those of the institution are acquired from the disposer. Therefore, given that the institute and the substitute are both successors of the disposer, the transfer of assets belonging to him is subject to only one prohibition on the possibility of the substitute being subject to the same obligation as the institute, being prohibited gradual substitutions, the only ones that would allow to dispose of another person's death.

Therefore, although prohibited by the rules of the Civil Code of 1864, considering that it seriously infringed the principle of free movement of goods, the substitution of the trustee is the lawful mechanism, regulated by the current Civil Code, by which the property and family of the free movement of goods, the observance of the strictly personal character of the will, but also the satisfaction of the interests of the reserve heirs.

II. GENERAL LEGAL REGIME AND PARTICULARS OF THE REPLACEMENT OF THE TRUSTEE

The trust substitution is a provision contained in a deed of donation or will, by which the author of the deed instructs the institute to administer and transmit, on his death, the property or goods subject to liberality to another person named substitute, designated by the disposer. The premises that justify such a legal operation are the good faith and the trust that the institution enjoys, and the reason consists in the desire of the disposer to keep the goods in the family and to preserve the patrimony of the successors.

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[2] Art. 1048 French Civil Code, material available online at https://www.legi-internet.ro/civil/fra2_cap6.htm.

[3] Law no. 287/2009 – on the Civil Code, published in the Official Gazette no. 511 of July 24, 2009, rep. according to art. 218 of Law no. 71/2011 for the implementation of the law on the Civil Code, publ. in M. Of. no. 409 of June 10, 2010, as subsequently amended and supplemented.

[4] Art. 993 et seq. C. civ.

[5] Negrilă, D. (2016). *Trust Substitution – Between Utility and Hostility*, Universul Juridic Magazine, Bucharest, pp. 8-12.

[6] Unlike the double liberality in usufruct and bare property, whereby the bare property is left to one beneficiary and the usufruct of another beneficiary, and in which we observe that the object of gratification is different, each recipient having to receive something else.

Since the substitution of the trustee[7] consists of a succession of two liberalities, it should be noted that the first, made by the disposer in favor of the institution, is executed at the time of the conclusion of the deed of donation or the death of the testator and is encumbered by the institution, and the second is made in favor of the substitute also appointed by the disposer, but which is executed only at the death of the institute.

II.1 Conditions of trust substitution

In order to operate lawfully and to produce legal effects, in accordance with national law, the substitute trustee must meet the following conditions:

a) There must be two successive liberalities, both coming from the same provider and having the same object. In this regard, we specify that the one in favor of the institute, is executed at the time of concluding the deed of donation or at the death of the testator, while following the second liberality. the substitute, also appointed by the disposer, the substitute has no current right, but an eventual one, conditioned by the death of the institute, at which moment his disposition *of cujus is executed.*

b) the task imposed on the institution may consist only in its obligation to administer the substitute's property or assets and to pass them on at his death to the substitute appointed by the disposer. In these conditions, the institute is the beneficiary of the first liberality, with the mention that as the owner the attributes of the extrication of his right are limited to him, he cannot dispose of good / goods[8] nor to encumber them with tasks.

c) the capacity of the parties, which, like the incapacities provided by art. 994 para. (3) Civil Code, must be analyzed separately on the one hand from the disposer, and on the other hand from the established and substituted. Thus, in order to order art. 987 para. (2) C.civ. provides that the condition of the capacity of the disposer must be fulfilled at the time when he expresses his consent, while to receive. the condition of the capacity of the institute and of the substitute must be fulfilled on the date on which he accepts the donation (art. 987 para. (3) Civil Code) or on the date of opening the testator's inheritance (art. 987 para. (4) Civil Code)[9].

II.2 Effects of trust substitution

In order to highlight the effects of the institution, we will analyze individually the norms contained in art. 995-999 of the Civil Code, therefore:

1. According to art. 995 para. (1) of the Civil Code, the task imposed on the institution „ *produces effects only with regard to the goods which constituted the object of liberality and which at the date of the death of the institution can be identified and are in its patrimony"*. Thus, since the provisions regarding the trustee are applied to the institution (art. 773 et seq. Of the Civil Code), he will have the obligation to give an account to his disposer / heirs not only for the preservation of the goods, but also for their administration. Moreover, if the loss of the property / assets involves the fault of the institution, it has the

[7] The notion is synonymous with that of trust – a provision contained in a will or codicil, by which the gratuity was asked to pass on the good received to a second gratuity. See Nicolae, I. (2022). Stopping the gradual and eternal trust substitutions, Universul Juridic Magazine, no. 1, Bucharest, p. 12 *apud* J. Kocis, P. Vasilescu, Civil law. Succession, Hamangiu Publishing House, Bucharest, 2016, p. 191.

[8] Since the law does not distinguish, we can say that the object of liberality can be both real estate and certain movable property, as well as securities.

[9] In this respect, we consider that it is necessary for the institute or the substitute to be at least conceived at the moment of opening the testator's inheritance (art. 36 of the Civil Code).

obligation to repair the damages caused by the defective fulfillment or non-fulfillment of the conservation and administration acts, in which case it can be sued for damages thus brought to the substitute. in compensation. By exception from the rule according to which the task produces effects only with respect to the goods that could be identified and were in the patrimony of the institution, par. (2) of the same article provides that „*when the liberality concerns securities, the burden also has effects on the securities that replace them"*. In the case of real estate, the task is subject to registration in the land register, and in the case of liberalities that have as object rights subject to formalities, advertising is carried out by registration in the Electronic Archive of Real Securities, in the trade register, as well as in other forms of advertising. (art. 995 para. (3) of the Civil Code, corroborated with art. 18 para. (2) of the Civil Code).

2. According to art. 996 para. (1) of the Civil Code, with reference to the substitute, his rights are born at the death of the institute, until that moment enjoying only an eventual right. Moreover, in accordance with the provisions of par. (2) and (3) even if the goods are transferred to him from the patrimony of the institute, the substitute acquires them from the disposer, as a result of his will, he cannot be subject to the obligation of administration and transmission of the goods.

3. In order to perform the task, the disposer may impose on the institution the establishment of guarantees and the conclusion of insurance contracts (art. 997 of the Civil Code). As the wording of the normative text allows, we can interpret that at the express request of the disposer, according to his will, he can stipulate, cumulatively, in charge of the institution both the establishment of guarantees and the conclusion of insurance contracts. In addition, „*if the institute is the reserve heir of the disposer, the task cannot violate his succession reserve"* (art. 998 Civil Code). The amount due to the reserved heirs of the disposer is imperative, which means that, in the event that the task of administering and transmitting the object of the liberality to the substitute infringes the legal succession reserve, the provision is struck by nullity. Also, taking into account the possibility of requesting the beneficiary of a liberality regarding the revision of the conditions and tasks of the liberalities, as a result of unforeseen and unaccountable situations to the beneficiary, after accepting the liberality, when their fulfillment or execution became extremely difficult or excessively onerous. beneficiary, we are of the opinion that the institute may request the revision, under the conditions of art. 1006-1008 C.civ.

II.3 Ineffectiveness of trust substitution

In the case of ineffectiveness of the trust substitution, by the precedent of the substitute or his renunciation of the benefit of liberality, „the *property belongs to the institution, unless it is provided that the property will be collected by the heirs of the substitute* or C. civ.).

If in the case of the precedent of the substitute, there is a consolidation of the property right of the institution regarding the object of liberality, in case of renunciation of the benefit of liberality, if the trust substitution was made in the form of donation, non-acceptance of the donation by the substitute leads to ineffectiveness if the trust substitution was made by will, the surrender of the substitute to the benefit of the liberality must be made within 1 year from the death of the disposer, attracting the expiration of the substitution and consequently the goods belong to the institution.

By way of exception to the general rule set out, the disposer may provide that, in the event of the surrogate's predecessor, the property be taken over by his heirs or the

appointment of a second substitute to benefit from liberality. From this point of view, it should be noted that, in case of ineffectiveness of the first substitution, the disposer determines that the object of the liberality be taken over, in the alternative, by the heirs of the substitute or by the new substitute, in the latter case. vulgar substitution by which another beneficiary of liberality is appointed.

III.COMPARATIVE ASPECTS OF THE REGULATION OF THE REPLACEMENT OF THE TRUSTEE IN THE CIVIL CODE OF 1864 AND IN THE CURRENT CIVIL CODE

In the comparative approach of the two regulations of the trust substitution, we will highlight only the important aspects of the legal regime of this institution, which results from the analysis of the normative provisions.

As a first legislative finding, we note that, at least apparently, according to art. 993 C. civ. the fiduciary substitution is presented as a real exception derogating from the rule of absolute nullity provided for in the Civil Code of 1864, called substitute, designated by the disposer, shall not take effect unless permitted by law". In these conditions, we appreciate that the phrase „ *... if permitted by law"* takes into account all the situations that fall within the legal regime established by the norms of art. 994-1000 C. civ.

At the same time, from the analysis of the definition of trust substitution (art. 994 C.civ.), It results that in essence any liberality can be burdened by a task, through which the institution, donee or legatee, has the obligation „ *to administer the goods and to transmit them, at his death, to the substitute appointed by the disposer „*, which generates the contradiction[10] related to the exceptional character of the substitution, resulting from the regulation of art. 993 C. civ.

Compared to the apparent inadvertence presented, resulting from the analysis and comparison of art. 993 and 994 of the Civil Code, we are of the opinion that in addition to the perpetual nature of designate. We base our claims on the fact that the essence of the trust substitution is the very succession of two liberalities with the same author / disposer, which means that in the case of the trust substitution allowed by law, the institution no longer has to dispose of the substitute property at its death. whereas if he were to transfer this property during his lifetime, even to the substitute appointed by the disposer, the trust substitution would be prohibited. We appreciate that through this mechanism the legislator has ensured that the institution is not a simple agent, empowered with the administration and transfer of the good / goods, but that at least during its life the institution is one of the beneficiaries of liberalities.

Moreover, in support of our claims we find art. 989 para. (2) of the Civil Code, according to which „*The person who does not exist at the date of drawing up the liberality may benefit from a liberality if it is made in favor of a capable person, with the task for the latter to transmit to the beneficiary the object of liberality as soon as possible".* The rule enshrined in the normative act indicates that when, for objective reasons, a person capable[11]

[10]As the regulation on the permission to establish a trust substitution is of European inspiration (French, Italian, Spanish etc. Civil Code), the legislator took over identically, from the old French regulation, the ban in principle of trust substitutions (art. 896 C. civ. fr.), expressly and only exceptionally admitting the gradual liberalities (art. 1048 C. civ. fr.).

[11] Urs, IR, Todică, C. (2015), *Civil law. General theory*, Hamangiu Publishing House, Bucharest, title II, chap. II, sec. a III.

of temporary liberality, charged with the task of transmitting to the real beneficiary the object of liberality as soon as possible, most likely even during the life of the able, we are in the presence of the trust substitution, but in the situation of a liberality through an intermediary.

We can also see that there are no significant differences in the definitions of the trust substitution given by both the current Civil Code and the Civil Code of 1864, with the only mention being that the old code provided for the obligation of the institution to preserve and transfer assets, while according to the legislation in force, the obligation incumbent on the institution is to administer and preserve them[12]. The different terminology used by the legislator in the current Civil Code does not significantly impact the nature of the obligation of the institution, because by sending that art. 994 para. (2) C.civ. it does so when applying the norms of trust towards the institution, we understand that it has the attributions of one administrator of the assets of another, and by applying the provisions of art. 795 of the Civil Code results that „it is required to perform all the necessary acts for the preservation of the goods, as well as the useful acts so that they can be used according to their usual destination".

IV. DISPUTER'S WILL – LEGAL ETERNITY?

An expression of generosity, liberalities subordinate patrimonial interests to emotional feelings, which determines the importance, interest and normative concern of the legislator towards them[13], doubled at the same time by the risk involved, knowing that they can affect many interests, from the perspective of correlative impoverishment. involves. Moreover, not only the owner's assets are exposed to danger, but also his moral, non-patrimonial side, since the owner's damage in case he becomes the victim of the malicious maneuvers of other persons, consists in both property losses and soul pains; psychological trauma. Therefore, in view of these assertions, we consider that in the context of the trust substitution mechanism the error that would harm the disposer will affect at least one of his testamentary or legal successors.

At the same time, from the perspective of legal inheritance, as this is the rule in matters of succession, any testamentary exception by which the assets are divided differently, according to the will of the author, but not in accordance with the law, is a peril for heirs. In this sense, the law prohibits the burden on liberality from violating the reserve of succession, if the institution is also the reserve heir[14].

Therefore, taking into account the potential dangers to which the rights and interests of the heirs and the disposer are exposed in the mechanism of the institution of the trust substitution, but also recognizing the freedom of disposition of the cujus on his property beyond his death, presumed to be serious and legitimate, the Romanian legislator in the

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[12] Article 803 of the Civil Code. from 1864 in the second sentence provided that „ *a provision by which the donee, the established heir or the legatee will be entrusted with the preservation and remission to a third person, will be null, even in respect of the donee, of the named heir or of the legatee".*

[13] As stated in the specialized doctrine, „ (...) free transmission is the highest form of social collaboration, which is the ultimate goal of law; it gives satisfaction to the affective feelings, which, together with the interests, and above them, are and remain the great engine of the social life „, see Cantacuzino, M. (1998). Elements of civil law, Ed. All Education, Timisoara.

[14] Pt. details see Muțiu, MI (2004). Civil law of successions, Paideia Publishing House, Bucharest, p. 145 apud Hamangiu, C., Rosetti-Bălănscu, I., Băicoianu, Al. (1998). Romanian Civil Law Treaty, vol. 3, Ed. All, Bucharest, p. 504.

current regulation of the Civil Code gives to the trust substitution a double nature, recognizing by this the will authority, *mortis causa*, of the disposer, with the limitation in time of its effects, thus achieving a balance between the absolute character of the testamentary freedom of the free movement of goods and that of the owner's right to dispose freely and absolutely of his property (art. 480 of the Civil Code), a right also guaranteed by the Constitution.

Under these conditions, the trust substitution certainly does not represent the perpetuation of the will of the disposer, because he cannot establish the succession devolution indefinitely, from generation to generation for heirs, but by a donation or act of last will only decides the fate of his patrimony[15].

V. Conclusions

Based on the analysis and considering that the trust substitution is certainly not the perpetuation of the will of the disposer, we will emphasize the justification and importance of regulating the trust substitution in the current Civil Code by analyzing the factual and legal arguments regarding the final effects impacting social and legal relations.

First of all, we agree that, by virtue of the respect of the person on the deathbed, any natural person should have the freedom to dispose of his own property, deciding what will happen to them even after his death. However, even by virtue of these moral considerations, it does not seem permissible for one generation to restrict the next in terms of power of disposition and *use*. leave. Therefore, we consider it useful and necessary that the successive transfers of assets made through the trust substitutions be accepted by the legislation in force, as we consider that on a temporary basis the person on the deathbed should be allowed to dispose of his property as far as he sees fit, that is, to decide how they will be used, but only by those who live with it at the same time[16].

Secondly, compared to the finding of the normative inadvertence taken over by the Romanian legislator from the European civil legislations, regarding the principle of interdiction of gradual liberalities and the admission, only by exception, of the simple fiduciary substitution, we consider that the non-correlation of the legal texts. it's just apparent. We mention that in addition to the perpetual character of the trust substitution prohibited by law, the difference between this and the one allowed by law is also the moment of transferring the good to the designated substitute. We base our claims on the fact that the essence of the trust substitution is the very succession of two liberalities with the same author / disposer, which means that in the case of the trust substitution allowed by law, the institution no longer has to dispose of the substitute property at its death. whereas if he were to transfer this property during his lifetime, even to the substitute appointed by the disposer, the trust substitution would be prohibited. We appreciate that through this mechanism the legislator has ensured that the institution is not a simple agent, empowered

[15] Article 996 para. (3) C.civ. expressly provides for the impossibility of perpetuating indefinitely the effects of the trust substitution, stating that „ *The substitute may not, in turn, be subject to the obligation of administration and transfer of assets*".

[16] „ *It is very possible that there are emotional relationships between those who live at the same time as de cujus. Thus, he could be allowed to decide, in a completely reasonable way, the destination and the way of using his goods with respect to those persons. But, clearly, there can be no affectivity for people who are not yet born, therefore, the rule could not be extended to them*". See Buruiană, ME, Mihăilă, O. *Substitution of trust or will beyond death*, lecture given in the Circle of Legal Hermeneutics „School of Organic Law".

with the administration and transfer of the good / goods, but that at least during its life the institution is one of the beneficiaries of liberalities.

Thirdly, I consider that it would be wrong to claim that the substitution of the trustee, by the right which it grants, may prejudice the community and economic relations, because it completely excludes from the civil and economic circuit the goods which are its object. the goods are in the civil circuit, because it is not the only legal institution with these consequences, by analogy, and the effects of the inalienability clause are similar, the good can no longer be alienated by *inter vivos legal acts* by the acquirer of ownership 49 years old[17]. Therefore, from the perspective of the effects on the property right that is the object of a patrimonial transfer, both the trust substitution – as a task of a liberality, by which the disposer obliges the institution to administer the primate goods and to transmit them at his death to another person named substitute also designated by the disposer), as well as the inalienability clause[18] – as a conventional limit of the private property right, consisting in the contractual or testamentary provision by which the alienation of an asset may be prohibited, but only for a maximum of 49 years and if there is a serious and legitimate interest, together they represent temporary limitations of the attributes of the property. Given the arguments presented, by comparing the effects of the two legal institutions, we consider once again allowed and justified the existence of the possibility of using the legal mechanism of trust substitution in the regulation of the current Civil Code.

Last but not least, we emphasize that the antithesis between the various historical moments of regulation of the institution of trust substitution and what is found in our legislation today is justified by the fact that although the balance is inclined to protect the general will, since ancient times, a greater importance of the individual will. In addition to the main effect of death consisting in the full transmission of the deceased's estate, we must also consider the primacy that was granted, over time, the testamentary succession, compared to the legal one, a fact enshrined in the Decemviral law (Lex duodecim Tabularum), where the idea of preempting the testamentary succession from the legitimate one was a first principle in the field of succession regulations of Roman law. Therefore, the testamentary succession presupposes a series of liberalities and ways of affirming the individual will[19], through which the will authority of the deceased is manifested, which thus ensures that his patrimony does not perish, but is transmitted together with the prerogatives of possession. In conclusion, according to the Romanian Civil Code in force and in accordance with the laws of other European states, the temporary substitution of the trustee, producing legal effects only for a period of time determined and limited by the death of the institution, may declare inalienable law the object of a succession transmission.

Bibliographical References

[1] BOROI, G., STĂNCIULESCU, L. (2012). Civil law institutions in the regulation of the new Civil Code, Hamagiu Publishing House, Bucharest

[2] CANTACUZINO, M. (1998). Elements of civil law, All Education Publishing House, Timișoara

[17] Boroi, G., Stănciulescu, L. (2012). *Civil law institutions in the regulation of the new Civil Code*, Hamagiu Publishing House, Bucharest, pp. 27-29.

[18] *Idem*, pp. 605-607.

[19] Ciuca, VM (2001). *Lessons in Roman law*, vol. IV, Polirom Publishing House, Iaşi, pp. 1037-1044.

[3] CIUCĂ, VM (2001). Lessons in Romanian law, vol. IV, Polirom Publishing House, Iaşi

[4] MUTIU, MI (2004). Civil law successions, Paideia Publishing House, Bucharest

[5] URS, IR, TODICĂ, C. (2015), *Civil law. General Theory*, Hamangiu Publishing House, Bucharest

[6] BURUIANĂ, ME, MIHĂILĂ, O. Substitution of the trustee or the will beyond death, lecture given within the Circle of Legal Hermeneutics „School of Organic Law", material available at http://www.centrulrobertianum.ro/scoala- organic-law / res / prelec tions / 9.monica-buruiana-oana-mihaila-substitutia-fideicomisara-sau-vointa-de-dincolo-de-moarte.pdf

[7] NEGRILĂ, D. (2016). Trust Substitution – between utility and hostility, Universul Juridic Magazine, no. 6, Bucharest

[8] NICOLAE, I. (2022). Stopping the gradual and eternal trust substitutions, Universul Juridic Magazine, no. 1, Bucharest

[9] POENAR, F. (2013). The perpetuation of his will through the trust substitutions, Studia Universitatis Babeș-Bolyai Iurisprudentia, no. 3, Cluj-Napoca

[10] POPESCU, R.- R. (2015). The trust substitutions in the new Civil Code, Annals of the University of Bucharest – Law,

[11] Law no. 287/2009 – regarding the Civil Code, published in the Official Gazette of Romania no. 511 of July 24, 2009, republished according to art. 218 of Law no. 71/2011 for the implementation of the law on the Civil Code, published in the Official Gazette of Romania no. 409 of June 10, 2010, as subsequently amended and supplemented

[12] French Civil Code (legi-internet.ro)

[13] https://legeaz.net/dictionar-juridic/substitutie-fideicomisara

APPEAL AGAINST THE EXPROPRIATION DECISION ISSUED UNDER LAW NO. 33/1994 AND LAW NO. 255/2010

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Abstract

One of the most important values that enjoys constitutional protection is the right of private property being protected against any expropriation, nationalization, confiscation or other infringements. In this sense, the legislator regulated a legal framework for carrying out the procedures of expropriation of real estate assets, the private property of natural or legal persons so as to be in accordance with the provisions of the Romanian Constitution, context in which Law no. 33/1994 was adopted as a legal framework in the field of expropriations. In order to simplify the expropriation procedure and reduce the deadlines in order to take the necessary preparation measures to achieve the objectives of national, county and local interest, as well as the objectives of strategic importance and national security, Law no. 255/2010 was adopted, which constitutes the special law in field of expropriations. The two normative acts regulate the essential conditions necessary to trigger the expropriation procedure, stages of the expropriation procedure, determination of compensation and transfer of ownership from the property of the expropriated owner to the property of the expropriator, the expropriation decision and the appeal against the expropriation decision.

Keywords: *expropriation, compensation, expropriation decision, appeal*

Introduction

One of the values protected by the Romanian Constitution is the right to private property, guaranteed and protected by the constitutional provisions contained in article 44 and whose limits are established by law. The constituent legislator guarantees the right to property against expropriation, nationalization, other infringements of the right of property by the authorities, as well as against confiscation which are in fact the most severe measures that can be taken against this right, they are not just a limitation of property right, but even lead to its loss.

Thus, by virtue of this constitutional protection the provisions of article 44 paragraph (3) of the Romanian Constitution provide that „ *No one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance."* In accordance with the constitutional provisions, The Civil Code provides for in article 562 paragraph (3) that „*The expropriation can be done only for a cause of public utility established according to the law, with just and prior compensation, fixed by mutual agreement between the owner and the expropriator. In the event of a divergence in the amount of compensation, it shall be determined by courts".*

Moreover, the Romanian legislator felt the need for a specific regulation in the field of expropriation establishing the legal framework governing the entire expropriation procedure, in this sense, adopted the *Law no. 33/1994 about expropriation for the cause of*

public utility[1], republished, with subsequent amendments and additions, normative act that represents the general law in the matter, respectively, *Law no. 255/2010 about expropriation for a cause of public utility, necessary to achieve objectives of national, county and local interest*[2], the special law on expropriations which has recently undergone numerous legislative interventions[3]. However, this fact has led to some difficulties in law enforcement especially with regard to determining the amount of compensation awarded to expropriated owners.

1.General references regarding the expropriation procedure

Regulated in the aforementioned legal provisions, the expropriation is one of the ways of acquiring the right of public property according to the provisions of article 863 letter b) of the Civil Code and it knows a series of definitions, for example: „*The forced transfer to public property, by court decision, of some privately owned real estate, with a just and prior compensation, for cause of public utility,"*[4] or *„the act of the competent state power through which the transfer into public property of private property real estate necessary for works of public interest in return for compensation"*[5].

Expropriation for cause of public utility is practically an exception to the absolute and inviolable nature of the right to private property. Considering that the inviolability of the right to private property is provided in paragraph (5) of article 136 of the Constitution, by virtue of the protection of private property, the constituent legislator also regulated the expropriation in the Romanian Constitution in article 44 paragraph 3 with the limitations provided for in paragraph (7) of the same article. Article 1 of Protocol No. 1 to the European Convention on Human Rights itself allows a restriction on the exercise of the right to private property so that by virtue of this article states may adopt such laws as they deem necessary and allow the use of private property in accordance with the general interest.

In application of the constitutional provisions it has been adopted *Law no. 33/1994 on expropriation for reasons of public utility* regulating the sphere of real estate that may be subject to expropriation, public utility and its declaration, preliminary and precautionary measures, stages of the procedure, the settlement of expropriation requests by the courts, establishing the compensations and paying them to the property owner. In addition to this law it comes *the Regulation on the working procedure of the commissions for conducting preliminary research in order to declare the public utility for works of national interest or local interest*, approved by Government Decision no. 583/1994.

In practice, the expropriation is applicable in those cases where the public administration authorities want to carry out works of general interest, for example: transport infrastructure, roads, bridges, water networks etc. and to be built on land privately owned by natural or legal persons.

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[1] Republished in the Official Gazette number 472 of July 5, 2011.

[2] Published in the Official Gazette number 853 of December 20, 2010.

[3] For example, we mention the Government Emergency Ordinance no. 38/2022, GEO no. 26/2022, Law no. 316/2021, GEO no. 68/2019, Law no. 144/2019, Law no. 22/2019, GEO no. 99 / 2018, Law no. 233 / 2018, GEO no. 55 / 2016, Law no. 174 / 2015, GEO no. 86 / 2014, GEO no. 6 / 2014 and others.

[4] Pop, L., Harosa, L.M., Drept civil. Drepturi reale principale, Ed.Universul Juridic, București, 2006, p. 97.

[5] Muraru, I., Tănăsescu, E.S., Constituția României. Comentariu pe articole, ediția 2, Ed. C.H. Beck, București, 2019, p. 388.

In order to carry out works that serve the public utility a particular application of expropriation has appeared, regulated by *Law no. 255/2010 about expropriation for reasons of public utility, necessary to achieve objectives of national, county and local interest*, and the *Methodological Norms for the application of Law no. 255/2010 about expropriation for the cause of public utility, necessary to achieve objectives of national, county and local interest* approved by Government Decision no. 53/2011, the legislator providing in these normative acts a special administrative procedure, taking into account the fact that the investments provided by Law no. 255/2010 involve large-scale works that overlap on large areas of land belonging to private property and a shorter execution time. From this point of view, the expropriation procedure provided by Law no. 33/1994 does not always respond to the urgency characteristic of achieving the objectives of national, county or local interest and the objectives of strategic importance and national security, thus, it was necessary to create a unitary legal framework and simplify the procedures for acquiring the land necessary for the expropriation for cause of public utility, respectively, a just and prior compensation, while ensuring respect for the property rights of expropriated persons.

The essential conditions to be met for the initiation of expropriation proceedings are, first of all, *the existence of a cause of public utility*, and secondly, *the existence of just and prior compensation*, precisely because the right to private property is subject to constitutional protection, its violation is allowed only in exceptional situations expressly regulated by the provisions of article 6 of Law no. 33/1994 and which specifies the meaning of the notion of „*public utility"*. The declaration of the public utility of the goods subject to expropriation is an essential condition for moving to the next stage.

Without having a limiting character, the public utility works are provided for in article 6 of Law no. 33/1994, these being: „*geological prospecting and exploration; extraction and processing of useful mineral substances; installations for the production of electricity; roads, opening, alignment and widening of streets; power supply systems, telecommunications, gas, district heating, water, sewerage; environmental protection installations; dams and regularization of rivers, reservoirs for water sources and flood mitigation; flow derivatives for water supply and flood diversion; hydrometeorological and seismic stations and systems for warning and prevention of dangerous natural phenomena and alarming the population, irrigation and drainage systems; deep erosion control works; buildings and land necessary for the construction of social housing and other social objectives of education, health, culture, sports, protection and social assistance, as well as for public administration and for the judicial authorities; the preservation, protection and enhancement of monuments, ensembles and historical sites, as well as national parks, nature reserves and natural monuments; prevention and elimination of the consequences of natural disasters – earthquakes, floods, landslides; defense of the country, public order and national security."* For works of national interest, the public utility is declared by decision of the Government, and for those of local interest, by the county council or by the General Council of the Municipality of Bucharest according to the provisions of article 7 paragraph (1) of Law no. 33/1994.

The enumeration provided for in article 6 may be supplemented with any other works for which the public utility is declared, for each case, by law.

Law no. 255/2010 extends the general procedure in the field of expropriation and to the railway, air and naval infrastructure, to water management works, mining works of national interest for the exploitation of lignite deposits, works of national interest regarding the

development of transport lines and energy distribution and other works declared of public utility provided in article 2 of this law.

We need to emphasise that lands in the public domain of the state are exempted from the expropriation procedure, as well as the lands in the private domain of the state, since the Romanian State as owner can affect to the public utility any building necessary for the public utility works with the application of the legal regulations corresponding to the legal regime. If there are no problems with the state-owned real estate, in the case of real estate privately owned by the state, it is necessary that they be transferred from the private domain of the state to its public domain, in accordance with the law. Also, the buildings in the public domain of the administrative-territorial units must be transferred to the public domain of the state according to the legal regulations in force.

At the same time, the provisions of article 4 of Law no. 33/1994 regulate two exceptional situations as alternative ways to expropriation, so that the legislator, through these legal provisions, offered the possibility of reaching an agreement between the owner of the property concerned and the expropriator by concluding a sale-purchase contract, a donation contract or an exchange contract, thus avoiding the initiation of the expropriation procedure, and consequently, shortening the deadlines for starting public works. If the agreement of the parties involved concerns only the transfer of ownership and not the amount or nature of compensation, the court will take note of the agreement of the parties and will establish only the amount or nature of compensation in accordance with paragraph (2) in article 4.

After the declaration of public utility in the pre-expropriation stage, the expropriator proceeds to draw up the plans comprising the buildings – land and buildings – proposed for expropriation indicating at the same time the names of the owners of the building, and in case they do not know each other, the „unidentified owner" is mentioned until the legal situation is clarified, as well as the compensation offers.

A first stage in the expropriation procedure consists in *approving the technical-economic indicators* of the work of national, county or local interest, by Government decision or, as the case may be, by the decision of the local / county public authority, respectively *the establishment of the location of the work*, which will be made public by posting either on the expropriator's website or by posting at the local council headquarters and then sent to The National Agency for Cadastre and Real Estate Advertising (ANCPI) for its approval.

A second stage of the expropriation procedure consists in *recording the related individual amount representing the payment of compensation* for the buildings that are part of the expropriation corridor and displaying the list of property owners. As it results from the provisions of article 26 paragraph (1) of Law no. 33/1994 „*the compensation consists of the real value of the real estate and of the damage caused to the owner or other entitled persons."* When calculating the amount of damages according to paragraph (2) of article 26 „*... the experts, as well as the court will take into account the price at which the buildings of the same kind are usually sold in the administrative-territorial unit, at the date of drawing up the expertise report, as well as the damages brought to the owner or, as the case may be to other entitled persons taking into account the evidence presented by them".*

The third stage of the expropriation procedure consists in *the transfer of the ownership right over the expropriated buildings,* which operates at the date of issuing the expropriation decision, an act that is issued by the expropriator and constitutes an enforceable title. To the

extent that the expropriated owner is not satisfied with the amount offered by the Romanian State, the compensation is not fair, he can apply to the competent court within the general limitation period, without being able to contest the transfer of ownership to the expropriator over the expropriated property and the exercise of the remedies does not suspend the effects of the decision establishing the amount of the compensation and the transfer of the property right.

A final step is *the completion of the formalities related to the expropriation procedure* and the possession of the expropriator.

2. Establishment of compensations and transfer of ownership

The multitude of legislative interventions on the special law – Law no. 255/2010 – has created difficulties in implementation regarding the establishment of the amount of compensations granted to the owners of the lands subject to expropriation.

The expropriation procedure for reasons of public utility can be carried out only after a right and prior compensation has been handed over to the expropriated owner. The compensation is „right" when it covers the entire loss suffered by the property owners affected by the expropriation measure. According to the provisions of art. 26 paragraph (1) of Law no. 33/1994, the compensation consists of the real value of the real estate and of the damage caused to the owner or other entitled persons. Under these conditions, a legal cap on compensation, up to a certain amount, is excluded[6].

Moreover, the expropriation framework law provides in Article 26 paragraph (2) the manner of establishing the amount of compensation, the criteria according to which it is calculated, namely: „*In calculating the amount of compensation, the experts and the court shall take into account the price at which the buildings of the same kind are normally sold in the administrative-territorial unit, at the date of drawing up the expert report, as well as the damages to its owner. where appropriate, to other entitled persons considering the evidence submitted by them".*

At the same time, the compensation must be *prior* as it constitutes a guarantee granted to the entitled persons in order to keep the same value of the patrimonial object by which the real right lost after the expropriation is replaced with a certain amount of money and not just a simple claim whose realization would be uncertain[7].

According to the special law – Law no. 255/2010 – the compensation is calculated by reference to the notarial grid, a fact that results from the provisions of article 5 paragraph (1), namely „*... the individual amounts related to the compensations estimated by the expropriator on the basis of an evaluation report drawn up taking into account the expertise prepared and updated by the chambers of notaries public...",* respectively, from the provisions of paragraph (8) of article 11 of the same law „*The evaluation report is drawn up taking into account the expertise prepared and updated by the chambers of notaries public, according to article 77[1] paragraph (5) of Law no. 571/2003 about the Fiscal Code, with subsequent amendments and completions."* At the same time, the amendments brought to Law no. 225/2010 by Law no. 233/2018 imposed not only the experts but also the courts to consider when calculating the compensations of the notaries' grid. Thus, Article 22 paragraph (6) establishes that „*Experts, when preparing the expertise report, as well as the*

[6] Florescu, D.A.P, ș.a., Exproprierea pentru cauză de utilitate publică, Editura Universul Juridic, București, 2013, p. 76.

[7] *Idem*.

court shall take into account the expertise prepared and updated by the chambers of notaries public, at the time of the transfer of ownership." Prior to the adoption of Law no. 233/2018, the amount of compensations was calculated by reference to art. 21-27 of Law no. 33/1994 which meant that these compensations consisted of the market value of the expropriated property, plus the damage caused by the expropriation.

The various interpretations given to the mentioned legal texts led to a series of legal actions aimed at establishing the compensations due to the expropriated owners dissatisfied with the amounts received.

Thus, the High Court of Cassation and Justice by Decision no. 78 of November 15, 2021 establishes that „*In the interpretation and application of the provisions of art. 22 para. (6) of Law no. 255/2010 regarding the expropriation for the cause of public utility, necessary to achieve some objectives of national, county and local interest, with the subsequent modifications and completions, and of article 26 paragraph (2) of Law no. 33/1994 regarding the expropriation for a cause of public utility, republished, with the subsequent completions, in the judicial stage of the expropriation procedure, when determining the amount of compensations, the provisions of art. 22 para. (6) of Law no. 255/2010 is interpreted extensively, in the sense that it considers both the expertise prepared and updated by the chambers of notaries public, at the time of the transfer of ownership", as well as the legal criteria provided by the provisions of article 26 paragraph (2) of Law no. 33/1994".*

Therefore, in applying the provisions of article 22 of Law no. 255/2010, although the special law no longer makes express reference to the provisions of art. 26 of Law no. 33/1994, it is necessary to take into account the provisions of article 34 of Law no. 255/2010 according to which the provisions of the special law „*shall be completed accordingly with the provisions of Law no. 33/1994, as well as those of the Civil Code and the Code of Civil Procedure, insofar as they do not contravene the provisions of this law".*

Regarding the transfer of the property right from the expropriated owner patrimony to the expropriator's patrimony Law no. 33/1994 establishes according to the provisions of article 28 paragraph 1 that „*the transfer of ownership of the property subject to expropriation to the property of the expropriator occurs as soon as the obligations imposed on him by a court decision have been fulfilled".*

Law no. 255/2010 establishes the expropriator's obligation to issue the expropriation decision, an act that constitutes an enforceable title for the delivery of the real estate subject to expropriation, both against those expropriated owners and against those who claim a right related to the expropriated real estate, until the settlement final and irrevocable of the dispute related to the ownership of the expropriated real estate, as it results from the provisions of art. 9 paragraph (2). This act is issued and produces the effects provided by law, the most important being the transfer of ownership of real property privately owned by individuals or legal entities in public ownership of the state or administrative-territorial units and the administration of the expropriator. This transfer operates by right on the date of issuance of the administrative act of expropriation by the expropriator, after recording the amounts related to compensation according to Article 9 paragraph (4) of the special law and by this way of regulating the constitutional imperatives contained in Article 44 paragraph (3) of the Romanian Constitution have been respected.

After the operation of the transfer of the property right the expropriator proceeds to the tabulation of the property right over the expropriation corridor based on the cadastral

documentation prepared for each administrative-territorial unit separately. The provisions of article 9 paragraph 5 thesis II impose on the expropriator the obligation to start the works within a reasonable time, but not later than 24 months from the issuance of the building permit.

3. Particularities concerning the expropriation procedure in case of in the case of succession proceedings

A special situation in the case of the expropriation procedure is the death of the owner of the buildings covered by the expropriation corridor. If the expropriated property belongs to a deceased person, the legislator regulated in Article 19 paragraph (7) of Law no. 255/2010 the possibility of recording the compensation on account of the deceased person being in accordance with the constitutional provisions contained in article 44 paragraph (3) of the Romanian Constitution. In such a situation the compensations will be issued only to the successors who will prove this quality with a certificate of heir or a final and irrevocable court decision establishing this quality, according to the provisions of the second thesis of paragraph (7) of article 19 of the special law.

Another situation is the situation of an open succession procedure regulated in paragraph (8) of article 19 of the special law. Thus, according to these legal provisions, the real estate covered by the expropriation procedure that is the object of a succession, and the successors are not known or cannot present a certificate of heir, the compensations will be recorded on account of the succession, provided the succession is opened.

At the same time, the legal provisions contained in paragraph (8) of article 19 establish if the succession procedure is not opened, a representative of the expropriator is entitled to request information on the opening of the succession and the amount representing the damages will be recorded in a separate account, on account of the successions. Compensation will be issued only to the successors who will prove their quality with the certificate of heir or with the final and irrevocable court decision.

In relation to the situation of unopened successions or unknown successors, the legislator has established according to the provisions of Article 9 paragraph (3) of Law no. 255/2010 that „*the expropriation decision is issued and takes effect even in the case when the owners of the listed buildings do not present themselves within the deadlines set out in Article 8, they do not present a valid title or the owners are not known, as well as in the case of unopened successions or unknown successors, or in which an agreement on the amount of compensation is not reached".*

Therefore, the transfer of ownership operates at the time of issuing the expropriation decision so that even in the event of the death of the owner of the land covered by the expropriation procedure the purpose of the special law is met – establishing the legal framework to simplify the expropriation procedure for the cause of public utility necessary to achieve objectives of national, county and local interest, but also the constitutional provisions mentioned above.

4. Appeal against the expropriation decision

According to the provisions of article 9 paragraph (2) thesis II of Law no. 255/2010 the legislator offered an appeal against the expropriation decision, namely: *the appeal against the expropriation decision*, stating at the same time that this expropriation decision does not

suspend the transfer of ownership of the real estate in question, but without setting a deadline within which can be challenged or the competent court.

As mentioned above, the transfer of ownership operates by right on the date of issuance of the administrative act of expropriation after recording the amounts of compensation which means that failure to record the amounts available to the expropriated owner prevents the transfer of ownership.

We note that neither the framework law nor the special law on expropriation refer to the procedure in case of contesting the actual expropriation, the two laws being limited to issues subsequent to the issuance of the expropriation decision, namely the determination of the amount of compensation awarded.

Therefore, in so far as the dissatisfied expropriated owner seeks to challenge the expropriation itself, this can be done under the conditions of *Law no. 554/2004 Law about administrative litigation* which represents the common law procedure. The expropriation decision being an administrative act will be able to be appealed following the procedure for the settlement of applications in ordinary administrative litigation.

Conclusions

Being a topical issue, expropriations are of particular interest because they are related to the development of infrastructure, in particular the network of roads, highways, motorways, in this context, the legislator sought to create a legal framework that would simplify the expropriation procedure and also reduce the time for public utility works so that the Romanian legislator also regulated the situations in which the owner of the expropriated property dies or the successions were opened.

In this context, in addition to Law no. 33/1994 which constitutes the framework law on expropriations, the legislator adopted Law no. 255/2010, a special law, on which occasion it widened the scope of public utility works, regulated the stages of the expropriation procedure etc. The significant amendments and completions made on Law no. 255/2010 created the premises for some legislative ambiguities, which led to numerous lawsuits, most of which concerned disputes over the amount of compensation for expropriated landlords, with courts interpreting and enforcing the law in a non-uniform manner. It should be borne in mind that excessive legislation in a certain field can lead to legislative uncertainty, which is in disagreement with the principle of security of legal relations guaranteed by Article 1 paragraph (5) of the Romanian Constitution on the component of legal norm quality.

It is therefore up to the legislator to carry out an analysis of the legal framework in this area and to clarify the existing ambiguities in the current regulations, taking into account the importance of the topic and its purpose, so as to avoid any confusion or uncertainty in law enforcement.

Bibliography

Pop, L., Harosa, L.M., *Drept civil. Drepturi reale principale*, Ed. Universul Juridic, București, 2006.

Muraru, I., Tănăsescu, E.S., *Constituția României. Comentariu pe articole*, ediția 2, Ed. C.H. Beck, București, 2019.

Florescu, D.A.P, ș.a., *Exproprierea pentru cauză de utilitate publică*, Editura Universul Juridic, București, 2013.

RELEVANT ASPECTS OF FORCED EXECUTION RELATING TO MINORS

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Abstract
Enforcement on minors, framed for direct enforcement and provided for in Article 910-914 the new Code of Civil procedure, is a newly regulated section and introduced in the field of civil procedure. Participants in the forced execution procedure regarding minors, in addition to those indicated in Article 644 of the new Code of Civil procedure – creditor, debtor, bailiff, enforcement court, agents of the public force, There are also representatives of the General Directorate of Social assistance and Child Protection, one of which is a psychologist, if the representative of the Directorate does not have this qualification. Although legally framed, the matter is restricted, having essential shortcomings, such as the term of summons, the method of termination of forced execution, s.a. the procedure of forced execution regarding minors begins with the debtor's summons, the term granted by summons, by the bailiff, to the debtor, in order to fulfill the obligation stipulated in the enforceable title, not clear. The enforceable title can be both a court order and another enlisted, which has „enforceable power".

Keywords*: Forced execution, minors, summons, enforcement court, direct enforcement, enforceable title*

1. General terms

Forced execution is the last phase of the civil process and occurs when the one who has fallen into the claims does not voluntarily fulfill the obligations established by the enforceable title, the intervention of the bailiff being made at the request of the creditor.

Although the bailiff is only an „executor" of court decisions or other documents to which the law recognizes the power of enforceable title, most of the time, he is seen as a malefactor or prejudice of the debtor. Probably, the reason of the legislator then provided that the bailiff can ask for the support of the agents of the public force – police, gendarmerie – was that, in the exercise of his duties, often and in various situations his life and physical integrity is endangered.

A delicate part of forced execution is forced execution concerning minors, which has as main subject the „object" of forced execution, **the minor.** According to the definition, a minor is a person who has not reached the age of 18 and who usually does not have full exercise capacity. I have mentioned *as a rule* because, as stipulated by the new Civil Code, there are situations when the minor acquires full capacity for exercise before 18 years These situations are provided for both by Article 39, paragraph 1 of the new Civil Code – „*the minor acquires, through marriage, full capacity for exercise" and* by Article 40 of the new Civil Code on the capacity for **early exercise** which States that „*for good reasons, the guardianship court may recognize the minor who has reached the age of 16 years of full capacity to exercise".*

I mentioned these aspects in order to make an introduction to the subject of this work, namely Section 2, an integral part of Chapter IV, Title III of Book V of the new Code of

Civil procedure (on enforcement), where, in articles 910-914 we find the procedure for the execution of court decisions and other enforceable titles concerning minors. Basically, at first glance a rather compressed procedure for a delicate subject both from a legal and socio-human point of view.

2. Participants

Participants in the forced execution procedure regarding minors, in addition to those indicated in Article 644 of the new Code of Civil procedure – creditor, debtor, bailiff, enforcement court, agents of the public force, There are also representatives of the General Directorate of Social assistance and Child Protection, one of which is a psychologist. According to Article 911 paragraph 2 *„the presence of the psychologist is not necessary if the representative of the Directorate has this qualification".* The role of the psychologist is, of course, extremely important in this procedure, being the factor that ensures how the debtor-creditor relationship is and how it goes. They must take into account the best interests of the minor. Although in the old civil procedure there were no provisions on forced execution concerning minors, the legislator considered it necessary to regulate a kind of procedure, which he introduced in the new Code of Civil procedure. In the old civil procedure, forced execution concerning minors is carried out according to the provisions of the „obligation to do". Thus, the presence of the representatives of the General Directorate of Social assistance and Child Protection and implicitly of the psychologist was excluded by the lack of foresight, which put the bailiff in the situation of filling the latter's role, depending on the situation on the spot. Of course, an unregulated or succinctly regulated procedure leaves room for interpretation, discriminatory law enforcement, abuses etc.

3. Court of execution

Although common civil cases concerning minors, such as for example the divorce of parents in respect of custody of minors, the establishment of custody of the minor, s.a, which are within the competence of civil courts, have specialized court panels in „minors and family" and thus in this context we are talking about the „guardianship court". In the enforcement procedure, the legislator did not provide for another specialized court, and as such the competence to judge the approval of the enforceable title regarding minors is the enforcement court. But the legitimate question is: Which court is competent to settle the application for the approval of the enforceable title concerning minors? Returning to the provisions of Article 651 of the new Code of Civil procedure *„**(1)** the enforcement court is the court in whose constituency, at the time of referral to the enforcement body, the **domicile or, as the case may be, the place of residence of the debtor**, unless the law provides otherwise".* Practice has taught us that, in the situation where both the creditor and the debtor of a minor who have the same common domicile, according to the identity documents, but who in fact, the debtor, the one who owns the minor without a valid title, has another domicile where he actually lives, without legal forms, the creditor shall address the bailiff from the domicile where the debtor lives without legal forms. The creditor shall indicate, on his own reply, by application for enforcement, the legal domicile, as well as the known domicile, that is, the effective and without legal forms, the latter attracting the competence of the bailiff and implicitly of the enforcement court which will consent to the enforcement of the enforceable title, of course, if it meets the conditions for the approval of forced execution. Finally, even if the new Code of Civil procedure provides for a separate

section on the subject of this work, the forced execution of an enforceable title concerning minors is mostly carried out under the provisions for the „obligation to do".

4. The summon

The enforcement procedure concerning minors begins with the debtor's notice. A common problem in practice is that of the term granted by summons, by the bailiff, to the debtor, in order to fulfill the obligation stipulated in the enforceable title.

(2) in these cases, the bailiff will send the parent or person with whom the minor is located the conclusion of the execution consent together with ***an summons*** *in which* ***he will communicate to her the date on which to present himself with the minor at his headquarters or in another place established by the executor****, in order to be taken over by the creditor, or, as the case may be, shall consider allowing the other parent to exercise the right to have personal ties with the minor, according to the program established in the enforceable title.*

The debtor's summons has the role of „warning" him that the forced execution procedure was launched against him and that he has the possibility to fulfill his obligation in the enforceable title, in this phase, of the summons. The term of summons is not expressly provided for in the aforementioned Article, either from the omission of the legislator, or was left to the discretion of the bailiff, depending on the particularities of each case given for enforcement. And yet what is the legal term of summons, granted to the debtor to execute the obligation established by the enforceable title?

Being a forced execution procedure that ultimately refers to an „obligation to do", from practice, court executors grant terms of 10, 15 days or 30 days.

The 10-day period would be justified by the provisions of Article 904 of the new Code of Civil procedure „*if the debtor refuses to fulfill* ***an obligation to make*** *an enforceable title,* ***within 10 days of the communication of the conclusion of the execution agreement****, the creditor may be authorized by the enforcement court, by enforceable conclusion, given the summoning of the parties, to perform it himself or through other persons, at the expense of the debtor."* However, the legislator refers to the communication to the debtor only of the conclusion of the approval, and the summons are not provided. However, I believe that it is mandatory to call the debtor if we refer to the provisions of Art. 667 and 668 of the new Code of Civil procedure „*the debtor will be ordered to fulfill his obligation, immediately or within the period provided by law, showing that otherwise, the execution will continue. According to Article 667 (1) if the application for enforcement has been approved, the bailiff will communicate to the debtor a copy of the conclusion given under the conditions of Article 666, together with a copy, certified by the executor for compliance with the original, of the enforceable title and, unless the law provides otherwise,* ***an order****. (2)* ***the communication of the enforceable title and order****, except in cases where the law provides that enforcement is done without order or without communication of the enforceable title to the debtor,* ***is provided under the sanction of nullity of enforcement****.* The cases of forced execution without summons are strictly stipulated by the law, under Article 669 of the new Code of Civil procedure, but returning to Article 910, paragraph 2 we find the obligation to communicate the summons. The two provisions of Articles 904 and 910 respectively are unclear – the first does not provide for the obligation to communicate the summons, and the second provides for the communication of the summons, but does not provide for the time limit granted in the summons for the debtor's enforcement of the obligation in the

enforceable title, but both provisions are in the chapter on the forced execution of other obligations to do or obligations not to do.

The 15-day term is a „general" term in the forced execution that we meet at the real estate summons and at the appeal to enforcement, so if the bailiff summons the debtor, granting a 15-day period for the fulfillment of the obligation in the enforceable title is covered the procedure.

In practice, the 30-day time limit is also granted, starting from Article 911 of the new Code of Civil procedure, „*if within one month of the communication of the conclusion provided for in Article 906 (2) the debtor does not fulfill his obligation, The bailiff shall proceed to enforcement"* which refers to Article 906, paragraph 2 „*when the obligation is not evaluable in money, the court seised by the creditor may oblige the debtor, by final termination with the summoning of the parties, to pay in favor of the creditor a penalty from 100 lei to 1.000 lei, established per day of delay, until the execution of the obligation stipulated in the enforceable title.* The two provisions are very ambiguous presented, apparently without any connection between them, but we could infer that if a month has passed since the communication of the approval conclusion and the summons, but the debtor has not voluntarily fulfilled, during the forced execution, the obligation in the enforceable title, the bailiff will continue enforcement. In other words, a 30-day period has elapsed since the debtor was summoned. It follows that it is not wrong for the bailiff to order the debtor with a 30-day summons. The continuation of forced execution regarding minors, on the debtor, is also to request the enforcement court, that the debtor be obliged to pay the creditor penalties, from 100 lei to 1000 lei per day of delay, until the execution of the obligation.

In conclusion, we consider that as long as a clear deadline for the debtor's notice is not provided, it remains up to the discretion of the bailiff, the deadline that he will grant to the debtor for the fulfillment of the obligation stipulated in the enforceable title relating to the minor.

5. Opposition to execution and refusal of the minor

Although the minor is the main „actor" in the present work, as well as in the aforementioned legal texts, the debtor is the one who depends on the execution of the forced, respectively, whether he manifests his intention to comply or not with the summons of the bailiff. In practice, there are many situations when either the minor refuses to go to the creditor, or the minor is hidden by the debtor and then the bailiff has the obligation to notify the prosecutor's office attached to the enforcement court. Under these conditions, forced execution also takes on criminal valences. The legislator no longer mentions whether the forced execution ceases or continues or whether it can continue under the given condition, namely the one in which the prosecutor's office attached to the enforcement court was notified, but the opinion is that the forced execution can continue and can be achieved if the debtor, in the meantime, it fulfills the obligation established by the enforceable title. It is obvious that the „struggle" between the creditor and the debtor is detrimental to the minor, which is the „stake" of forced execution.

Art. 913 paragraph 1 of the new Code of Civil procedure speaks of the „refusal of the minor" ***(1)*** *if the executor finds that the minor himself categorically refuses to leave the debtor or shows an aversion to the creditor, it shall draw up a record of its findings and*

communicate it to the parties and to the representative of the directorate-general for social assistance and child protection."

We are shown in this context that the „agent" who is the judge is the executor himself, and not the representative of the Directorate. Indeed, the bailiff has the duty, according to Article 679, to conclude the minutes for all the enforcement acts performed during the forced execution, but the pertinent question that arises is that, why did the legislator provide exclusively for the bailiff the obligation to establish the refusal of the minor? The opinion is that the bailiff is the body that ensures the enforcement of the enforceable title, with all the procedures stipulated by the law, but the record of finding in the matter of forced execution concerning minors should be drawn up based on the findings of the representatives of the Directorate. The latter have the role of talking with the parties and especially with the minor to determine the factual situation and the reason for the refusal of the minor. Various situations have been encountered in practice, when the minor's refusal to leave the debtor was due to fear of the latter. And here comes the role of the representative of the direction, namely of the psychologist, who must distinguish between a disguised refusal or a real refusal.

6. Conclusions

In conclusion, the fact that with the introduction of the new Code of Civil procedure was regulated the enforcement procedure concerning minors, which is a delicate procedure since we are talking about children, which, as I have already pointed out, are a „stake" between the creditor and the debtor, and in the end, there are those who suffer the most from this „war."

And yet forced execution when the „object" of the minor is the object, and this cannot be achieved when it is not possible, when it ceases? It follows from the provisions of Article 913, paragraph 5 and Article 914, that if forced execution cannot be carried out, even after receiving the psychologist's report, because of the minor's refusal, the creditor may refer the matter to the court for a penalty, in accordance with the provisions of Article 906, paragraphs 2, 4 and 6, to conclude a report on how to fulfill the obligations under article 910 (1). Basically, from the text of the law, we understand that forced execution can be resumed indefinitely, since the situation given by the legislator – the refusal of the minor – does not fall under any of the provisions of Article 703 regarding cases of termination of forced execution, only the same if the creditor waives enforcement. But if the minor refuses, and the psychologist's reports attest to this fact, how does forced execution cease? Probably in the future, such a legal provision will be necessary, that after all the ways stipulated in Art. 910-914, the bailiff will have the opportunity to have found the impossibility of carrying out forced execution and to order the termination of forced execution, based on the reports of refusal of the minor, Issued by the psychologist of the General Directorate of Social assistance and Child Protection, on the one hand for the clarity of the law, and on the other hand, in order not to scothe the best interest of the minor.

By way of *Ferenda law*, I consider it appropriate to introduce an Article of law providing for the presence of the representative of the General Directorate of Social assistance and Child Protection, implicitly of the psychologist, throughout the forced execution, its presence to be requested from the beginning of the execution forced since the debtor is summoned to appear with the minor at its headquarters or in another place established by the executor, in which case, if the debtor presents himself, the representatives of the directorate, respectively the psychologist, to be present and make their own findings

on the spot – to talk to the minor, to understand which of the parties they are affectionate toward, what they understand from what is happening etc.

I also consider it appropriate to introduce a clear provision, so that the representatives of the Directorate, namely the psychologist, will be those who make the finding on the refusal of the minor, to draw up a report or a report in this regard, on the spot, the bailiff being the one who will draw up the minutes according to Article 679, based on the findings of the representatives of the directorate.

Also as *a Ferenda law*, I consider it appropriate to clearly mention the term of summons of the debtor for the fulfillment of the obligation in the enforceable title.

Also by way of *Ferenda law* I consider it appropriate to introduce faster and more drastic sanctions to be applied to the debtor who does not fulfill the obligation established by the enforceable title, regarding minors, such as: If the debtor, legally summoned, does not proceed to the fulfillment of the obligation for which he was ordered, the bailiff, at the request of the creditor, To immediately notify the prosecutor's office attached to the enforcement court for non-compliance with the court decision in order to prevent the delay in enforcement for the realization of the creditor's right or even an offense that could occur over the minor, as well as to make the minor „a weapon of war". Although the legislator provided that the notification of the prosecutor's office attached to the enforcement court should be made only after the expiry of a deadline, which may be even more than 3 months, if we are to consider the procedure for notifying the court for the application of penalties. These time limits granted by the legislator are a serious breach of the best interests of the child, which are paramount. In practice, this procedure provided for in Article 912 would be carried out in the following way: The debtor legally summoned fails to fulfill the obligation established in Article 906, respectively to pay the daily penalties, as granted by the enforcement court, a penalty that will run until the moment of enforcement, but not more than 3 months after the communication of the conclusion referred to in article 906, paragraph 2. In other words, the elapsed time would be more than 3 months, which starts with the notification of the enforcement court in order to obtain the enforceable title on the application of penalties, plus the maximum period allowed by law, the 3 months, until the date when the bailiff can notify the prosecutor's office attached to the enforcement court. Obviously, these time limits are a serious breach of the best interests of the child, as well as of the creditor in order to realize his right in the enforceable title.

Also as *a Ferenda law,* I consider it opportune to introduce a clear legal provision, with the way of stopping forced execution, in case of repeated refusal of the minor.

Bibliografie

1. E. Oprina, I Garbulet, Theoretical Treaty and practical enforcement. General Theory and enforcement procedures, Vol. I, Ed. Univ. legal, buc., 2013, p. 916

2. I. Deleanu, Treaty of Civil procedure, vol. I and II, ed. Legal Universe, buc., 2013

3. V.M. Ciobanu, M.. Nicholas, the new Code of Civil procedure, commented and annotated, vol. II, 2nd ed Revised and added, ed. Legal Universe, buc., 2016

4. M. Dinu, R.. Stanciu, Forced execution in the civil procedure code. Comments on articles, ed 2, ed. Hamangiu, buc., 2019, p.. 841

5. I. Les, The new Code of Civil procedure. Comments on articles, vol. I, ed. C.H. Beck, buc, 2011

6. I. Les, Treaty of Civil procedural Law, Ed. C. H.Beck, pcs., 2010

7. S. Zilberstein, V. M. Ciobanu, Forced execution Treaty, ed. LEX light, buc, 2001

OVERVIEW ON THE MORTGAGE OVER THE RIGHT OF SUPERFICIES DERIVING FROM THE REAL ESTATE LEASING AGREEMENT IN THE CONTEXT OF ITS TRANSMITTAL TO THE ABSORBENT COMPANY

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Abstract

The leasing contract is, without a doubt, one of the North American-inspired contracts which, implemented in the local legislation, generated the diversification of the local market, by entering the multinational companies holding expertise and know-how in the field, increasing the opportunities and turnover of the professionals.

Thus, as an effect of the entry into force of Government Ordinance no. 51/1997 on leasing operations and leasing companies (hereinafter referred to as Ordinance 51), multiple leasing companies were set-up which delivered added value, in the difficult economic context of that period, precisely through its wide addressability (movable and immovable goods), being an alternative to the classic bank loan (and very difficult to be granted in those years when the Romanian banking system, mostly owned by State, still had a long roa until its consolidation), the provision of certain financial advantages / business and favoring intermediation operations, in the broad sense, respectively the interposition between the producer and the beneficiary.

The purpose of this article is to highlight some (atypical) aspects of the right of superficies derived from the real estate leasing contract, which probably were not sufficiently used by the leasing companies in the context of securing the bank loans contracted by them, to support and develop the current activity using the real estate mortgage over the right of superficies, as provided by the Article 2379, 1st paragrapgh, letter d) of the Civil Code, with the mention that the general framework is provided by the Article 24 of Ordinance 51, in particular.

It should be mentioned that such a valid mortgage right is maintained and it can be transferred from the leasing company's patrimony to the absorbent company's patrimony in the hypothesis of a merger by absorption, respecting the legal conditions of procedure, form and opposability.

To the same extent, as a result of the analysis, proposals will be submitted de lege ferenda which may be useful to the business communities and legal professionals.

Keywords: *right of superficies, real estate leasing, financial leasing, real estate mortgage, transmittal of rights*

Section I. The leasing operations. The leasing agreement. Particular aspects

The leasing operations are defined by the Article 1, 1st paragraph of the Ordinance 51 as actions by which a party, called lessor / financier, transfers for a certain period the right of use over a good (property), whose owner is, to the other party, called lessee / user, at its request, against a periodic payments, called leasing rate, and at the end of the leasing period

the lessor / financier undertakes to respect the lessee's / user's right to buy the good, to extend the lease without changing the nature of the leasing or to terminate the contractual relationship.

The lessee / user may choose to purchase the property before the end of the leasing period, but not earlier than 12 months, if the parties so agree and if he pays all the obligations assumed by the contract.

For greater traceability, the following stages of the leasing operation can be highlighted:

a) the intersection of the user's business interest, respectively the identification the good necessary for his professional activity with the commercial interest of the financier, respectively the exploitation of his own good or purchased from a supplier. This step also implies the user's right to choose the supplier of the good in case the financier is not the owner of the good;

b) the offer that identifies the good object of the leasing;

c) signing the leasing agreement that will contain all the elements provided by the Ordinance 51;

d) the insurance of the property to be ensured by the financier if the leasing contract did not provide otherwise;

e) the fulfillment by the financier of the obligations that he has in relation to the user, respectively to ensure the right of use for a limited time against the payment of the royalty and the right of option of the user, respectively to buy the good, to extend the leasing agreement without changing the nature of the leasing or to terminate the contractual relationship.

We reasonably consider that the right of option should not have been affected by any suspensive or resolutive condition, term or burden, unless the parties have agreed otherwise by the leasing agreement and the relevant legal provisions are followed.

Otherwise, the legal cause of the right of option, which must exist, be lawful and moral, could be affected.

In the event that the legal cause of the right of option does not meet the above three requirements at the same time, the possible sanction is the annulment of the lease, because granting the right of option is an obligation for the financier and not a faculty and at the same time is one of the the elements that define the essence of the lease. In other words, without this element, the parties would not be in the presence of a leasing agreement.

Although there is a similarity in terms of legal content, the leasing contract is not interferred with the leasing operation, but i is the modality by which the leasing operation is performed, respectively the ascertaining document or the material support that register or documents the manifestation of will. This approach is in line with the provisions of ther Article 7 of the Ordinance 51, according to which the leasing agreement is concluded in writing, this being an *ad probationem* requirement and for ensuring the opposability in the context of the Article 21 of the Ordinance 511.

It should be noted that in the current practice of the leasing companies, the written form of the leasing agreement of any type prevails, for reasons related to the civil circuit security and corporate governance, given that the non-banking financial institutions in the leasing area are subject to the supervision of the National Bank of Romania according to the Law no. 93/2009 on non-banking financial institutions.

Thus, a finance lease is any lease that meets at least one of the following conditions:

a) the risks and benefits of ownership of the leased asset are **transferred** to the user at the time the leasing agreement takes effect;

The legal wording is quite interesting in the sense that the object of the transfer is not represented by the property right in its essence, but by the risks and benefits related to the property right.

We emphasize that the wording is not rigorously accurate, because in reality only some of the benefits are transferred, namely the right to use the good (*jus utendi*) and the right to harvest the fruits of the good (*jus fruendi*), the content of the latter being deprived by the benefit of using the good represented by the payment of the royalty to the user, mainly.

It is true that the regime of the right of disposal (*jus abutendi*) is provided by the letter c) of the same article, but the normative rigor requires the revision of the legal text in this respect and with the express indication of the transmitted benefits and risks.

Then, we consider that the wording **being transferred** may not be the most appropriate from a terminological perspective, the notion of transfer not being specific to the area of civil law.

The related rights may be assigned or the contract itself may be assigned (according to the Article 1315 and the following from the Civil Code), the transfer being **an effect** of the assignment or of the transmittal. Consequently, we are of the opinion that it would be more appropriate to use the term **transmittal** instead of the transfer term.

We also consider that the legal regime of the financial leasing contract should be given by the cumulative fulfilment of all the conditions provided in letters a)-e) of the Article 7 point 7 of the Fiscal Code, the main argument being that the fulfilment only of the condition from letter a) may create areas of interference with the operational leasing agreement.

In this light, we consider that **each** of the conditions provided in letters a) -e) indicated above are defining elements for the financial leasing agreement through which it is different from other contracts meaning that we recommend by *de lege ferenda*

This condition is defining for the legal regime of the financial leasing contract, being rather the expression of an economic benefit deserved by the user after using the good for a certain period, together with the payment of the royalty.

c) the user has the option to buy the good at the expiration of the contract, and the residual value expressed as a percentage is less than or equal to the difference between the maximum normal operating time and the lease term, relative to the maximum normal operating time, expressed as a percentage;

Such a requirement has a predominantly accounting connotation that can generate profit / economic benefits for the financier and user and we consider that it can only regard the financial leasing agreement.

d) the leasing period exceeds 80% of the normal maximum operating time of the leased asset; for the purposes of this definition, the lease term includes any period for which the leasing may be extended;

This measure is intended to support the business of the leasing company, while also seeking to encourage or support the local industry.

e) the total value of the leasing rates, less the ancillary expenses, is greater than or equal to the input value of the good;

The insertion of this condition aims to emphasize the predominantly economic nature of leasing which is the result of a mix of financing techniques. However, financial leasing is

the most common in practice and due to the possibility of purchasing the good at a residual price[2].

The operational agreement is any leasing agreement concluded between the lessor and the lessee, which transfers to the lessee the risks and benefits of the property right, less the risk of capitalization of the good at the residual value, and which does not meet any of the conditions provided by the letters b) – e) of art. 7, po.7 of the Fiscal Code; the risk of capitalization of the good at the residual value exists when the purchase option is not exercised at the beginning of the contract or when the leasing contract expressly provides for the return of the good at the time of expiration of the contract.

We point out that the opportunity of the explanation regarding the risk of capitalization of the good at the residual value should be rethought by referring to the fact that the lack of this risk determines the qualification of the lease as operational.

At the end of this section we highlight the main legal features of the leasing agreement: thus, the leasing agreement is a bilateral contract, onerous, commutative, with successive performance and consensual[3].

Section II. The mortgage over the right of superficies deriving from the leasing agreement. Specific aspects.

The Article 24 of Ordinance 51 lists at letters a) -b) some legal hypotheses generating some rights of superficies, if the leasing companies will offer financing in this respect, respectively:

a) the construction of a building on the land owned by the lessee / user, in which case the parties may agree that the period of repayment of leasing installments begins to run from the taking-over the building (after its completion) and gives the landlord / financier a right of ownership over the building and a right of use on the ground, unless otherwise agreed by the parties;

b) the acquisition of the right to build a building on the land of the landlord / financier, in which case the parties may agree that the period of repayment of leasing installments begins to run from themtaking over the building (after its completion) and gives the tenant / user ownership of the building and a right land use, unless otherwise agreed by the parties.

The common element of the two examples above is given by the fact that, at the end of the constructions on the land owned by another, followed by the registration in the Land Book of the property right over these constructions, a right of superficies is born (dismemberment of the property right) which must also be properly registered in the Land Book, according to the Civil Code and the Law on the cadastre and real estate publicity no. 7/1996.

The leasing company could constitute a real estate mortgage right over this right of superficies having as object the constructions and the land with different owners, fact allowed by the Artcile 2397, 1st paragraph, letter d) of the Civil Code in case it would contract loans to support the current activity (for the purpose of attracting funds for leasing type financing, for example), insofar as this is allowed by the applicable legislation (respectively it would not be affects the specialty of the leasing company's capacity to use).

Of course, the other real estate owner must be the signatory of the real estate mortgage, in addition to the leasing company. Thus, it is necessary to ensure the existence of an economic interest related to the other real estate owner, so that the cause of the guarantee is

lawful. Likewise, the other owner is advised to waive the benefits of division and discussion in the warranty deed.

Until the completion of the constructions, such a guarantee would be possible for the leasing company if, *de lege ferenda*, Ordinance 51 would allow, in guaranteeing the granted lease, the establishment of a real estate mortgage over a future good (construction), by taking over the principle described by Law no. 190/1999 on the mortgage loan for real estate investments.

Thus, according to the Article 3^1 of this normative act, the mortgage on a future good is registered in the Land Book if the building permit has been noted in the Land Book in advance.

Moreover, the paragraph 4 of the same legal text speaks of the mortgage over the right of surfaces constituted over the construction and the right of use over the land on which the construction had been erected.

The above considerations apply accordingly to the last two examples contained in letters c)-d) of the Article 24 of the Ordinance no. 51, of course to the extent that a right of superficies is valid.

Sectiunea III. Conclusions

The guarantee operation described in this article is possible as a legal (theoretical) construction and can be of real practical use to the leasing companies. *Thus, in the event of a merger by absorption of the leasing company, the valid guarantee rights set-up in favor of the lessor are transferred to the acquiring company*.

In the same way, the principle can be used by professionals from other industries.

We reasonably deem that the proposals *de lege ferenda* related to the Ordinance 51 out of which we reiterate the provision of the possibility to be secured the leasing contract with real estate mortgage on a future good may be considered a starting point for the next legislative intervention, in order to improve the professionals activity and to consolidate the business legislation.

Bibliography

[1] Clocotici, D., Gheorghiu, Gh. (2000), The leasing operations, the 2nd edition, Lumina Lex Publishing House, Bucharest, p. 52.

[2] Angheni, S. (2019), Commercial Law. Treaty, C.H. Beck Publishing House, Bucharest, p. 667.

[3] Cărpenaru, St.D. (2019), Romanian Commercial Law, the VI th edition, Universul Juridic Publishing House, Bucharest, p. 570-571.

IS RIGHT OF OCCUPATION OF THE SURVIVING SPOUSE, INHERITAsNCE RIGHT OR MEANS OF SOCIAL PROTECTION?

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Abstract

The death of a loved one is an event in every person`s life, whose significance, beyond the sentimental one, is strongly felt in the legal reality. This article focuses on the surviving spouse as the holder of the right of occupation of the property in which he or she lived with the deceased spouse and which forms part of the inheritance items.

This special right of occupation of the surviving spouse was first regulated by Law no. 319/1944 on the inheritance rights of the surviving spouse which in Article 5 of this law had the following provision: „In cases where the surviving spouse inherits together with classes II-IV, he/she shall inherit, in addition to his/her inheritance share, the furniture and objects belonging to the household, as well as the wedding gifts". In the new Civil Code, it was decided to keep these provisions but with some minor changes.

The reason for keeping these provisions was considered in terms of the positive effects that occur, the surviving spouse having the possibility to keep these assets, assets that may have an emotional charge, sentimental value, also a mean of protection offered to him/her, which for ascendants or collaterals would be without any significance or value. On the other hand, the text of the law is also intended not to deprive the surviving spouse of the property that he/she used with the deceased spouse, otherwise the conditions and way of life of the surviving spouse would be changed without any justification, taking into account the fact that the heirs outside the family with whom he would come in concurrence to inheritance, do not have any contribution to the acquisition of property, so that this special right of occupation conferred by law to the surviving spouse appears under this aspect all the more legitimate.

In the New Civil Code, this right is provided for in Article 974: „When not in concurrence with the descendants of the deceased, the surviving spouse shall inherit, in addition to the share established in accordance with Article 972, the furniture and household objects which have been assigned to the joint use of the spouses".

Keywords: *surviving spouse, special right of residence, inheritance law, means of protection*

1. The surviving spouse and his/her inheritance rights. Evolution of the regulations

Initially, the Civil Code of 1864 in art 679 and art. 681-684, the surviving spouse was totally disadvantaged in relation to the relatives of the deceased, who had no legal right of inheritance except in one case when there were no successors called to inherit in any of the four classes of heirs.

Thus Article 684 of the Civil Code of 1864 gave the poor widow a right of life usufruct on a share of the inheritance when she came to inherit in concurrence with the descendants

of the deceased and a right of full inheritance in 1/4 of the inheritance when she came to inherit in concurrence with the ascendants and collaterals of the deceased.

This situation was criticized and was later remedied by the adoption of Law 319/1944 for the inheritance rights of the surviving spouse, who without being related to the deceased (*de cujus*) and without being part of a class of heirs, was conferred a full legal right of inheritance, entering the concurrence with each class of heirs.

In addition to this legal right, the law also establishes certain special rights in favour of the surviving spouse, namely a special right to furniture and household goods and a temporary right of occupation in the dwelling house[1].

The provisions of Section I, Chapter III, Title II of Book IV of the new Civil Code reiterated and perfected the regulation of Law 319/1944, giving the surviving spouse similar rights, eliminating the spouse's special right to the wedding gifts.

2. Right of occupation of the surviving spouse

To be able to enjoy and at the same time ensure an environment close to that which the surviving spouse enjoyed during his or her deceased spouse's lifetime, the lawgiver grants him or her a temporary right of occupation over the house in which he or she lived.

Thus, according to Art. 973 paragraph 1 of the Civil Code „the surviving spouse who does not hold any real right to use another dwelling corresponding to his/her needs shall benefit from a right of occupation over the house in which he/she lived until the date of the opening of the inheritance, if this house is part of the inheritance assets".

The right of occupation described above is thus a right in rem which has as its object a dwelling house and which allows the holder of the right to possess and use that dwelling, the property of another person (of the deceased spouse), for the purpose of satisfying the needs of habitation[2], and operates regardless of the heirs with whom he/she comes in concurrence for the inheritance, therefore including the descendants of the deceased (*de cujus*).

In view of this legal provision, it is necessary to make several observations:

2.1 The law does not require that the object of the right of occupation be the house in which both spouses lived up to the date of the inheritance opening. Since the law allows spouses to have separate dwellings, the object of the right of habitation must be the house in which the surviving spouse lived, even if the deceased did not live in that house[3].

2.2 The law also does not require that the object of the right of occupation be the house in which the surviving spouse had a domicile. It is therefore possible that the object of this right is the property in which the surviving spouse had their residence[4].

2.3 It is also irrelevant whether the dwelling was the family dwelling, in the sense of articles 321-324 of the Civil Code[5] **or that there was no such entry in the land register.**

2.4 ***There is also no legal requirement to have lived in a particular property for a certain length of time.*** In this situation, it is possible that the object of the right of occupation is a house in which the surviving spouse had his or her domicile or residence for a short period of time before the date of the inheritance opening.

3. Conditions of the right of residence of the surviving spouse

The surviving spuse acquires, from the moment of the opening of the succession, this right of occupation if the following conditions are cumulatively fulfilled:

3.1 At the date of the opening of the inheritance, the surviving spouse must have effectively lived in the property forming the subject of the right of occupation.

3.2 The property in question, which is the subject of the right of occupation, to form part of the estate.

As a result, it is mandatory that the property in question is in the ownership of the person who leaves the inheritance, regardless of whether it is common property with the surviving spouse, and it is also irrelevant whether the property in question was in the exclusive ownership of the deceased or was in co-ownership with other persons. Regardless of one of these cases, the right of occupation of the surviving spouse will function validly if it is subject to the provisions of art. 636 and following of the Civil Code. If the property which constituted the surviving spouse's dwelling is owned by the deceased under a rental contract or as the holder himself of a right of usufruct or life tenancy, there can be no question of the existence of a right of occupation based on the provisions of art. 973 of the Civil Code[6].

3.3 The surviving spouse does not hold any real right to use another dwelling suitable to his/her needs

We consider the following 2 aspects:

Firstly, the law refers to the fact that there must be no real right to use another dwelling, and not just the non-existence of a property right conferring the benefit of the use of a dwelling. So, he/she will not be able to take advantage of art. 973 Civil Code and will not be able to benefit from the right of occupation that surviving spouse who is the holder of a right of ownership, usufruct, occupation, use.

Secondly, it is required that the home to which the surviving spouse has a real right of use must meet his or her needs.

The extent of these needs and how they are identified are left to the parties to determine, and the legislator does not lay down any criteria for determining them. It should be noted that the person's needs must be assessed both from the point of view of the objective, physical, material needs and the subjective, moral, psychological, and spiritual needs of the surviving spouse, within the limits of good faith and without allowing the abusive exercise of the right conferred by law.

3.4 The surviving spouse does not become, by inheritance, the exclusive owner of the dwelling in question.

This condition results from the general application and interpretation of the rules concerning property, the holder of this right necessarily cumulating all three prerogatives of the right of ownership (ius utendi, ius fruendi and ius abuntendi) and thus the right of occupation is included in them[7].

There are some cases arising in judicial practice that give rise to such situations when the surviving spouse becomes the exclusive owner of the property in question, enjoying all

the prerogatives of this right of ownership and thus no longer justifies the recognition of a right of occupation in his favor under Art. 973 of the Civil Code.

An example in this respect[8] is the practice of the District Court of Galati, which has ruled by a matter sentence: „The surviving wife who came to inheritance after the death of the deceased together with their two sons, and the two brothers of the deceased, who inherited the parents of the deceased, the brothers of the deceased donating their parts of the inheritance to the son of the deceased, in the end the surviving wife, son and daughter of the deceased remained on the estate, and the court took into account when awarding the property to the surviving wife the fact that she lives in that property, has taken care of that property, has paid the related tax, has no other house to live in, and is the most entitled to be awarded it even if their son has the largest share of the inheritance, is not a criterion for awarding it and also the fact that both children have other personal dwellings to live in. The surviving wife has paid the respondents the shares to which they are entitled out of the estate as determined by the court. In doing so, the court, by awarding the property to the surviving wife, who becomes the sole owner of the property, has also included the right of occupation and a social protection conferred in this way, considering the circumstances of the case which led to the pronouncement of this decision as mentioned above.

3.5 The deceased not to be disposed otherwise[9].

The surviving spouse is not a reserved right holder about the right of occupation[10], and this means that if the deceased has tested in favour of someone else a right of usufruct or habitation on the property that could be claimed by the surviving spouse, by virtue of his/her right of habitation, then the beneficiary of the legacy will deprive the spouse of his right, or part of it.

4. Content and manner of exercising the right of occupation of the surviving spouse.

The surviving spouse's right of occupation appears to be a special right, being established strictly in consideration of the deceased's capacity as spouse and for this reason, the content, and the way of exercising it are different from the ordinary right of occupation regulated by art. 750 and following of the Civil Code.

4.1 The question we ask is whether this right of surviving spouse's occupation is a special inheritance right or whether it can take the form of a means of social protection that the legislator confers on the surviving spouse after the death of the deceased?

Considering the evolution over time of the inheritance rights of the surviving spouse in the framework of legal inheritance, initially in the old Civil Code of 1864 the surviving spouse was clearly disadvantaged in relation to the relatives of the deceased and which was later unanimously criticized, this situation was later remedied by the approval of Law no. 3197/1944 and subsequently also by the New Civil Code through the establishment of art. 973 which recognised the surviving spouse a right of legal inheritance in full ownership of a share of the inheritance, and also a temporary right of occupation of the house inhabited by the spouses during the marriage.

In this context, we consider that the surviving spouse's right of occupation is first and foremost a right of inheritance that exists by operation of law, being operational once the

surviving spouse accepts the inheritance, regardless of the heirs' agreement or disagreement, and is born from the moment the inheritance is opened, its acceptance by the surviving spouse implicitly determining the consolidation of his right of occupation over the house in which he/she lived until the moment the inheritance is opened.

Then the mere acceptance of the inheritance will presume the acceptance of the right of occupation of the surviving spouse who may or may not make use of this right of inheritance, but on the basis of this right he or she may or may not claim its respect by the other heirs, but this can be seen as a benefit he/she has, a faculty which the law recognises as a practical alternative and, last but not least, we say that it can also represent a means of social protection born with this special right of occupation, which puts the surviving spouse at the shelter for a period of at least 1 year from the moment of opening the inheritance.

4.2 The extinction of the right of occupation before the expiry of the term or before the partition or before the remarriage of the surviving spouse implies an express renunciation by the surviving spouse of his or her right of occupation, and this express renunciation by the surviving spouse will only operate regarding the right of occupation, without affecting the other rights that the surviving spouse has already acquired through the effect of inheritance[11].

4.3 Another issue that arises is whether the waiver of the surviving spouse's inheritance leads to the loss of the right of occupation conferred by the effect of the law, i.e., art. 973 of the Civil Code. By renouncing the inheritance automatically leads to the loss of the status of heir and implicitly of the right of occupation which is a right of inheritance recognized strictly in the consolidation of the status of heir of the surviving spouse and intervenes following his or her choice of inheritance to receive this status.

4.4 If the surviving spouse renounces the inheritance as legal heir, but accepts the inheritance as testamentary heir, can the right of residence conferred by law still operate or not?

In this regard, opinions are divided into **two**, we could say **the first** affirmative **opinion**, namely that the surviving spouse benefits from the right of occupation regardless of the way of acquiring the status of legal or testamentary heir, since the law does not make a distinction in this regard and there is no reason for sanctioning the non-recognition of this right of occupation conferred by law and towards which judicial practice should be inclined.

The second opinion is negative, and it is considered that the right of occupation is generated exclusively by the status of surviving spouse as legal heir, and in case of renouncement of this status automatically loses the right of occupation.

4.5 By virtue of his or her right of occupation, the surviving spouse has the right to live in the property alone or with his or her children or other dependants.

Even in this case, the law does not make a distinction as to the persons with whom the surviving spouse may live in the property, giving equal status to all children of a person. All the children of the surviving spouse will be able to live in the house and benefit from this right, regardless of whether those children of the surviving spouse were born after the date of the opening of the succession, whether or not they have the deceased as a parent.

4.6 If the surviving spouse has remarried, the right of occupation is extinguished. He or she may live in the house which is the subject of the right of occupation only by virtue of another right by virtue of a common law right of occupation, right of usufruct, right of lease etc., and may not avail himself/herself of the provisions of the law which provide for the right of occupation granted to the surviving spouse.

4.7 If the surviving spouse lives in the house with another person but has not remarried, the other heirs will not be able to invoke the extinction of the right of occupation, because the provisions of the law are very precise in this respect, only the conclusion of another marriage can extinguish the right of occupation.

4.8 The dwelling being assigned exclusively to the surviving spouse and his/her family, it cannot be rented and therefore the right of occupation cannot be transferred.

4.9 The holder of the right of occupation is obliged to bear based on the right of occupation acquired according to the law, all the expenses related to his right of occupation and the maintenance expenses of the building he/she uses.

On the other hand, its right of habitation extends to everything that is incorporated with the property in question, as well as all its accessories.

5. Restriction and change of the object of the right of occupation

Under Article 973(3) of the Civil Code, the heirs may request the restriction of the right of occupation of the surviving spouse if the dwelling is not entirely necessary for him/her. The assessment of the need to use the entire dwelling or only part of it is made in relation to the person of the surviving spouse, his state of health, his professional or intellectual concerns, and the persons he has in his care.

Also in this article, which states that the heirs may request a change of the object of the right of habitation, it is stipulated as a condition to provide the surviving spouse with a suitable dwelling.

To identify the appropriate dwelling, therefore, it will be necessary to assess it based on the parties' arguments or based on the court's intervention, considering the general rules mentioned above and which corresponds to the objective and subjective, material, and spiritual needs of the surviving spouse and which does not create any legal or factual discomfort.

Regarding the practical way of restricting and changing the object of the occupation, it is not a question of extinguishing the right of occupation, but only of changing its object, the right of occupation will continue to exist, only the object of the occupation is changed by the provision of another property by the heirs and accepted by the surviving spouse.

6. Termination of the right of occupation

Article 973 paragraph 4 of the Civil Code provides for two situations of extinction of the surviving spouse's right of occupation: by partition and by remarriage of the surviving spouse, and as general cases of extinction of the right we mention the surviving spouse's resignation, death of the holder of the right change of the object of the right of occupation and non-use.

6.1 The extinction of the right of habitation by partition can be achieved by partition either by mutual agreement or by court. The law imposes a certain time limit on the duration of the right of occupation, one year from the date of the opening of the succession. Regardless of the way in which the partition was carried out, in kind or by equivalent, and regardless of who was awarded the property in its materiality, a part of this property or a sum, the right of occupation ceases with the conclusion of the partition deed or after the final judgment has become final.

6.2 The remarriage of the surviving spouse shall result in the extinction of the surviving spouse's right of occupation, regardless of whether this occurred before the expiry of one year from the date of the opening of the succession.

6.3 The surviving spouse's renunciation of the right of occupation is made expressly and exclusively by the holder of the right, any other renunciation coming from other persons living with the surviving spouse, children, parents does not have the effect of extinguishing the right of occupation.

6.4 The death of the holder of the right is another way of extinguishing the surviving spouse's right of occupation. It is intuitu personae and therefore cannot be transferred to the heirs of the surviving spouse.

6.5 The change of the object of the right of occupation provided for in Article 973 paragraph 3 of the Civil Code does not represent an extinction per se but only a change of its object.

6.6 Extinction of the right by non-use for a period of 10 years according to art. 746 of the Civil Code, if during this period no other case of extinction has occurred, the remarriage of the surviving spouse or the partition.

7. Legal characteristics of the surviving spouse's right of occupation

The legal characteristics of the right of occupation are regulated in the provisions of Article 973 paragraph 2 of the Civil Code, this right being free, inalienable, and unassignable. In addition to these, we can also add other characteristics resulting from the application and interpretation of the law in judicial practice.

7.1 It is a right in rem, the object of which is a dwelling house. The holder of the right of occupation will have the right to use both the property and its appurtenances, the land, and the common parts.

7.2 It is a temporary right that lasts until the exit of the indivision (at least one year from the opening of the inheritance) or until the remarriage of the surviving spouse.

7.3 It is a free right, and the surviving spouse is not obliged to pay rent to the other heirs for the use of the property.

The surviving spouse's right of occupation will operate only if the dwelling was the exclusive property of the deceased or the joint property of the spouses.

The surviving spouse will be able to use the dwelling after the termination of the right of occupation, either as owner (when it fell into his/her lot) or as co-owner (although the

spouse has not remarried). In this case, if the spouse uses more than his/her share of the property, he/she will be obliged to pay the rent. If he or she has not acquired any part of the dwelling and it has become the exclusive property of his co-heirs, he or she can be evicted under common law.

According to Article 973 paragraph 5 of the Civil Code, all disputes regarding the right of occupation of the surviving spouse shall be settled by the court competent to judge the division of the inheritance, which will decide urgently, in chambers.

7.4 It is an inalienable and inalienable right

This characteristic implies that the right of occupation is unassignable and cannot be transferred either by deeds free of charge or onerously, nor by deeds between living persons, nor by death. The surviving spouse's right of occupation will be extinguished by his or her death. As a consequence of the inalienable nature of the surviving spouse's right of occupation, it will also be unattachable, and cannot be pursued by the spouse's personal creditors or by the creditors of the inheritance.

7.5 The right of occupation is a mean of protecting the surviving spouse

The status granted by law to the right of occupation is a special one. This legal institution is regulated with a protective purpose to remove any state of danger to which the surviving spouse who does not own a dwelling and who would be evicted from the property by the other cohabitants before the partition of the dwelling could be exposed.

This legal character of the right of occupation as a mean of protection is not expressly provided for by the law, it can be inferred from the interpretation of the law, the legislator grants this right which constitutes a privilege conferred in this way to the surviving spouse who, following the death of the deceased, ensures him/her an environment close to that which he/she enjoyed during his/her lifetime, an aspect also taken into account in the practice of the courts when pronouncing inheritance division decisions, assigning the surviving wife the deceased's home on these criteria for lack of another personal home, as she had nowhere else to live, lived in the house of the deceased, took care of the maintenance of the house, paid the taxes, the surviving wife being the most entitled to receive the property in question, subject to the payment to the other co-sharers of the civil shares of the inherited parts established by the court.

By doing so, the right of occupation, which is regarded as a means of protection, is incorporated into the exclusive right of ownership acquired by the surviving spouse through partition.

Conclusions

The inheritance rights of the surviving spouse have thus gone through several stages over time. Under the old codes, the surviving spouse, whether male or female, enjoyed inheritance rights, acquired in full ownership or in usufruct depending on the category of heirs with whom he/she was competing for the deceased spouse's inheritance, their number etc. However, although the surviving spouse had a satisfactory position regarding the inheritance, he or she did not enjoy a special right of occupation in the dwelling in which he/she lived until the death of the deceased spouse.

The Romanian legislator felt the need to protect the inheritance rights of the surviving spouse, but also to respect the principle of the presumed affection of the deceased, by

adopting the Decree-Law no. 319/1944 which introduced the temporary right of occupation in favour of the surviving spouse, a regulation which was free of shortcomings and many criticisms were made. Therefore, the observations made by the doctrine and the jurisprudential debates have led to the innovations brought by the new Civil Code, and there are still criticisms against the provisions of art. 973, in order to clarify the situation of the surviving spouse's right of occupation to the social realities that are necessary, in order to ensure the post mortem continuity of the protection of the rights over the dwelling by the right of occupation of the surviving spouse, so we believe that a prompt legislation in this regard would be welcome in the Romanian legal landscape.

Bibliography

[1] Official Gazette no. 133 of 10 June 1944, approved by Law no. 71/2011

[2] C. Barsan, Drept civil. Drepturile reale principale (Civil Law. Main real rights), Ed. Hamangiu, Bucharest, 2013, p. 285

[3] According to Article 309 paragraph 2 of the Civil Code: „Ei au îndatorirea de a locui împreună. Pentru motive temeinice, ei pot hotărî să locuiască separat" („They have a duty to live together. For good cause, they may decide to live separately").

[4] See Fr. Deak, R. Popescu, *op. cit.*, volume I, p. 270

[5] Art. 321 Civil Code: Meaning (1) The family dwelling is the common dwelling of the spouses or, failing that, the dwelling of the spouse where the children are. (2) Any of the spouses may request the registration in the land register, in accordance with the law, of a property as a family dwelling, even if he/she is not the owner of the property".

[6] D. Negrilă, Moștenirea în Codul Civil – Studii teoretice si practice (Inheritance in the Civil Code Theoretical and practical studies), Ed. Universul Juridic, Bucharest 2018, p. 265

[7] See Fr. Deak, *op. cit.* p. 136 ff. It is the idea supported in almost all the literature, in the sense that as long as the surviving spouse becomes the exclusive owner of the property in question, benefiting from all the prerogatives of the right of ownership, the recognition of a right of occupation under art. 973 of the Civil Code is no longer justified. Under it, the surviving spouse would benefit only from a right of use for the benefit of himself and his family – except for a possible spouse – whereas full ownership confers on him an entire and unrestricted right, which cannot be affected even by a subsequent remarriage.

[8] In this sense, see Judgment no. 2764/28/03/2007 of the District Court of Galați, pronounced in civil case no. 3062/c/2006, (civil case no. 9797/233/2006), p. 1-6.

[9] De cuius can remove the surviving spouse's right of occupation, since the surviving spouse is not a reserved person except in relation to the inheritance rights provided for by art. 972 of the Civil Code.

[10] See Fr. Deak, R. Popescu, *op. cit.*, volume I, p. 272.

[11] See D. Chirilă, Tratat de drept civil, Succesiunile si liberalitatile (Civil Law Treatise, Successions and Liberalities), 2nd edition, Ed. Hamanghiu, 2017, p. 268

LEGAL ASPECTS REGARDING THE ACT OF SUCCESSION OPTION

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Abstract

Our aim in this article is to analyze the legal act of succession option under several legal aspects, as well as the notarial procedure. In this regard, we have considered it necessary to present in the first chapter the legal characteristics which individualize the act of succession option in the view of the negotium iuris meaning.

Starting from the idea that the option act is a legal act, in the second chapter we have analyzed the conditions of validity of the option act, according to common law, by briefly clarifying the substantive and formal conditions of the option act and in the third chapter we have presented the procedure for the authentication of the act of succession option, highlighting aspects related to the competence of the notary public to authenticate the act of succession option, as well as the procedures he has to follow when authenticating such an act.

Keywords: *legal characteristics of the deed of succession option, substantive and formal conditions of the act of succession option, authentication procedure of the act of succession option*

1. Prerequisites

The importance of approaching the topic lies in the fact that at the moment of the cessation of the existence of the natural person it takes place, independently of the expressed will of its full transmission of assets.

The right of succession dates back to the classical period of Roman law, but the existence of this right was quite rigid, in the sense that the heirs had a partial freedom in accepting or repudiating the inheritance. At that time the heirs were divided into two categories: the voluntary heirs (*heredes voluntari*) who had a right to choose between accepting or repudiating the inheritance, and the necessary heirs (*heredes necesari*) who did not have the right to choose, but acquired inheritance without being given the opportunity to repudiate the inheritance.

In modern law, as in Romanian law, inheritance is not imposed, but gives the successor this right to choose, by which he can consolidate or abolish the title of heir, by accepting the inheritance, respectively by renouncing it.

Therefore, at the death of a natural person, we witness a patrimonial transmission, this one operating *mortis causa*, towards the successors of the deceased, as it also appears from the analysis of art. 953 C. civ.[2]. This patrimonial transmission takes place by virtue of the law – *ope legis* – and independent of the acceptance or renunciation of the successors, from

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[2] Art. 953 of the Civil Code: „ *The inheritance represents the transmission of the patrimony of a deceased natural person to one or more persons in existence".*

the moment of opening the inheritance, at the date of death[3], regardless of whether it is a legal or testamentary inheritance, the succession patrimony never remaining without owner[4].

The doctrine[5] rightly considers that there is a legal situation of uncertainty between the moment of opening the inheritance and the decision to accept or renounce the inheritance, in the sense that it is not known which of the successors want to inherit and which do not.

Given that there is no legal definition of the right of option, in the literature, several definitions of it have been tried. Thus, some authors[6] consider that the right of option of succession represents a special right, being neither real (it does not carry over a good) nor of claim (it does not give its holder the possibility to ask someone else to give, to do or not to do something), but an optional right and is defined as a legal prerogative that allows its holder to be able, through a unilateral act of will, to change an uncertain legal situation, after a precise and predictable alternative.

Other doctrinaires[7], in a much more comprehensive definition, to which we also agree, define the right of succession option as that subjective civil right of an optional nature, born with the opening of the inheritance, but not part of the succession patrimony, which confers on its holders. the right to choose, by a unilateral act of will performed within a certain period, between accepting or renouncing an inheritance, thereby consolidating or abolishing the title of heir, with retroactive effect.

Regarding the term in which the right of succession option can be exercised, it is necessary, without going into detail, to make certain clarifications. Thus, in accordance with art. 1103 para. (1) of the Civil Code, the right of succession option is exercised within one year from the date of opening the inheritance. Therefore, the succession option involves the expiration of a period for the successor, following an analysis, to be decided in full knowledge of the facts. The term of succession option, as it is also appreciated in the doctrine, is a term of forfeiture to which certain provisions from the matter of extinctive prescription apply, respectively the suspension and rescheduling. It is considered that this one – year term has the legal nature of a limitation period for two reasons[8]:

a) the exercise of the right of option does not imply the introduction of an action in court;

b) the non- exercise of the right of option (as an optional right) extinguishes the respective right (and not the right to action in the material sense).

In the literature, it is considered that the right of succession option is a right of the successors[9] and that this right is born directly in their patrimony, as an effect of opening the

[3] Article 954 para. (1) Civil Code: „*The inheritance of a person opens at the time of his death".*

[4] Deak, Fr., Popescu, R. (2019). *Treaty of succession law, vol. III, Transmission and sharing of inheritance*, Universul Juridic Publishing House, Bucharest, p. 17.

[5] Chirică, D. (2017). *Civil law treaty. Successions and liberalities, 2nd edition*, Hamangiu Publishing House, Bucharest, p. 365.

[6] *Idem,* p. 365.

[7] D. Negrilă, *The right of succession option, Theoretical and practical studies, Vol. I*, Universul Juridic Publishing House, Bucharest, 2014, p. 19.

[8] Stănciulescu, L. (2017). *Heritage, Doctrine and Jurisprudence*, Hamangiu Publishing House, Bucharest, p. 334.

[9] By successive according to the provisions of art. 1100 para. (2) Civil Code means the person who meets the conditions provided by law in order to be able to inherit, but who has not yet exercised his right of succession option.

inheritance, in order to establish the future holder of the succession patrimony. At the same time, it is considered that the acceptance of the inheritance by the creditors of the successor obliquely within the limit of their claim and the revocation of the fraudulent renunciation by the creditors of the successor are false exceptions to the rule that the successor is the sole holder of the right of succession[10].

In order to inherit, a person must cumulatively meet two positive and one negative conditions, namely: to have succession capacity, to have a succession vocation and not to be unworthy to inherit.

The right of succession belongs to all those called to inherit by law or by will without distinction as their vocation is universal, universal or private[11].

There is only one boundary between the status of successor and that of heir: the exercise of the right of succession option[12]. If the successor accepts the inheritance, the title of heir will be consolidated, and if the successor chooses to relinquish the inheritance it is considered that he was never an heir.

2. Characteristics of the Legal Act of Succession Option

Usually, the succession option is manifested by concluding certain legal acts, that is why it is stated in the specialized literature that the legal act of succession option represents the way of exercising the right of option, the form by which it is exercised and externalized[13].

The doctrine defines the act of succession option as the manifestation of the will by which the holder of the subjective right of succession option exercises his right to choose between accepting the inheritance or renouncing it[14]. Therefore, the successor through the legal act of choice expresses his will with the intention of producing legal effects consisting in accepting or repudiating the inheritance.

The legal act of succession option is individualized by the following legal characteristics:

a) it is a unilateral legal act, because it presupposes the manifestation of the will of a single person, of the successor. In the event that there are several successors of the deceased, they will exercise their right of option of succession through a unilateral and individual legal act, not being allowed to exercise their right of option collectively. In the same sense, we also specify art. 1324 of the Civil Code, the provisions of which stipulate that the legal act is unilateral, which presupposes only the manifestation of the will of its author.

b) is a legal act, in principle, voluntary[15]. In accordance with art. 1106 of the Civil Code: „ *no one can be forced to accept an inheritance that belongs to him".* Hence the rule (principle of freedom of choice) according to which the secessionist can accept or repudiate the inheritance according to his own will.

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[10] Negrilă, D., *op. cit.,* p. 43.

[11] Eliescu, M. (1966). *Transmission and division of inheritance under RSR law*, Ed. Academiei, Bucharest, p. 88.

[12] Negrilă, D., *op. cit.,* p. 154.

[13] *Ibidem*, p. 186.

[14] Stănciulescu, L., *op. cit.,* p. 326.

[15] Deak, Fr., Popescu, R., *op. cit.,* p. 31.

However, we must emphasize that the principle of freedom of choice also presents some exceptions, as follows: a first exception is the one provided by art. 1113 of the Civil Code, which provides that for good reasons, at the request of any interested person, a successor may be obliged, with the application of the procedure provided by law for the presidential ordinance, to exercise his right of succession within a time limit set by the court, shorter than the one provided in art. 1103 of the Civil Code, of one year. Paragraph 2 of the same article also provides for the sanction, in the sense that when the successor does not exercise his right of option within the term established by the court, he is considered to have renounced the inheritance; another exception to the principle of freedom of choice is encountered when the creditors of the successor exercise their right of succession option by way of the oblique action[16] or the revocation action[17] and a last exception is the one provided by art. 1119 Civil Code para. (1) by which the successor who, in bad faith, stole or hid property from the estate or hid a donation subject to the report or reduction is considered to have accepted the inheritance, even if he had previously renounced it. Therefore, even if he did not want to accept the inheritance, the successor is considered the acceptor of it.

c) is a legal act that can be concluded by representation. The act of succession option is not an essentially personal act, it can be concluded either by legal representation, with the authorization of the guardianship court, or by conventional representation, based on a power of attorney granted by the successor in which the limits of the succession option are set.

d) it is a legal act, in principle, irrevocable. Regarding the acceptance of the inheritance, the principle of irrevocability of the succession option operates with absolute character, in the sense that the subsequent renunciation of the inheritance will no longer produce legal effects. On the other hand, in case of waiver, exceptionally, the revocation of the waiver is possible if the conditions provided in article 1123 of the Civil Code are fulfilled. (1) of this article stipulates that the waiver may revoke the waiver, throughout the term of the option, if the inheritance has not already been accepted by other successors who have a vocation to the party that would return, and in para. (2) it is specified that the revocation of the renunciation is worth accepting, and the assets of the inheritance being taken over in the state in which they are and subject to the rights acquired by third parties over those goods. Therefore, not every waiver can revoke the waiver, but only the one whose successor portion would have been accepted by other successors, provided that the waiver of the waiver is exercised within the option period. Once the waiver is revoked, the right of option expires and the waiver becomes the acceptor of the inheritance.

e) it is a legal act, in principle, indivisible[18]. In the matter of the succession option, the principle of indivisibility consists in the fact that the successor exercises his right of option in a unitary way, regarding the whole inheritance, therefore he can not accept a part of the inheritance and give up the rest. In the same sense are the provisions of art. 1101 of the Civil Code which provides that under the sanction of absolute nullity, the succession option is indivisible.

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[16] Art. 1107 of the Civil Code: „*The creditors of the successor may accept the inheritance, obliquely, within the limits of the satisfaction of their claim".*

[17] Art. 1122 of the Civil Code: „ *(1) The creditors of the successor who renounced the inheritance in their fraud may request the court to revoke the renunciation in respect of them, but only within 3 months from the date on which they met the renunciation. (2) The admission of the action for revocation shall have the effect of accepting the inheritance by the successor debtor only in respect of the claimant creditor and within the limits of his claim".*

[18] Deak, F., Popescu, R., *op. cit.,* p. 33.

From the principle of indivisibility of the succession option there are also some exceptions provided in the Civil Code. A first exception is when the successor, based on the law or the will, has a multiple vocation to inheritance can exercise a distinct right of option [art. 1102 para. (1) C. civ]. Therefore, the successor may accept the legal inheritance and renounce the testamentary inheritance, may renounce the legal inheritance and accept the testamentary inheritance, or may repudiate or accept both.

In accordance with the provisions of art. 1102 para. (2): „*if it results from the will that the deceased wanted to reduce the share that would have been due to the legatee as legal heir, the latter can only choose as legatee"* the only condition being that the succession reserve had not been violated.

The succession option may also be different if a person is rewarded with several bequests and they are not indivisible, in which case the person will be able to exercise a separate right of option for each bequest.

Another exception to the principle of indivisibility is found in the situation where the successor who renounced the inheritance in creditors' fraud following the admission of the revocation action will be an acceptor of the inheritance in relation to the claimant creditor and will remain a waiver to the other heirs and other creditors they did not intervene in the process. In this case, the succession option results from a court decision and will take effect only between the parties to the proceedings.

Derogations from the principle of indivisibility of the act of succession option are also provided in special laws, for example Law no. 18/1991, Law no. 169/1997, Law no. 112/1995 and Law no. 10/2001, as it conditions the restitution in kind or by equivalent of the properties usurped by the communist regime by the request of the former owners or their heirs, in the specific conditions regulated by each normative act separately. If the heirs of the former owner do not make the request, they do not benefit from the provisions of the mentioned legal provisions, even if they have previously accepted the inheritance after the former owner. Therefore, by not submitting the applications, under the conditions and terms regulated by the specified normative acts, by their abstention, some heirs may waive the rights over the respective buildings, after accepting the inheritance, which is a derogation from the indivisible character of succession option.

f) is a legal act of disposition. The specialized literature has defined the legal act of disposition as the legal act that aims at the exit from the patrimony of a right or the encumbrance with real tasks of a good[19].

Therefore, the renunciation of the inheritance is undoubtedly an act of disposition, as a right that has existed in the succession patrimony since the date of opening the succession is lost. Regarding the acceptance of the inheritance, as a rule, this often leads to the increase of the heir's patrimony, but there may be cases in which the acceptance of the inheritance may cause certain damages (material and / or moral), although the heirs have a limited liability. to the successor assets received. These damages caused, as a result of accepting the inheritance, cannot be deducted from the received asset, only apparently the liability is borne by the received asset, in reality the material condition of the heir is affected[20].

g) is a simple legal act. According to the provisions of art. 1101 of the Civil Code: „under the sanction of absolute nullity, the succession option cannot be affected in any

[19] Boroi, G., Pivnicieru, M.-M., Anghelescu, C.A., Nazat, B., Nicolae, I., Rădulescu, T.V. (2018). *Civil law files, 3rd edition*, Hamangiu Publishing House, Bucharest, p. 47.

[20] Negrilă, D., *op. cit.,* p. 188.

way". Therefore, under the sanction of absolute nullity, it is not possible to accept or renounce the inheritance under condition, with term or with tasks. It is essentially a legal act.

h) it is a legal act declaring rights because when the successor exercises his option, retroactive effects occur, from the date of opening the inheritance. Thus, by accepting the inheritance, the rights and obligations of the succession are consolidated from the moment of opening the inheritance, and in case of renunciation, according to art. 1121 of the Civil Code, the successor who renounced is considered to have never been heir.

2. Conditions of Validity of the Legal Act of Succession Option

3.1. The substantive conditions of the legal act of succession option

Being a legal act, the act of succession option must meet the substantive and formal conditions imposed by law, such as those established by the provisions of art. 1179 of the Civil Code and of art. 1325 of the Civil Code, respectively: the capacity to conclude the act, the consent to be validly expressed, the object to be determined and lawful and, at the same time, the cause must exist, to be lawful and moral.

3.1.1. Ability to conclude the legal act of succession option

Given that the act of succession option is an act of disposition, the successor must have full capacity to exercise, regardless of how it was acquired: at the age of 18 (art. 38 Civil Code), in advance at the age of 16 (art. 40 of the Civil Code) or by marriage (art. 39 of the Civil Code).

As an exception, a legally capable person may not be able to defend his or her own interests. At other times, the conclusion of the legal act of succession option may have an urgent character, considering that the right of succession option must be exercised within a certain term, situation in which the provisions of art. 178 of the Civil Code and the appointment of a curator.

Regarding the minor and the person placed under interdiction, it is necessary to make some clarifications, thus, regarding the minor between 14-18 years old, as it appears from the provisions of art. 41 of the Civil Code, has a limited capacity to exercise, he may personally conclude a legal act of succession option, with the approval of the legal guardian and with the authorization of the court of guardianship. Both the approval and the authorization are required at the latest on the date of the act. If there are conflicting interests between the minor and the legal guardian, a special guardian will be appointed [art. 150 and art. 502 para. (1) C. civ.]. The minor under 14 years of age and the person placed under judicial interdiction, these are persons lacking the capacity to exercise and can exercise the right of option only through their legal representatives and only with the authorization of the guardianship court. Similarly, in the event that there are contrary interests between the minor or the forbidden and the legal representative, a special curator will be appointed pursuant to art. 150 C. civ.

The sanction of lack of capacity to conclude the legal act of succession option is the relative nullity (art. 44 of the Civil Code), and the limitation period of the right to request the annulment of the legal act of succession option is 6 months, starting from the date on which the holder of the right to action knew the cause of annulment (art. 1124 of the Civil Code).

3.1.2. Valid consent expressed

For the succession option to be valid, the consent of the successor must be unconfirmed. Thus, in accordance with art. 1204 of the Civil Code, the existence of three requirements is necessary for the validity of the consent:

a) the consent must be serious, ie it must be expressed with the intention of producing legal effects. Consent will not be taken seriously if it is too vague, has been given as a joke, out of friendship, courtesy or pure complacency or when given under a condition;

b) the consent to be expressed knowingly, ie to come from a person with discernment.

Capable persons are presumed to have discernment. However, a person with full exercise capacity may be temporarily deprived of discernment due to causes that lead to temporary loss of decision-making capacity. From the analysis of art. 1205 para. (1) The Civil Code results in the annulment of the legal act of succession option concluded by a person who, at the time of its conclusion, was, even if only temporarily, in a state that made him unable to realize the consequences of his actions.

c) the consent must be free, ie it must not be vitiated. The vices of consent that can alter the act of succession are: error, deceit and violence. Considering the unilateral character of the legal act of succession option, the injury does not find applicability in the matter of the act of option.

It is necessary to make brief clarifications regarding the defects of consent, such as:

a) The error is the defect of consent which consists in the false representation of certain circumstances at the conclusion of a legal act[21], and depending on the consequences of the error the error is essential and non-essential.

From the provisions of art. 1207 para. (2) It is clear that the error is essential when it concerns the nature or object of the legal act being concluded (*error in negotium*), the physical identity of the object of the service (*error in corpore*), the substantial qualities of the object of the service. *substantiam*) or on the identity of the person or on a quality of the person in whose absence the legal act would not have been concluded (*error in personam*). As regards the non-essential error, it falls on less important aspects of the legal act, which are not such as to cause the party not to conclude that act. Therefore, the consent of the successor is vitiated only if the error is essential, both objectively and subjectively.

Depending on the nature of the misrepresented reality, the error may in fact be in the sense that it vitiates the consent of the successor when it concerns a factual or legal element when it concerns a legal norm that determined the direction of the option, and this direction has a completely different meaning. if the successor had known the legal norm exactly.

The error on the content (emolument) of the succession patrimony cannot be retained as a consent defect[22].

b) Dolo, according to art. 1214 of the Civil Code, is an error caused by the fraudulent maneuvers of a third party in order to create a false representation of reality to a person. Thus, fraud can also be encountered in the matter of the legal act of succession option, only if the successor as a result of fraudulent maneuvers has opted in a certain way, and in the absence of these maneuvers the act of option would have had a different content.

Therefore, in order for the deceiver to vitiate the act of succession option, the third party must, in bad faith, act with the intent to mislead the successor, by using malicious

[21] Boroi, G., Pivnicieru, M.-M., Anghelescu, C.A., Nazat, B., Nicolae, I., Rădulescu, T.V., *op. cit.,* p. 63.

[22] Deak, F., Popescu, R., *op. cit.*, p. 29.

maneuvers so that the successor opts in another way as a result. of misleading. The malicious means may come from a person who has a direct interest in establishing a certain meaning of the option (co-heirs, creditors of the estate etc.), and from other persons who have an indirect interest in assigning the estate.

3) Violence consists in threatening (physically or morally) the successor with an evil that will cause him a fear, and under the rule of this fear, the successor is determined to conclude an act of choice that he would not have concluded otherwise. Thus, in order for the successor to have the vitiated consent, the fear provoked must be decisive for the conclusion of the legal act of choice. At the same time, according to art. 1216 para. (4) Civil Code: „the existence of violence is assessed taking into account the age, social status, health and character of the person on whom it was exercised".

Violence as a vice of consent of the legal act of choice also exists when it was directed against a person close to the successor, such as the husband, wife, ascendants or his descendants [art. 1216 para. (3) C. civ].

The sanction that intervenes in case of lack of consent is the relative nullity of the act of succession option, and as we mentioned before, the holder of the right to action in annulment of acceptance or renunciation has a limitation period of 6 months, calculated in case of violence. and in other cases (error or malice) from the moment when the holder of the right to action knew the cause of relative nullity (art. 1124 of the Civil Code).

Moreover, considering the importance of the will of the parties regarding the production of legal effects, as a result of the conclusion of some legal acts, we specify that, in accordance with the provisions of art. 1260 Civil Code, the conversion occurs when the act of alienation of a successor property is null and void, and it is valid as an act of acceptance of the succession[23].

3.1.3. The object of the act of succession option

In the matter of the act of succession option, the object is the legal operation by which the successor accepts or renounces the inheritance, without being affected by the modalities.

According to art. 1225 of the Civil Code, the object of the legal act „ *must be determined and lawful, under the sanction of absolute nullity"*. Therefore, the act of succession option cannot be concluded if it contains provisions that are contrary to public policy or morals and, at the same time, the object of the legal act of succession option must be determined, ie contain provisions relating to acceptance or repudiation of inheritance, without the existence of any term, condition or task.

In order for the object of the[24] legal act of succession option to exist, it is necessary for the inheritance to be opened, being struck by absolute nullity the act of succession option, by which a future inheritance is accepted or renounced, according to art. 956 C. civ.

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[23] Genoiu, I. (2016). *Civil law. The general part. Persons. Seminar booklet*, 2nd edition – revised and added, Ed. C.H. Beck, Bucharest, p. 277.

[24] We are of the opinion that the normative provisions contained in art. 956 of the Civil Code, regarding the object of the legal acts on the inheritance, represents a special application in the matter of the object of the civil legal act, since although it is completed with the regulation of art. 17 para. (1) of the Civil Code, as a general rule, the derived object of a legal act may also be the future goods, according to art. 1228 of the Civil Code, regarding which it can be said that the rights, although they exist in a theoretical and abstract way, their concrete exercise is possible only if in the future those goods will exist.

3.1.4. The cause of the deed of succession

The case, in the matter of the legal act of succession option, represents the reason that determined the successor to choose in a certain way.

From the analysis of article 1236 par. (1) The Civil Code states that the conclusion of the act of succession option must have a lawful, moral cause and for it to exist.

Regarding the cause of the deed of succession option, we specify that the successor must at the time of drawing up the deed have an exact representation of the reason for doing so, regardless of whether he accepts or renounces the inheritance. The existence of a valid cause is presumed until proven otherwise[25], and the sanction for lack of cause is relative nullity.

The cause is illicit when it is contrary to law and public order [art. 1236 para. (2) Civil Code], as well as when the conclusion of the legal act of succession option is a means of circumventing the application of an imperative legal norm (art. 1237 Civil Code), and the cause is moral when it does not contradict good morals. In both cases, both when the case is unlawful and when the case is immoral, the sanction is the absolute nullity of the legal act of succession option.

Since the act of succession option is a unilateral act emanating from the successor, both the illicit cause and the immoral cause must be related to the succession and not to the possible beneficiaries of this act.

3.2. Formal conditions of the legal act of succession option

From the analysis of art. 1100 para. (1) The Civil Code results that the succession option involves two variants, namely: accepting the inheritance or renouncing it.

3.2.1. Acceptance of inheritance [art. 1108 para. (1) C. civ.].

a) The acceptance is expressed when the successor explicitly acquires the title or the quality of heir through an authentic document or under private signature [art. 1108 para. (2) C. civ.].

Therefore, the express acceptance of the inheritance presupposes to be concluded by document (ad validitatem).

According to art. 1109 of the Civil Code: „ *In case the acceptance is made by an authentic document, the declaration of acceptance will be registered in the national notarial register, kept in electronic format, according to the law".*

The legal act of succession option must have a certain date in order to prove that the successor accepted the inheritance after its opening and within the term of succession option. In the case of the authentic document this issue is not raised, certainly fulfilling this requirement, but in the case of the deed under private signature there may be situations in which this element is missing and, in principle, will not be considered valid.

The document under private signature acquires a certain date under the conditions provided by art. 278 C. proc. civ.

However, the date may be completed and supplemented, if this does not result from the intrinsic elements of the document, by other means of proof, even with witnesses[26].

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[25] Article 1239 para. (2) Civil Code: „*The existence of a valid cause is presumed until proven otherwise".*

[26] Negrilă, D., *op. cit.,* p. 222.

Failure to comply with the written form of the express acceptance is sanctioned with absolute nullity, but if the successor is still within the term of succession option, he will be able to exercise his right of option again.

b) The tacit acceptance of the inheritance does not presuppose a certain form, as provided by art. 1108 para. (3) Civil Code: „ *acceptance is tacit when the successor does an act or a fact that he could only do as heir „*. On the other hand, if „the successor intends to make an act which may have the meaning of accepting the inheritance, but which he wishes not to be considered acceptor, he must give in this sense, prior to the execution of the act, an authentic notarial declaration." (art. 1111 Civil Code)

3.2.2. Giving up inheritance

This is always express and is a solemn legal act. In accordance with art. 1120 the provisions of par. (2) of the Civil Code, „*the declaration of renunciation shall be made in authentic form at any notary public or, as the case may be, at the diplomatic missions and consular offices of Romania, under the conditions and limits provided by law"*.

Therefore, the declaration of renunciation, being a solemn act, is made only in compliance with the formal condition imposed by law, *ad validitatem*. In case of non-observance of the authentic form, the sanction is absolute nullity.

In this sense, we specify decision no. 436 of 16 feb. 2001 of the Bucharest Court of Appeal, Civil Section IV, where it was correctly shown that an authentic statement of a person that he did not make any act of express, tacit or forced acceptance of the succession and understands to remain a foreigner of the succession does not have the legal nature of renouncing the inheritance, as the court wrongly held, since, given only 15 years after the opening of the succession, it does not meet the conditions for exercising the right of succession, but as a unilateral manifestation of will, it has the legal nature of an extrajudicial confession (recognition)[27].

For the information of third parties, the declaration of renunciation will be registered, at the expense of the renouncer, in the national notarial register, kept in electronic format, according to the law [art. 1120 para. (3) C. civ.].

4. Procedure for Authentication of the Legal Act of Succession Option

The question is what is the procedure that applies to the drafting of the legal act of succession option, is the authentication procedure mandatory or can other procedures be used, for example, giving a certain date or legalizing the signature of the successor?

Considering the provisions of art. 1108 of the Civil Code, which stipulate that the acceptance is expressed when the successor acquires the title of heir through an „authentic document" and the provisions of art. 1120 of the Civil Code, which stipulate that the renunciation of the inheritance can be made only „ ***in authentic form „***, it is obvious that the legal act of succession option can be drawn up only through the authentication procedure[28].

If it is requested that the legal act of succession option be drawn up in the form of a document on which the signature of the party is legalized, this procedure cannot be performed because in case of renunciation the act can be concluded only in authentic form,

[27] Available here: https://sintact.ro/#/jurisprudence/520297113/1/decizie-nr-436-2001-din-16-feb-2001-curtea-de-apel-bucuresti-sectia-a-iv-a -civila? pit = 2001-02-16 & keyword = decizia% 20436% 20curtea% 20de% 20apel% 20bucuresti & cm = SREST.

[28] Negrilă, D., *op. cit.*, pp. 234.

and in case acceptance, even if it may be a deed under private signature, when it is drawn up before a notary public, the required form is the authentic one, considering that the law refers to an authentic deed and not to another notarial deed. With regard to giving a certain date, the notary public may be presented with a document under private signature which includes a succession option, in which case the notary will only verify that the act is not contrary to law and morals, as the legislator establishes an exception. from the establishment of the identity, of the domicile and of the capacity of the parties provided in the provisions of art. 78 para. (5) of Law 36/1995[29] within the procedure of giving a certain date. According to the doctrine[30], this exception is based on the fact that for the validity of the consultation offered or of such notarial deeds, it does not matter who presents themselves and requests their preparation. By way of example, we may find ourselves in the situation where the successor, having left the country, sends the declaration of acceptance of the inheritance by post, and the addressee appears before the notary and asks for its certain date in order to prove that his acceptance made within the term of succession option. Of course, this procedure cannot be refused by the notary public, given the negative consequences that would occur, especially if the successor will not be able to return to the country until after the expiration of the option period.

Regarding the competence to authenticate the legal act of succession option, the provisions of art. 15 of Law no. 36/1995 stipulates that the notary public has general competence, so an applicant can address any notary public, who is not bound by his place of residence or the last domicile of the deceased whose inheritance is in question. Therefore, a notary public with the headquarters of the office in Bucharest can authenticate, without any impediment of competence, an act of succession option of an applicant from Călăraşi county. It is necessary to specify that according to the same article letter a) of Law no. 36/1995, only the succession procedure is within the competence of the notary public located in the territorial constituency of the court where the deceased had his last domicile. Therefore, the act of succession option can be drawn up by any notary public, even if he will not carry out the succession procedure or if it will be fulfilled through the court[31].

As an exception, there may be a situation in which the notary public may be required to conclude the deed of succession option outside the headquarters of the office or of the company, in which case according to art. 83 of Law no. 36/1995[32], the notary public, at the request of the interested party, is obliged to comply with the norms regarding the territorial competence. Therefore, in this situation we are in the presence of a limitation of the competence of the notary public, in the sense that he can conclude an act of succession option outside the notary office only within the territorial circumscription of the court in

[29] Law no. 36 of May 12, 1995 (republished) of notaries public and notarial activity, published in M. Of. no. 237 of March 19, 2018, available here: https://legislatie.just.ro/Public/DetaliiDocument/159087.

[30] Hilsenrad, A., Rizeanu, D., Zirra, C. (1964). *State notary*,. Scientific Publishing House, Bucharest, p. 58.

[31] Negrilă, D., *op. cit.*, p. 236.

[32] Art. 83 of Law no. 36/1995: „*(1) The notarial deeds are fulfilled, as a rule, during the service program with the public, displayed accordingly. (2) A notarial deed may be performed outside the office of the notary public, at the request of the interested party, in compliance with the legal provisions on competence. (3) If the drawing up of a notarial deed is not postponed, for duly justified reasons, it may be performed outside the working hours, at the request of the interested party".*

which he operates. The situation provided by art. 215 of the Regulation for the application[33] of Law no. 36/1995 when the notary public travels to the place of detention of a person deprived of liberty in order to authenticate an act of succession option, in which case the notary public must respect the territorial competence provided by law.

We specify that when the notary public concludes an act of succession option outside the office, he must, in accordance with art. 84 lit. e) of Law no. 36/1995, to specify the place where the notarial deed was performed and also the circumstance that justified the elaboration of the document in that place under the sanction of annulment of the deed as it results from the provisions of art. 87 para. (1) of Law 36/1995.

As a rule, authentication of the act of succession option, as provided by art. 83 para. (1) of Law no. 36/1995, is made during the service program with the public, properly displayed at the notary office. Exceptionally, there may be a situation[34] where the operation of authentication of the legal act of succession option may take place outside the working hours, at the request of the interested party, if this operation is not postponed for duly justified reasons. Therefore, the applicability of this exception is conditioned by the urgency of the act, and the validity of the reasons is left to the discretion of the notary public. Both the urgency and the validity of the justification of the reasons are assessed by each notary on a case-by-case basis, for example, the health status of the successor or the fact that he must leave the country can be considered as good reasons.

Authentication of the legal act of succession option from the interpretation of art. 78 of Law 36/1995 can be done only at the request of the applicant, being excluded, in our opinion, the fulfillment of notarial acts ex officio.

The request for authentication of the legal act of succession option can be made successive, in one's own name, but also by a legal or conventional representative. Also, in accordance with art. 1107 of the Civil Code, the creditors of the successor may request the authentication of an act of acceptance of the inheritance so that, obliquely, they accept the inheritance within the limit of the satisfaction of their claim. At the same time, we specify that this request can be made both in writing and orally.

For the authentication of an act of succession option, the notary, as it appears from the provisions of art. 90 para. (2) of Law no. 36/1995, must fulfill the following procedures, respectively: to establish the identity of the parties, to take the consent of the parties regarding the content of the act of succession option and its signing by the parties.

Regarding the identification of the person who concludes an act of succession option, we consider that it represents a particularly important operation, considering that the very validity of the act may depend on this procedure. Therefore, an incorrect or insufficient identification of the person requesting the authentication of a succession option may lead to the annulment of the respective act, but also to the liability of the notary instrument. We must also take into account the provisions of art. 100 of Law 36/1995, which stipulate that the authentic notarial deed fully proves, to any person, until the declaration as false, regarding the findings made personally by the person who authenticated the document, in accordance with the law. It should also be noted that the parties participating in the

[33] ORDER no. 2,333 / C of July 24, 2013 on the approval of the Regulation for the application of the Law on public notaries and notarial activity no. 36/1995, Published in M. Of. no. 479 of August 1, 2013, available here: http://www.uniuneanotarilor.ro/files/legi/Regulament_L36_1995_cu_anexe.pdf.

[34] Article 83 para. (3) of Law no. 36/1995: „ *If the drafting of a notarial deed is not postponed, for duly justified reasons, it may be performed outside the working hours, at the request of the interested party*".

conclusion of an act of succession option may be identified in another way than by means of the identity document, namely: when they are known personally to the notary attestation of the lawyer assisting the parties.

The second procedure for authenticating the document is the expression of consent by the parties. The notary must, as far as possible, verify whether the successor can express a valid consent, and if the notary has any doubt as to the discretion of the successor, he must no longer authenticate the deed of succession.

The effective procedure for obtaining the consent of the successor is the one provided by art. 92 para. (1) of Law 36/1995 by which the notary public, after reading the act of succession option, asks him if he understood the content of the act and if the contents contained in it represent exactly his will.

This procedure is followed by the signing of the deed. The signature of the party represents the externalization of its consent, but also a guarantee that the entire procedure of authentication of the act of succession option has been fulfilled. In principle, a legal act of succession option cannot exist if it is not signed by the applicant. However, as an exception, if he cannot sign for various reasons, either due to a disability or due to illness or other causes, the notary public will take the consent only in the presence of two assistant witnesses.

According to the provisions of art. 84 of Law no. 36/1995, the fulfillment of the notarial deeds is ascertained by conclusion, therefore the value of the authentic document of the succession option deed is given by the conclusion of the authentication which ascertains its fulfillment. We specify that the conclusion by which the authentication of the legal act of succession option is authenticated must include, under the sanction of annulment of the act, also the mentions regarding the fact that the consent of the parties was taken, was signed before the notary by all those required to sign notary that one of the parties cannot sign and must also be invested with the authentication formula with the words: „ *This document is declared authentic*".

After completing all these stages, the deed of succession being an authentic deed is drawn up in a single original copy which will be kept in the archives of the notary public, and will be issued to the duplicate parties on the original deed. Please note that the duplicate issued on the occasion of the authentication of the deed of succession has the same probative force as the original. The duplicate represents the faithful reproduction of the content of the legal act of succession option and of the original authentication conclusion, except for the signature of the successor and of the notary public. Instead of signatures, the names and surnames of the signatories are mentioned, and on the first page of the duplicate a primer with the words „DUPLICATE" will be applied. It should be specified that at the end of the duplicate issued at the authentication of the succession option deed, the duplicate formula with the content provided by art. 225 para. (6) of the Regulation[35], under which the notary public applies the signature and the seal.

5. Conclusions

In conclusion, starting from a fundamental principle in the matter of succession, enshrined in art. 1106 of the Civil Code, respectively „ *no one can be forced to accept an*

[35] „*This duplicate has been drawn up in… copies, by…, notary public, today, the date of authentication, and has the same probative force as the original".*

inheritance that belongs to him" (*nemo invitus heres*) we can say that the patrimonial transfer is not obligatory, since succession option, which consists either in accepting the succession patrimony or in renouncing it. Please note that when the deed of succession is accepted by the deed of succession, it operates in an absolute and irrevocable manner, according to the principle „ *Semer heres, semper heres „* (*Once you are heir, you remain heir forever*), at the same time, we emphasize that the successors must decide by the act of succession option in a unitary manner regarding the right of option, according to the principle „*Nemo pro parte heres"* (*No one can be heir only on one side*).

We mention that the right to opt is exercised and externalized through the act of succession option, and this act, with its specific legal characteristics, is a manifestation of will by which the holder of the subjective right of succession by accepting the inheritance consolidates his title of heir, and by renouncing the inheritance, he abolishes his title of heir, with retroactive effect.

Finally, we consider it necessary to make a brief clarification regarding the special situation created by the successor when, legally cited, he refuses to appear at the debate of the notarial succession for various reasons or he has a passive attitude. In this situation there can be two variants, either the successor is presumed, until proven otherwise, that he renounced the inheritance if he does not exercise his right of succession option within one year, as it appears from the provisions of art. 1112 of the Civil Code, or, although not very common in practice, the suspension of the succession case may take place under the conditions of art. 109 para. (1) lit. a) of Law no. 36/1995. In the second version, it is necessary to fulfill the cumulative fulfillment of several conditions, namely, to have passed one year from the opening of the succession, to have been legally summoned, the successor not to have appeared or if, to have appeared at one of the terms, to have subsequently abandoned the succession procedure, not to have requested the issuance of the heir certificate and to have proof that at least one of the successors has accepted the succession. As a similarity, this cause of suspension can be found in the provisions of the Code of Civil Procedure, respectively in art. 411 para. (1) § 2 C. proc. which provides that the trial is suspended when the parties, legally summoned, do not appear at the call of the case, provided that none of the parties has requested the trial in absentia.

Bibliography

[1] Boroi, G. (2018). Pivnicieru, Mona-M., Anghelescu, CA, Nazat, B., Nicolae, I., Rădulescu, TV, Civil law files, 3rd Edition, Hamangiu Publishing House, Bucharest

[2] Chirică, D. (2017). Civil law treaty. Successions and liberalities, 2nd edition, Hamangiu Publishing House, Bucharest

[3] Deak, F., Popescu, R. (2019). Treaty of Succession Law, vol. III, Transmission and sharing of inheritance, Universul Juridic Publishing House, Bucharest

[4] Eliescu, M. (1966). Transmission and division of inheritance under RSR law, Academy Publishing House, Bucharest

[5] Genoiu, I. (2016). Civil law. The general part. Persons. Seminar notebook, 2nd edition – revised and added, CH Beck Publishing House, Bucharest

[6] Hilsenrad, A., Rizeanu, D., Zirra, C. (1964). State Notary, Scientific Publishing House, Bucharest

[7] Negrilă, D. (2014). The right of succession option, Theoretical and practical studies, vol. II, Universul Juridic Publishing House, Bucharest

[8] Stănciulescu, L. (2017). Heritage, Doctrine and Jurisprudence, Hamangiu Publishing House, Bucharest

[9] Law no. 287/2009 – regarding the Civil Code, published in the Official Gazette of Romania no. 511 of July 24, 2009, rep. according to art. 218 of Law no. 71/2011 for the implementation of the law on the Civil Code, published in the Official Gazette of Romania no. 409 of June 10, 2010, as subsequently amended and supplemented

[10] Law no. 36 of May 12, 1995 on notaries public and notarial activity, published in the Official Gazette of Romania no. 237 of March 19, 2018, with subsequent amendments and completions

[11] Order no. 2,333 / C of July 24, 2013 on the approval of the Regulation for the application of the Law on public notaries and notarial activity no. 36/1995, published in the Official Gazette of Romania no. 479 of 1 August 2013.

INHERITANCE – LEGAL ETERNITY

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Abstract

In this article we seek to demonstrate that the deceased's patrimony is not lost but will be transferred to his successors who will pass it on to their successors, by adapting the principle of the Greek philosopher Anaxagoras of Clazomenae, „Nothing is born or lost, but things that already exist are combined and then separated again. „ to the legal reality of inheritance.

The institution of inheritance in Romanian civil law aims to ensure a continuity, especially of the patrimonial legal relations, considering the fact that the person does not have an eternal existence. The inheritance has played a key role since ancient times. Starting from the idea of the existence of a patrimony over which the heirs have a lifelong right of possession as well as the obligation to hand it over to the successors, it required the intervention of the regulations of inheritance law and the concern of the Romanian legislator for reuniting and perpetuating the deceased's patrimony.

The characteristics of the transmission of the patrimony by inheritance prove that, even after the disappearance of the personality, the activity of the deceased during his life is transmitted to his descendants and does not disappear with death. The inheritance is a perpetual institution through which rights and obligations are transmitted. Succession is the transmission from generation to generation, suggesting, among other things, the principle of continuing the personality of the deceased.

The legislator regulated in the Civil Code and in other legal norms the manner and order of transmission of the deceased's patrimony and established the responsibility that the heirs have in connection with ensuring legal certainty in the case of debts that are part of the deceased's estate. Civil law seeks to regulate all situations to ensure the continuity of vacant assets and liabilities.

Keywords: *inheritance, succession law, private law, patrimonial assets and liabilities*

1. INTRODUCTION

From a legal perspective, from the conception, the natural person is guaranteed the possibility of accessing the inheritance, so that the legislator regulates the capacity for early use in art. 36 of the Civil Code, stipulating that „ *the rights of the child are recognized from conception, but only if he is born alive".* The inheritance starts from the conception and is transmitted, at the death of the person, to his successors who are determined in art. 953 C. Civ. as *one or more persons in being.* The legislator of the Civil Code represented the institution of inheritance as a transmission of the patrimony, including rights and obligations taken together. Corobor following the provisions of art. 953 C. Civ. with the provisions of art. 557 C. Civ. we note that inheritance is a way of acquiring property through which the deceased transfers his estate to one or more persons.

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Another argument that argues for our assertion to prove the perpetual nature of the inheritance is the right of the deceased's estate to the inheritance collected as universal or universal successor, and not liquidated until his death, which he transmits, in turn. to him, the heirs.

We must point out that, in Romanian civil law, the basis of the institution of inheritance is closely correlated with the kinship between *the deed* and the persons called to inherit, as well as the surviving spouse. In a straight line, his cousin's relatives *are* called to inherit indefinitely, but in a collateral line the legatee limits their call to the 4th degree inclusive, just as it appears from the provisions of art. 963 para. (1) Civil Code „ *The inheritance belongs, in the order and according to the rules established in this title, to the surviving spouse and relatives of the deceased, namely his descendants, ascendants and collaterals, as the case may be."* This way of summoning the successors to the inheritance is based on the social importance of preserving the acquired goods.

of his death on the patrimony are regulated in the Civil Code in Book IV, Title I art. 953-1163, as well as in other normative acts, among which we mention: Law no. 36/1995 of notaries public and notarial activity and the Regulation for the application of law no. 36/1995, Law no. 18/1991 of the land fund, Law no. 112/1995 for the regulation of the legal situation of some real estates with the destination of dwellings, passed into state ownership, Law no. 10/2001 regarding the legal regime of some immovables abusively taken over in the period March 6, 1945-22 December 19894, which contain provisions of succession law, Law no. 119/1996 regarding the updated civil status documents, Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, Law no. 134/2010 on the Code of Civil Procedure. In accordance with the provisions of the above-mentioned rules, we specify that the main effect of death is the realization of the full patrimonial transmission, regardless of the will of the deceased.

Guaranteed by the fundamental law through the provisions of art. 46 of the Romanian Constitution, the inheritance in the Romanian civil law can be of two types: legal or testamentary. The legal or *ab intestate inheritance* can occur when the deceased did not leave a will or if the will did not include the entire parrimonial mass or left other provisions such as the removal of relatives from the succession. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 18)* This inheritance is the rule and is governed by the legal provisions that take into account the persons who have a vocation to inheritance, the order in which they have access to inheritance and the quotas. what they inherit. *(Genoiu, Ilioara, Drept civil. Succesiuni – Caiet de seminar, 2014, p. 4)* The testamentary inheritance is found in situations where the deceased wanted to pass on his assets and / or part of the assets to certain persons. The inheritance can be exclusively testamentary or can coexist with the legal inheritance, a situation consecrated *expresiss verbis* in art. 955 para (2) Civil Code. according to which *one part of the deceased's patrimony can be transmitted by testamentary inheritance, and the other part by legal inheritance.*

From the provisions of art. 1102 C. Civ. we can draw the conclusion that the quality of legal heir can coexist with that of legatee. It is considered that the only possibility to remove the *intestate* inheritance by testamentary inheritance is applicable in the case of the testator who establishes one or more universal legatees, who, together, have a vocation to the entire inheritance, there are no reserved heirs. *(Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 10)*

The inheritance of a person is opened only upon his death, while he is alive it is not possible for a person to pass on the entire estate to one or more persons and no other person or persons can acquire inheritance rights from him. Article 954 of the Civil Code. it must be interpreted as a legal consequence of the cessation of capacity that takes place when the person dies.

2. THE MATTER OF SUCCESSIONS IN ROMAN LAW

Closely related to the institution of private property, inheritance represented in Roman law a legal system that allowed the replacement of one person with another belonging to the same classes, and most often the same families. The matter of succession in Roman law regulates the transmission of his *deed of patrimony* to his heirs, even if, initially, the Romans did not accept this idea as they did not admit the idea of transferring property *inter vivos* considering that there is no heritage and that a person's patrimony disappears with his death. Considering the approach of the old Roman law, we can understand that the succession, originally, is based on the right of possession over the goods that the heirs obtain and not on the transmission of the deceased's patrimony. The characteristic of the inheritance in the old Roman law is found in the family character of the property by the fact that the goods were the property of the family and did not belong to the person, so that at the death of his *father* another member replaced him to ensure and exercise family rights.

With the evolution of the Roman society, the goods ceased to be co-ownership of the family, a situation that created new regulations for the institution of inheritance and justified the right of inheritance in general and the institution of the succession reserve in particular, for the protection of children, parents and surviving spouses. the maintenance of the common pledge and of the creditors, motivated by the fact that the patrimony must exist even after his death *of cuius*.

intestate inheritance was proved to be the oldest form of inheritance, it appeared with the individual possession of the property, and with the advent of the patriarchal family, the testamentary inheritance also appeared. The will, in Roman law, was seen as a legal act that ensured the transmission of the power of the *pater familias* to his descendants. Originally, the legal acts by which the patrimony was transmitted to the deceased's descendants took on extremely rigid solemn forms, the will assuming conditions similar to those necessary for the adaptation of a law. It is well known that, as the economy developed, the forms of the will were simplified, and the simple verbal statement could be considered a will.

3. LEGAL CONSIDERATIONS REGARDING THE INSTITUTION OF HERITAGE

Article 31 C. Civ. provides a legal definition of the patrimony, according to which *any natural or legal person is the owner of a patrimony that includes all the rights and debts that can be valued in money and belong to it.* We specify that there are rights of the person that cannot be transmitted, for example those regulated in art. 58 para (2) Cod Civ. with the marginal name – Rights of the personality, but which may project in the patrimony of the person rights of claim, such as the right to *claim damages or, as the case may be, a patrimonial reparation for the damage (...) caused;* according to the provisions of art. 253 para (4) C. Civ. this action has a pecuniary value, and can be used to defend any personal non-patrimonial rights. In the specialized legal literature it is considered that the

non-patrimonial damages are practically invaluable pecuniary, but the legislator allows the granting of compensations for the moral damages.

We will exclude from the patrimony that is transmitted *mortis causa* the categories of rights that cannot be transmitted by inheritance: non-patrimonial rights and obligations, patrimonial rights that cease at the death of the holder (patrimonial rights that have a lifelong character or those that were contracted or born ex lege *intuitu personae* (such as: right of use, usufruct, dwelling, a claim for maintenance or annuity, the right to a pension etc.), or for other reasons, as well as patrimonial obligations arising from contracts concluded *intuitu personae* or those related to personal quality of the deceased.

We mentioned that a person 's assets consist of **assets –** which include capital and income and **liabilities –** which include all the financially valued debts that a certain person has. In the analysis of the legal characteristics of the patrimony we will mention its divisibility which finds application in art. 1114 para. (2) Civil Code. which regulates the situation in which *the legal heirs and the universal or universal legatees are liable for the debts and tasks of the inheritance only with the goods from the succession patrimony, proportional to the share of each one.* Also as an applicability of the divisibility of the patrimony we refer to art. 1156 para (1) C. Civ. in which the legislator stipulates the situation that does not allow the personal creditors of an heir to pursue, before the division, his share of the assets of the inheritance.

Another characteristic of the patrimony is the non-transferability, which regulates the situations in which a person can transmit one or more rights from his patrimony through *inter vivos acts,* and the transmission of the patrimony in its entirety can take place only through acts *mortis causa*. The universal transfer of the estate is the transfer not only of his rights and obligations *in isolation, but also of all rights and obligations which belonged to the deceased, as a universality or a fraction of the universality, as the transfer is made to a single heir or to several heirs,* the object of the transmission being always the inheritance and not a *patrimony left without master (abandoned). (Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 81)*

4. INHERITANCE IN THE REGULATION OF THE CIVIL CODE. DIFFERENCES BETWEEN *MORTIS CAUSA* AND *INTER VIVOS TRANSMISSION*

In order to avoid any confusion, we consider that it is necessary to treat comparatively the two types of acts by which the transmission of rights and obligations is carried out, respectively the transmission by *inter vivos acts* and the transmission by acts *mortis causa*. The distinction between the two types of acts is relevant in the matter of the transmission of the patrimony of the natural person, because only the natural person can transmit his patrimony by inheritance. According to the provisions of art. 954 para. (1) C. Civ. „ *A person's inheritance opens at the time of his death*." It is clear from the text of the law that succession transmission, unlike *inter vivos transmission,* occurs only at the time of termination of the natural person's life, whether it is a physical death or a death declared by a court decision, thus distinguishing between the elements. distinctive features of the two types of transmissions – death and „*being"* of individuals. Until the time of his death, *the* heirs, whether testamentary or legal, have no right to his estate.

Through the provisions of art. 956 C. Civ. it is provided that any legal acts concluded before the opening of the succession such as acts by which the inheritance is accepted or renounced or the acts by which the alienation of certain rights that could be acquired at the

moment of opening the inheritance are struck or absolutely null and void, if the law does not provide otherwise. An essential feature of the transmission of inheritance compared to the transmission between the living, and at the same time the distinguishing element is that the transmission of inheritance concerns a universality of goods, and not only singular goods, but also the universality of debts and not singular debts. *(Genoiu, Ilioara, Civil law. Successions – Seminar book, 2014, p. 11)*

Another difference in the case of the transfer of assets by deeds of *death* compared to the transfer by *inter vivos documents* is that, as a rule, it is not subject to advertising rules to become opposable to third parties in the situation where real estate rights are transferred. We find this situation regulated by the legislator in the provisions of art. 887 para. (1) C. Civ. The case of assignment of claims, which is not subject to the necessary rules and formalities compared to *inter vivos transmission,* is another difference between the two types of transmission. The finality pursued by the legislator through the text of the law is that of preserving the real right of the acquirer as a result of the character of the mode of acquisition conferred by the transmission by deeds *mortis causa,* the recognition of the real right having priority in relation to the publicity rules.

Given the differences set out above, we can conclude by pointing out that the transmission by deeds between living beings cannot have as its object a patrimony. As long as the holder is alive, his estate cannot be transferred to another person, but only rights can be transferred in isolation, while after death *the entire estate is transferred to natural or legal persons*.

5. RECIPIENTS OF THE DEATH'S HERITAGE. ABILITY TO RECEIVE AND ABILITY TO DISPOSE

At the date of opening the succession, the succession patrimony is transmitted to the heirs of the deceased, being born in the patrimony of each one a subjective right of succession option. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 173).* According to the provisions of art. 987 para. (1) of the Civil Code, „ *any person may make and receive liberalities, in compliance with the rules on capacity „*. The text of art. 36 C. Civ. states in Thesis I that „ *the rights of the child are recognized from conception, but only if he is born alive."* Continuing the same legal reasoning, we appreciate that by applying the provisions of the mentioned text of the law we will be able define the situation of the person able to access the inheritance, ie whoever is conceived at the date of the testator's death. As previously mentioned, the Civil Code by art. 963 paragraph (2) confers succession vocation to the relatives of the deceased to infinity and to those in collateral line up to the 4th degree inclusive.

In the provisions of art. 957 para. (1) C. Civ, the conditions that a person must meet in order to be able to inherit are provided, namely: *in order to be able to inherit, a person must exist at the time of opening the inheritance,* not to fall into the categories mentioned in art. 958-959 of the Civil Code, and to have a vocation according to art. 962 Civil Code. The ability to inherit should not be confused with the capacity to use or exercise, which represents a person's ability to be *subject to the rights and obligations that the status of heir entails. (Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 27)*

Therefore, they may have the capacity to inherit both natural and legal persons, but there are also categories mentioned by the legislator that may not have this quality, namely persons who do not exist at the date of opening the succession (unborn persons and

deceased persons), such as and the persons who fall within the provisions of art. 957 para. (2) Civil Code. namely the *Comorians* and the co- *ceded.* The regulation from paragraph 2 of art. 957 C. Civ. answers the question of whether people who die at the same time can inherit each other. In this respect, the answer given by the legislator is that, if it cannot be absolutely established that one person has survived the other, it is necessary to remove their succession capacity. *Comorians are persons who have died in the same circumstances and conditions under* which it is not possible to determine whether one person has survived the other and the *co-deceased are persons who have died in different circumstances, which could not be determined who survived the other. (Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 30)* It is necessary to specify that, in the situation of incapable persons, the effects occur *ipso jure* and can be invoked by the interested persons.

The succession vocation is enshrined as a condition of the right to inherit and is regulated by the legislator in art. 962 of the Civil Code: „ *in order to be able to inherit, a person must have the quality required by law or have been designated by the deceased by will". Eo ipso,* we appreciate that the vocation to inheritance has the meaning of a call to inheritance, regardless of whether the deceased left a will or if the inheritance is *ab itestated*. As mentioned in the paper, in the case of legal inheritance, the vocation is recognized to descendants indefinitely, and to collateral relatives up to grade IV inclusive, but in the case of testamentary inheritance the vocation is not mandatory, the testator can appoint any person as legatee.

In the light of the regulations, in Romanian civil law, three principles have been developed that give legal expression to the inheritance, based on which the person and / or the persons who have a succession vocation access to inheritance. The first principle is that of calling the relatives to inherit in the order of the houses of legal heirs, regulated in art. 964 para. (1) and (2) of the Civil Code, followed by the principle of the proximity of the degree of kinship between the heirs of the same class [art. 964 para. (3) Civil Code] and the principle deriving from art. 964 para. (4) C. Civ. which reveals the equality of relatives of the same class and of the same rank called to inherit.

The third condition that must be met in order to be able to access the inheritance is regulated in art. 958 and art. 959 C. Civ. The non-existence of indignity is required both in the case of *ab intestate* inheritance and when it is transmitted according to the testamentary clauses. **Succession indignity** is the forfeiture of the legal heir's right to collect a certain inheritance, including the reservation to which he was entitled, because he was guilty of a serious act against the deceased or his memory. The sanction of succession indignity derives *ope legis* from the limiting enumeration made by the legislator in art. 958 para. (1) lit. a) and b) C. Civ. Article 959 para (1) C. Civ. sets out the conditions that must be met in order to be able to order the **indemnity that may be** optionally pronounced by the court. The main effect of indignity is to remove both legal and testamentary inheritance, but we can remember that the forfeiture of the right to inherit an estate does not affect the vocation to inheritance but only the benefit that the unworthy could. reaps from the inheritance. This can be deduced from the provisions of art. 967 para. (1) C. Civ. which provides that the unworthy may be represented, „*in other words, the sons and daughters of the unworthy will reap the share of the inheritance from which the unworthy is excluded."*

6. *CUIUS* 'S HERITAGE. RIGHTS AND OBLIGATIONS TO BE TRANSFERRED TO THE HEIRS AFTER THE OPENING OF THE HERITAGE

From the content of art. 1091 para. (1) C. Civ. it appears that the estate, which is also the calculation table according to which the estate reserve and the available quota are individualized, includes both the patrimony of the deceased at the date of opening the inheritance and the *inter vivos liberalities* made by him. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 162)* At the death of the deceased, the patrimony that is transmitted includes only his rights and obligations *of cuius* not the non-patrimonial personal rights that cease at the moment of death, these being closely related to the person of the one who leaves the inheritance.

We consider it useful to mention that the patrimony is passed on to the successors regardless of the nature of the rights and obligations that form it *(at the opening of the inheritance no distinction is made between real rights, or debt, movable or immovable property),* their *origin from the maternal or paternal line),* from the origin of the rights and obligations *(if they entered the estate of the deceased as a result of an inheritance or were acquired by other means)* or by the ways in which they are affected *(term or condition)*. Given the characteristics of the patrimony – *it is unitary and indivisible,* we can conclude by showing that the transmission of the patrimony by succession will meet the same characteristics, with the following consequences: no distinction will be made according to the nature of the rights and obligations. he must accept or renounce the inheritance.

The estate assets include the real and claim rights of the deceased, among which we mention:

- the right of ownership over the built-in or out-of-town buildings, regardless of the locality in which they are located, and the right over the movable goods;
- other principal real rights which belonged to the deceased and which do not expire on his death (for example, the right of servitude or surface) and ancillary real rights: mortgage, pledge etc.;
- patrimonial copyrights: the right to derive material benefits from the capitalization of the work etc.;
- the patrimonial actions that belonged to the deceased: the action in claim, the action in termination or resolution, in revocation for ingrat titud ine, actions that were not initiated or solved during the life of the one who leaves the inheritance and that will be started or continued by the successors according to the applicable rules.

The succession liability is represented by the debts that are in payment at the date of opening the inheritance arising from contracts that do not have an *intuitu personae character,* or as a result of the deceased committing illicit acts causing damage to a third party, as well as inheritance tasks that they can be: expenses that take place on the occasion of the inventory, conservation, administration, liquidation of the succession, funeral expenses, bequests in a private capacity that have as object generic goods etc. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 196)*

6.1. Succession assets that are passed on to the heirs following the opening of the inheritance

In the continuation of the paper, we will discuss a series of rights that are transmitted to the heirs of the deceased, the legislator expressly listing in the norm the categories of heirs and the order in which they will benefit from the rights of the deceased.

Article 256 of the Civil Code. regulates the situation that occurs in the event of the death of the holder of a non-patrimonial right, a right which, as we mentioned before, is not part of the patrimony that is transmitted by inheritance. The right enshrined in art. 256 C. Civ. successors in this situation, the action in defense of the rights of the deceased, „ *may be contained or initiated (...) by the surviving spouse, by any of the deceased's direct relatives, and by any of his collateral relatives up to and including the fourth degree"*. In consideration of what he represented, respect is due to the deceased, and in order to restore the non-patrimonial personal rights violated during his life, his descendants and ascendants may exercise the action in defense according to the provisions of par. (1).

The surviving spouse's rights constitute a set of rights, as we are discussing not only the right to inherit a portion of the inheritance, but also other rights attached to it that the surviving spouse enjoys under his or her status. The right to housing regulated in art. 973 para. (1) C. Civ. is the right in the estate of the deceased which is passed on to the surviving spouse who „*does not hold any real right to use a dwelling to suit his daily needs, enjoys a right of abode over the house in which he lived until the date of opening the inheritance, if this house is part of the estate „*. This right arises from the date of opening the inheritance and belongs to the surviving spouse if he is not the sole heir (*neminem res sua servit),* but comes to inheritance in competition with other relatives of the deceased and if the surviving spouse does not become the sole owner of the estate by inheritance. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 76)*

In support of the right enshrined in art. 973 of the Civil Code, the legislator provides, in a rt. 974 of the Civil Code, the situation of the surviving spouse who has the right over the furniture and household objects, simultaneously with the succession part that he collects in competition with the different classes of heirs. In order for the surviving spouse to have this special right, he must not inherit in competition with the heirs of the first class, and these assets must not be affected by *inter vivos* or *mortis causa liberalities* made expressly by the deceased, so that the spouse survivor being deprived in whole or in part of this right. *Eo ipso,* we mention the fact that this special right contained in art. 974 C. Civ. it concerns only the share of the deceased from these assets, the surviving spouse having the right of ownership over the share that belongs to him. *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 72)*

Regarding the provisions of art. 1049 para. (1) C. Civ. with the marginal name – ***The will of the sums of money and the values deposited,*** the law regulates other forms of will through which the holder can indicate, through the testamentary clause, the person to whom the sums or values are to be released in case of his death. The testamentary disposition is valid only if it meets the formal requirements provided by the legislation in force. The designation of the beneficiary of the testamentary clause must contain sufficient elements so that he can be determined or determinable at the time of opening the inheritance. *(Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 180)* As a result of the testator completing this clause, the credit institution has the obligation to to communicate to the National Union of Notaries Public the data necessary for the registration of the testamentary disposition in the National Notarial Register, following that any modification, revocation, withdrawal or any liquidation of the deposit by the testator until the date of death will be communicated immediately.

The testamentary clause constitutes a liberality, producing effects only at the death of the disposer, so that the legal provisions applicable to the private legatee are incidents. We consider that these provisions regarding the values that are part of the patrimony transmitted by inheritance: the *amounts of money, values or securities deposited with specialized institutions,* including interest, which will be deposited with the credit institution at the date of death of the holder *(Stănciulescu, Liviu, Civil Law Course. Successions, 2012, pp. 110-113)* will not be included in the mass of the deceased's shared assets if they do not exceed the limits of the available quota. If the legatee violates the succession reserve, and the legatee is reduced, upon request, within the limits of the available quota, the transfer of sums, values or securities will be made in favor of the legatee within the limit of the available quota, respectively in favor of the heirs. legal reservations within the limits of their succession reserve. *(Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 181)*

In art. 1125 of the Civil Code, the legislator regulates the right of legal heirs (sezinari) to administer the deceased's patrimony and to exercise the rights and actions acquired from *de cuius* or later entered in the patrimony without requesting the possession in possession to enjoy the use of the succession estate.

The notion of sitting, regulated by the new Civil Code, constitutes *the legal possession of the inheritance,* the term of possession having, in the mentioned text, a special meaning, different from the one from art. 916 C. civ. The seizure is an operation independent of the actual possession of the successor assets, in the legal literature there are authors who consider that it is possible that the heir to the seizure does not have this possession, and the assets are owned by people who do not have this quality. This assertion is one of the solutions adopted by the legislator in order to avoid that a universality of goods that formed the patrimony of a deceased person, be considered without master.

According to art. 1126 of the Civil Code, the surviving spouse, the privileged descendants and ascendants have the legal possession of the inheritance, from the moment of its opening. This enumeration is limiting and imperative, the heirs included in the text of the norm enjoy the session in the order of the vocation to the succession, not all collectively. These preferred categories by law have the possession of the succession patrimony from the moment of opening the inheritance, without having to fulfill an additional condition as it happens in the case of the other successors who, in order to take possession of all the successor assets must request the possession of the notary public.

The administration right conferred by art. 1125 C. Civ. includes the right to the estate of the estate, the right to sue all the debtors of the estate and the holders of the estate, *the right to exercise the actions of the possessor in respect of the estate and any other patrimonial actions belonging to the heir, the right to defends, as a defendant, against the third plaintiffs, with claims relating to inheritance. (Stănciulescu, Liviu, Civil Law Course. Successions, 2012, p. 203)* Continuing the same legal reasoning, we specify that the right of administration does not give the heir to the right to claim the de facto possession of a successor property owned by other persons, with which is *found in indivisibility and which, as such, possesses in accordance with the law. (Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 324)*

Article 1834 of the Civil Code. stipulates the situation of the tenant's death in the case of the lease, which expires within 30 days from the date of registration of the tenant's death,

while offering the right to descendants and ascendants to, within 30 days, opt to continue the lease until at the end of its term, provided that they are mentioned in the contract and have lived with the tenant. According to the text of the law, the lease continues its existence for 30 days from the date of death of the owner, after which, if there are no options for its continuation, it ceases.

The text of the article protects the surviving spouse in connection with the family home because he has his own housing right that continues if he does not expressly renounce it, unlike other descendants and descendants who must opt to continue the contract within 30 days. With regard to the latter, the option can only operate if they have been mentioned in the contract and have actually lived with the deceased tenant. *(Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code Comments, doctrine and jurisprudence Vol. III, 2012, p. 204)*

The right of the surviving spouse to exercise his or her right to housing in the event of the death of one of the spouses is also regulated in art. 323 para. (3) C. Civ. In this case, the surviving spouse continues to exercise his or her right to housing, unless he or she expressly waives it, according to art. 1834 of the Civil Code, within 30 days, calculated from the date of the husband's death.

The Civil Code regulates *expressis verbis* in art. 2230 in the case of personal insurance and establishes the beneficiary of the indemnity and in the case of the death of the insured, when no beneficiary has been appointed, the insurance indemnity being part of the estate and reverting to the heirs of the insured. Unlike the Civil Code of 1864, the current regulations provide that, in case it is paid to the heirs following the death of the insured, the indemnity is divided between the heirs according to the rules of inheritance *ab intesat*. We specify *ab initio* the fact that the value that enters the estate is not subject to the reduction of a liberality, nor to the report as a donation nor can it be pursued by the creditors of the insured.

Moreover, the jurisprudence qualifies the designation made by the insured person (deceased) in a will in order for the third party to acquire directly and *iure proprio (Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, New Civil Code Comments, doctrine and jurisprudence Vol. III, 2012, p. 614)* will be considered a legatee and the rules of legacies will be applied to him. Another application of this article in legal practice is found in the situation where the third party, in whose name the insurance was stipulated, dies before the stipulator. In this respect, we note that in the Italian origin practice it was firmly decided that the insured amount should be paid to the heirs of the third party but not to the heirs of the stipulator if the stipulation was not revoked until the death of the stipulator.

In the provisions of art. 162 para. (2) of the Labor Code regarding unpaid salary rights due until the date of death of the employee, the legislator stipulates that *in case of death of the employee, the salary rights due until the date of death are paid, in order, to the surviving spouse, adult children of the deceased or to his parents,* and if none of these categories of persons exist, *the salary rights are paid to other heirs, under the conditions of the common law*. In the text of the mentioned law, the categories of heirs who can benefit from the rights of the deceased as a result of the employment contract concluded with the employer, both salary rights and other allowances or compensations due to the deceased are expressly mentioned and limited by the legislator. The legal doctrine considers that these

provisions also apply to the allowance due to the deceased employee for the unpaid leave, using the principle that the leave allowance has the legal nature of the salary.

Another relevant example that illustrates the transmission of the deceased's patrimony can be found in art. 27-28 of Law no. 8/1996 updated, on copyright and related rights. The legal provision states that the patrimonial rights are born from the moment of creation of the work and last throughout the life of the author, and after his death are transmitted by inheritance, according to civil law, for a period of 70 years, whatever the date on which the work has been legally made public. The specialized legal literature considers that the copyrights constitute a different patrimonial mass, reason for which, their transmission by means of special norms has only temporary character.

6.2. *The succession liability that is transmitted to the heirs following the opening of the inheritance*

In the first part of this chapter we have addressed, without limiting ourselves to these, the rights that are transmitted after the opening of the inheritance. In order to outline a more accurate picture of the institution of inheritance, we will continue in the work, the claims and debts of the deceased that are passed on to his successors. The transfer of obligations, as part of the patrimonial liability, represents a characteristic of the institution of inheritance because, by *inter vivos acts,* obligations cannot be transmitted, in principle, only rights. The current Civil Code, in Title VI *Transmission and transformation of obligations,* Chapter III *Taking over the debt,* Section I, enshrines the exception of transmission of obligations by *inter vivos acts* through the provisions of art. 1599, in which the legislator regulates the Taking over of the debt / the assignment of the debt. It follows from the provisions of this text of the law that the obligation *to pay a sum of money or to execute another service may be transferred by the debtor to another person.*

As I specified during the work, the composition of the succession liability includes the debts of the inheritance, more precisely those patrimonial obligations assumed by the deceased regardless of their nature or origin (contractual obligations (obligation to pay the price of a thing bought), tort compensate a third party for the damage caused by the deceased by an unlawful act), legal (to reimburse an undue payment)] and which exists in the deceased's estate at the date of opening the inheritance *(Dan Chircă, Civil Law Treaty. Successions and liberalities, 2nd Edition, 2017 p. 399),* as well as the tasks of inheritance, respectively those obligations that did not exist in the patrimony of the deceased but are born directly in the patrimony of the person (s) which accepts the inheritance, regardless of the will of the heir or the deceased, but which derive from the fact of his death. Therefore, the category of inheritance tasks includes funeral and subsequent expenses incurred according to religious tradition and expenses incurred in opening the inheritance, such as taxes and duties related to property in the estate, expenses necessary for the succession procedure, expenses for the administration of the inheritance, expenses. inheritance inventory.

Once the succession liability has been defined, the rules according to which the claims of the successor creditors are paid are presented, a procedure called «liquidation of the inheritance». For a complete analysis, we consider that it is necessary to approach the situation of execution of an obligation by the successors in the situation of the assumption by the deceased, during his life, to fulfill an obligation. The legal doctrine formulated two answers in this regard:

a) the obligation will have to be paid by the successor who will accept the inheritance, in the conditions in which it was born directly in the patrimony of the deceased, but its execution was postponed until the death of one of the parties. Thus, the death of the party can be assimilated to the fulfillment of a suspensive term; *(I. Adam, Civil Law. General Theory of Obligations, 2014, p. 176)*.

b) the obligation did not exist in the patrimony of the deceased, being born directly in the patrimony of the heir; in this situation, as the heir is not a contracting party to the act by which the deceased has assumed the fulfillment of the obligation, he cannot have the quality of debtor. *(I. Adam, Civil Law. General Theory of Obligations, 2014, p. 177)*.

Analyzing the provisions of art. 1114 para. (2) and art. 1155 para. (1) of the Civil Code, it is important to note that the succession liability is borne only by the legal heirs and the universal and universal legatees, and not by the private legatees. This observation is necessary because the legal and universal heirs and universal heirs inherit the estate of the deceased, a universality that includes not only rights but also debts and duties, unlike the private legatee who himself becomes a creditor with the right to claim payment. the legatee whose holder is. In the case of private legatees, however, there are exceptions, among which we mention the situation of the inheritance collected by the testator and not liquidated so that the payment of debts is a natural consequence of the nature of the legatee. *(Dan Chircă, Civil Law Treaty. Successions and Liberalities, 2nd Edition, 2017 p. 417)* The legal heirs and universal or universal successors are liable for the claims and debts of the deceased under the conditions of art. 1114 para. (2) Civil Code, only with *the goods from the succession patrimony, proportional to the share of each one.*

In judicial practice, it is considered that in the case of a child who has provided care to the deceased parent and cared for his or her shelter without being in a situation of having a legal obligation of care, it is appropriate to reimburse the expenses for the maintenance of the deceased on the principle enrichment without just cause. This claim will be included in the liability of the inheritance, because through the benefits provided by the son, the deceased avoided impoverishment with the value he would have spent to ensure his care. *(Dan Chircă, Civil Law Treaty. Successions and Freedoms, 2nd Edition, 2017 p. 399) They are* also part of the succession liability and legally established fines during the life of the deceased that can be pursued by creditors.

In accordance with the provisions of Article 1282 para. (1) C. Civ. „ *Upon the death of a party, its contractual rights and obligations shall be transferred to its universal or universal successors, unless otherwise provided by law, by the agreement of the parties or by the nature of the contract,"* we emphasize. must fulfill the obligations assumed by *de cuius,* either under a contract or under the law. At the same time, the provisions of par. (2) of the same article refer to the fact that „*The rights, as well as, in the cases provided by law, the contractual obligations in close connection with a good are transmitted, together with it, to the particular successors of the parties".* Analyzing this disposition we notice that the legislator, with reference to the situation of the acquirer of the property both by *inter vivos* and *mortis causa acts,* recognizes his right to benefit from the effects of the act concluded by the testator or, as the case may be, to fulfill the obligations assumed by the deceased. As we have stated *ab initio,* universal or legally universal successors are the successors of the deceased's personality, acquiring, as mentioned above, the entire estate not only a part of it, so they will also acquire the debts and debts of the deceased. A very important point to keep in mind is that successors will become parties to contracts entered into by the deceased,

replacing one or both of the original contracting parties from whom they acquired the estate. *(Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 610).*

Another aspect in the formation of the succession liability on which we want to focus our attention is represented by the *obligation of compensation*. The reason for this obligation demonstrates that tortious civil liability, a sanction of civil law, is applied in consideration of the property of a person, as opposed to the penalty in criminal law which is applied in consideration of the person who committed the wrongful act. Therefore, art. 1381 para. (3) C. Civ. states that depending on the moment of the birth of the obligatory indemnity report, *all the legal provisions regarding the execution, transmission, transformation and extinguishment of the obligations derive. (I. Adam, Civil Law. General Theory of Obligations, 2014, pp. 326-327)*. From the analyzed we specify the fact that, in case the perpetrator of the illicit deed dies, the obligation of compensation will be transmitted to his heirs.

In light of the regulations of art. 1155 para. (1) C. Civ. *the universal and universal heirs contribute to the payment of the debts and tasks of the inheritance in proportion to the succession quota that belongs to each one.* From the text of the article paraphrased above, we can extract the idea that the legislator enshrines the principle of the legal division of the succession liability between the heirs, from the date of opening the inheritance. It is important to note that this principle also has exceptions, which we will mention below: a) the situation of indivisible obligations; b) when the obligation has as object a determined individual good or a determined benefit on such a good; c) when the obligation is secured by a mortgage or other security interest; d) if one of the heirs is entrusted, by title, to execute the obligation himself. The first two exceptions refer to the indivisible obligation both naturally and conventionally. In the case of the obligation secured by a mortgage or other real guarantee, as these guarantees are indivisible, we can conclude that this exception is also a case of natural indivisibility. Article 1155 para. (3) lit. d) C. Civ. refers to the obligation established either by a clause inserted by the deceased in a contract or by a will. *(Dan Chircă, Civil Law Treaty. Successions and Liberalities, 2nd Edition, 2017 p. 420)*

We complete this legal table of the obligations transmitted by return by mentioning the situations of the obligations assumed by *de cuius* from art. 1425, art. 1427, art. 1442 and art. 1460 C. Civ. In accordance with Art. 1425 (1) and (2) C. Civ. we specify the fact that the indivisible obligation is transmitted indefinitely to the heirs, having as a consequence, as in the case of solidarity, the creditor's right to pursue, for the full value, any of the heirs. „ *The indivisible obligation does not allow the division of the debt between the co-owners of the indivisible debtors." (Mădălina Afrăsinie; Monna-Lisa Belu-Magdo; Alexandru Bleoancă, The New Civil Code – comments, doctrine and jurisprudence Vol. II, 2012, p. 767).* Continuing the reasoning, we emphasize the fact that art. 1427 C. Civ. refers to the obligation assumed by a creditor and a debtor which will be executed as if it were an indivisible obligation but, in the event of the death of one of them, between the heirs of the deceased party will remain a divisible obligation.

In accordance with the provisions of art. 1442 C. Civ. we emphasize that the obligation assumed in favor of the creditor will be divided by right between his heirs in the event of his death. Respecting the principle of symmetry, the legislator of the Civil Code regulated in art. 1460 C. Civ. the divisibility of the joint and several obligation between the heirs. Analyzing the provisions of the aforementioned article, we note that, except for the

indivisible obligation, the obligation of a joint and several debtor is divided by right between the heirs in the event of the debtor's death. In support of this statement, we consider that „ *solidarity operates only in the first degree, more precisely than between those who stipulated it, and between the successors the obligation will be divided, they can be pursued only for the part of each".*

Another aspect on which we want to focus our attention is the provisions of art. 518 C. Civ. From the interpretation of the provisions of this article, we specify that the legislator establishes the conditions that must be met in order to establish the maintenance obligation for the heirs of the deceased. We emphasize that, in the aforementioned article, the legislator regulated the scope of the maintenance obligation, *„only as long as the maintenance is minor"* and only *„as long as the circumstances that require the fulfillment of the obligations persist".* In accordance with the principle established by art. 1114 para. (2) C. Civ., And in the case of the maintenance obligation, the maintenance is granted within the limit of the value of the goods from the succession patrimony. We consider that it is necessary to mention the fact that this maintenance obligation belongs only to the universal and universal heirs and is due only from the moment when the conditions provided by law are met. We consider that this obligation is a subsidiary obligation, therefore the obligation exists only if the minor's parents *have died, are missing or are in need.*

7. CONVERSION OF THE CIVIL LEGAL ACT

The institution of conversion of the civil legal act regulated in art. 1260 C. Civ., Represents a legal paradox from the perspective of the theory of autonomy of will, a principle *expressly expressed* by the provisions of art. 1169 C. Civ. called Freedom to contract. The conversion, as a legal operation, was not known in Roman law, in which the sanction of nullity was irreparably deprived of any effect of the legal act, according to the principle *nihil actum est, nullum est negotio.*

In this sense, the conversion is presented as a result of the contradiction between the rigor of the sanction of nullity and the adaptability of civil legal relations, which requires safeguarding a manifestation of will by requalifying the initial legal will, transforming the subsequent legal act into a legal act generating obligatory relations. The conversion of the civil legal act, as a legal operation, corresponds to the modern conception of nullity seen as a sanction that aims to remove the effects contrary to the law. Thus, the conversion is based on the presumed will of the parties to the original act to accept both the conversion procedure and the effectiveness of the subsequent valid legal act.

In the matter of successions, we find applications of the conversion in art. 1068 para. (2) and para. (3) C. Civ. which provides (2) *„any alienation of the property which is the object of a particular bequest, consented by the testator, even if it is affected by the manner, implicitly revoke the bequest for all that has been alienated". The legal act by which* an asset is alienated (in principle, except for the donation in favor of the beneficiary of the legatee), affected by a cause of nullity (other than incapacity, vitiation of the will or lack of discretion of the testator), is valid act of revocation of the legatee as object the respective good, legally drawn up previously by the alienator. The alienation of the object of the bequest constitutes an act of revocation if it is a voluntary act, affecting only the bequests with particular title and not the universal ones or with universal title, because only the bequests with particular title have the determined object in its individuality. The specialized legal doctrine has stated that a contract of sale that is not concluded in the form of *ad*

validitatem, and implicitly, is null and void, entails the revocation of the bequest in a private capacity, even if, by conversion, it becomes a pre-contract or a promise of sale – legal acts that are not transferable property deeds, because it is essential the external intention of the testator to dispose otherwise than through the initial will.

Another hypothesis of conversion is found in art. 1110 para. (1) lit. a) C. Civ., the case of the act of alienation of a successor property by the heir, null as such, but valid as an act of tacit acceptance of the inheritance. The acts of alienation of the rights over the inheritance are valid for the act of tacit acceptance of the inheritance. The donation, sale or assignment of inheritance rights constitute acts of tacit acceptance of the succession. In the event that an heir sells part of the inheritance rights, it is noted that he tacitly accepted the entire estate.

Article 1050 of the Civil Code. is considered an application of conversion: „ *A null will due to a defect in form produces effects if it meets the conditions provided by law for another form of will."* A will that is considered void due to defects in form may be considered valid as another form of will provided that it meets the requirements for its validity. We note the situation of the authentic or privileged will, void for formal defects, but valid as a holographic will, insofar as it is written in its entirety, signed and dated by the hand of the testator. Conversion occurs in this situation by converting the form of the will, not the legal act itself.

As we have tried to show in this paper, the patrimony transmitted by inheritance varies depending on the personality of the deceased and his activity during life, interpersonal relationships. Romanian legislation has tried to include in its regulations all possible situations, creating rules for the transmission of rights and obligations *mortis causa,* but it is perfectible, because the law is a living body, which gives rise, modifies and extinguishes rights and obligations between the parties. At the same time, taking into account the fact that the core of civil law is *the will of the parties* (the principle of autonomy of will), during his life, *of* whom he may dispose of the goods that form his estate at will, but without affecting the patrimony of his creditors because *no one is obliged to leave an inheritance*.

8. Conclusions

Romanian civil law has taken over the ideas from the international legal doctrine, which states that „ *The Civil Code does not know the right of the dead, it is only interested in the living",* thus regulating the rules for transmitting the deceased's assets to his heirs, respectively through legal inheritance or testamentary. In the content of the paper we tried to show the complexity and amplitude of the regulations regarding the fate of the deceased person's patrimony. These characteristics stem from the legislator's desire to protect the testator from possible errors that could affect the rights of persons entitled to benefit from his estate.

In our opinion, the current Civil Code, compared to the old regulation, offers the institution of inheritance a modern and coherent regulation. However, Romanian society agrees with the changes taking place in the international community, so that state legislation must keep pace with the development of society and be a factor in its development, having a huge impact on the life of the individual.

According to art. 1034 C. Civ. „*The will is the unilateral, personal and revocable act by which a person (...) disposes (...) for the time when he will no longer be alive".* Our proposed *law ferenda* will address the issue of the legal status of non-human beings as well as the legal mechanisms to ensure their future following the death of the owner. One thing

that needs to be emphasized is that for many people, pets, not family members, are „the closest and dearest." In order to outline a more accurate picture of this situation, we note that the current rules on the succession of non-human beings defeat the wishes of the deceased, excluding them from the succession table. This abstract view of the institution of inheritance excludes the beings whom the deceased appreciated and to whom he was bound by affection to the detriment of the family paradigm which assumes that, in the case of devolution, the ascendants and descendants of the deceased are the recipients of the estate.

In the sociological literature, the family paradigm is considered outdated, non-inclusive and discriminatory. Researchers have shown that this traditional family paradigm – made up of a legally married husband and wife and their children – is deteriorating rapidly as individuals increasingly find support and affection outside the family.

In the event of the death of a person, his relatives inherit the estate, and non-human beings are considered *„property"* of the deceased, and will be inherited by successors. According to the rules in force at international level, pets cannot inherit, even if the deceased leaves them by will, in whole or in part, his property, the document being considered null and void. In contrast, in other states, wills are popular in which the deceased appoints a trusted person to whom he or she bequeaths his or her estate or part of it, subject to a stipulation that he or she will provide care for the testator's pets, or *trusts are established*. whose purpose is the care of non-human beings through which a trustee acts for the benefit of pets.

For the reform of legal norms in relation to the legacy of non-human beings, we believe that the strategy should include the following steps:

- Defining the state of non-human beings as representing a specific class of beneficiaries
- Regulation of a new form of will by which the deceased can pass on his patrimony to non-human beings
- Update legislation in accordance with international regulations in the field of pet insurance, in order to minimize judicial interference with wills for non-human beings and to ensure a secure future for them after the death of the owner
- Creating and / or appointing an administrator or custodian to ensure that non-human beings will benefit from the legacy left by the deceased

We appreciate that, at present, the rules governing the institution of inheritance expose a lack of regulations in the field of ensuring a secure future for pets in the event of the death of the owner. We believe that the regulation of the succession should no longer impose its vision on the distribution of the deceased's patrimony by ignoring his real will.

Therefore, we can conclude by stating that, by using this strategy, the protection of non-human beings after the death of the testator can be achieved by creating tools to ensure compliance with the intent of the deceased regarding the heirs of his estate.

BIBLIOGRAPHY

[1] Stănciulescu, L. (2012), Civil law course. Successions, Hamangiu Publishing House, Bucharest.

[2] Genoiu, I. (2014). Civil law. Succession – Seminar book, CH Beck Publishing House, Bucharest.

[3] Afrăsinie M., Belu-Magdo, M.-L., Bleoancă A. (2012). The New Civil Code –

comments, doctrine and jurisprudence Vol. II, Hamangiu Publishing House, Bucharest, pp. 24, 182, 205, 791.

[4] Molcuț, E. (2011). Romanian private law, Universul Juridic Publishing House, Bucharest, p. 148.

[5] Boroi, G., Anghelescu, CA, Nazat, B. (2013). Civil law course. Main real rights, Hamangiu Publishing House, Bucharest, pp. 2-11.

[6] Deak, Fr., Popescu, R. (2019). Succession law treaty Vol. 1 Legal inheritance, Universul Juridic Publishing House, Bucharest, pp. 37-38.

[7] Boroi, G., Stănciulescu, L. (2012). Civil law institutions in the regulation of the new Civil Code, Hamangiu Publishing House, Bucharest, p. 645.

[8] Afrăsinie M., Belu-Magdo, M.-L., Bleoancă A. (2012). The New Civil Code – comments, doctrine and jurisprudence Vol. III, Hamangiu Publishing House, Bucharest, p. 24.

[9] Law no. 53 of January 24, 2003 on the Labor Code, published in the Official Gazette of Romania no. 72 of February 5, 2003

[10] Macovei, C., Dobrilă, M.C. (2017). The legal characters of the inheritance transmission, the Scientific Annals of the Alexandru Ioan Cuza University of Iași, Legal Sciences series, vol., and no. 1/2017, pp. 21-50.

[11] Law no. 8 of March 14, 1996 on copyright and related rights, published in the Official Gazette of Romania no. 489 of July 14, 2018

[12] Chircă, D. (2017). Civil law treaty. Successions and liberalities, 2nd edition, Hamangiu Publishing House, Bucharest.

[13] Adam, I. (2014). Civil law. General Theory of Obligations, 2nd edition, CH Beck Publishing House, Bucharest, p. 176.

[14] Urs, I.R., Ispas, P.E. (2015). Civil law. Theory of obligations, Hamangiu Publishing House, Bucharest, p. 211.

[15] Afrăsinie, M., Belu-Magdo, M.-L., Bleoancă, A. (2012). The New Civil Code – comments, doctrine and jurisprudence Vol. I, Hamangiu Publishing House, Bucharest, p. 761.

[16] Boroi, G., Anghelescu, C.A., Nazat, B., Nicolae, I. (2019). Civil law files 4th edition, Hamangiu Publishing House, Bucharest, pp. 153, 862.

[17] D. Chircă, „Civil Law. Successions and Wills," 2003. material available at: https://www.scribd.com/document/468415284/Dan-Chirica-Drept-civil-Succesiuni-si-testamente. [Accessed March 25, 2022].

[18] Law no. 578 of December 14, 2004 on granting a monthly allowance for the surviving spouse, published in the Official Gazette of Romania no. 1223 of December 20, 2002.

[19] Lupașcu, D., Rizoiu, R., Trăilă, D. (2020). Civil Code ed. 8th, Rosetti International Publishing House, Bucharest.

[20] Foster, F.H. (2011). Florida Law Review, material available at: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1094&context=flr. [Accessed April 2022].

[21] Stanciulescu, L. (2017). Inheritance. Doctrine and jurisprudence, Hamangiu Publishing House, Bucharest.

ADOPTION AND THE CHILD'S RIGHT TO INHERITANCE

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***Abstract**:*

I have chosen as a theme the adoption and the right of the child to inheritance, expressing our conviction that the subject of its legal implications are far from being exhausted, with the hope that we will be able to contribute to the understanding of this institution.

The current study aims to analyze the child's right to inheritance as far as the adopted children are concerned. Thus, the most important form of protection of an adopted child is adoption, as the only chance for a harmonious development within a family to permanently support them in order to achieve their dreams.

In terms of inheritance, in any case, the children of the deceased are entitled to inherit, unless they do not want to or are partially removed.

The rules governing inheritance apply only in the event of the death of an individual person.

The conclusion that emerges is that what we set out to do is to highlight some aspects of the notion of inheritance. In this context, we will highlight some peculiarities regarding the adoption within the inheritance.

***Keywords**: adoption, inheritance, patrimony, legal affiliation, adopted, adopter*

Introduction

In Gaius' conception, expressed in the work „Institutions", adoption is seen as „the passage of an alien juris from the power of there pater familias to the power of another pater familias" [186]. The main purpose of adoption is to acquire some civilian descendance. Later on, during the reign of Emperor Justinian (527-565 AD), adoption took place in the following situations:

a) By two successive releases from slavery and three sales, the son was removed from the power of the pater familias.

If the father sells his son three times, the son must remain free from the father's power. The sale was valid for five years, after which the son returned to the initial situation, ie came in the possession of his father again. It took a period of ten years to finally come out of his father's power.

All children could be adopted regardless of gender, if a daughter was adopted, their grandchildren have only one sale.

b)The procedure takes place in the form of a fictitious trial, before a magistrate. As a plaintiff, the adopter appeared before the magistrate together with the buyer and the son of the family.

The procedure was simple, the adopter claims it from the buyer (defendant) claiming that it is his son. He would not object and the son was assigned to the person claiming him, passing under the power of the adopter. Thus, the child passed from his family of origin to the family of the adoptive father.

The adoption procedure was simplified towards the end of the empire, the adoption was concluded as a simple convention before the authority, through the consent expressed by the heads of the families involved.

For the adoptee, this form represents an enormous disadvantage because they ware excluded from the inheritance of there natural father and did not participate in the inheritance of the adoptive father either.

According to Emperor Justinian, these inconveniences had to be eliminated by creating two types of adoption, full-adoption and limited-adoption.

„Adoption with full effect was allowed when the child was given up for adoption by an ascendant (maternal or paternal). In this way, the rights deriving from natural and adoptive kinship came together to one and the same person. In this case, in the situation of an emancipation, the adoptee could inherit the adoptive father as a *cognat*.

Adoption with limited effects (adoption minus plena) consists in the adoption of a child by a foreign pater familias, a situation in which the adopted person did not pass under the power of their adoptive father, although they were allowed to inherit it. At the same time, the adopter created their descendants through the adopted one, and the adoptee remained under the power of their natural father. Thus, in the situation of emancipation, they lost their right to inheritance in the adoptive family, but they kept it in the family they came from". [15]

The old Civil Code regulated the adopter's right to inherit the adoptive parent as well as their natural children, excluding them from the inheritance of the adopter's relative.

In terms of inheritance, the old Civil Code regulated certain situations but it did not regulate the dissolution of the adoption and did not provide for the cases of nullity regarding the adoption.

Over time, the institution of adoption has undergone many changes, simplifying the entire procedure.

In summary, the adoption regulated in the Civil Code of 1964 and the adoption regulated by Decree no. 182/1951 functioned in parallel as legal institutions until the enforcement of the Family Code.

The concept of adoption has stimulated the interest of many researchers, different topics regarding the adaptation being studied and researched, as well as the well-being and the development of the adopted children and their parents.

„Adoption is generally a happy event for both the adoptive parents and the adopted child, bringing positive effects to the lives of all members involved in the process. Although most adoptive families experience a relatively smooth and harmonious transition when they come to live with their new child, some parents may find that they experience symptoms such as sadness, irritability, stress, or fatigue with the appearance of the new family member. [151]

The central element of: Law no. 273/2004 is the identification of a family for the adoptable child and not of a child for an adoptive family „(Romanian Office for Adoptions, justified by the fact that the rights of the child are a priority and are more important than the wishes and needs of a family arduously wanting a child […] the adoption procedure starting from the child for whom the specialists decided that adoption is the best solution „[181].

1. Inheritance rights regarding the adopted child

By inheritance, we mean the transfer of the patrimony of a deceased natural person to one or more natural or legal persons, or the state, and the persons who acquires the patrimony of the deceased are called „heirs" or „successors".

By dispositions, art. 953 of the Civil Code, the legislator is entitled to define the inheritance: „Inheritance is the transmission of the patrimony of a deceased natural person to one or more living persons": Practically, any person who has the call to the inheritance left by the deceased during the legal or testamentary return of succession, can be the subject of the right to a succession option.

By adoption, we mean that legal operation by which the parentage is established between the adoptee and the adopter and kinship between the relatives of the adopter and the adoptee. Thus, we acknowledge the situation in which the adopted child has the same rights in terms of succession to the inheritance of the adoptive parents and relatives of the adoptive parents as the natural child.

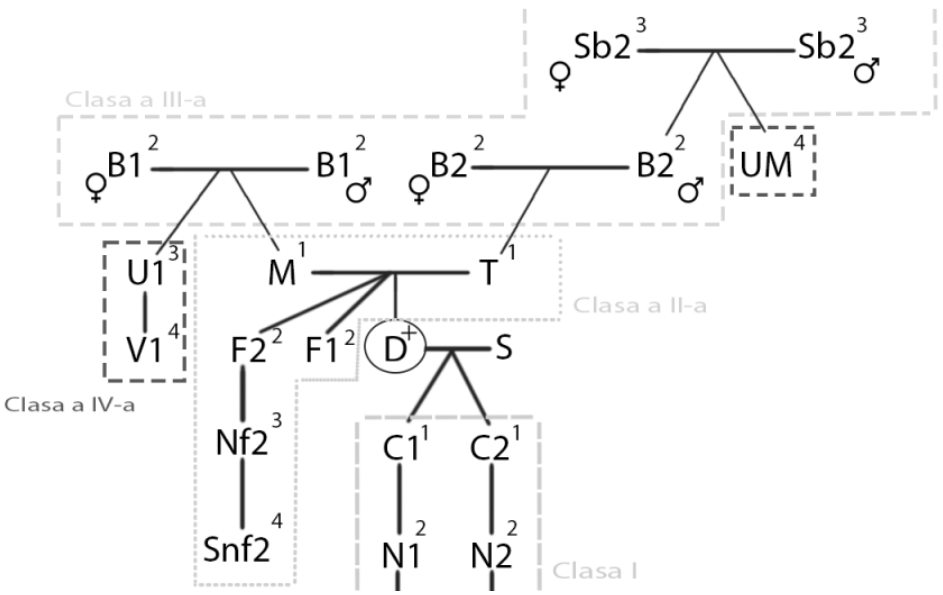

Fig. 1. Elementul de bază în materia moștenirilor: arborele genealogic (cu clase și grade) [1]

The basics of inheritance: the family tree (with classes and grades) [1]

Once the child is adopted, it is considered that he no longer has any connection or right of inheritance with the biological parents.

Once the child is adopted, it is considered that he has no connection or right of inheritance with the biological parents.

Until 1 February 1954, when the Family Code was enforced, the effects and termination of the adoption were governed by the provisions of the Civil Code.

Thus, according to dispositions in. art. 313 of the Civil Code „adoption has no other effect than to transmit the name of the adopter to the adoptee, to give rise to reciprocal

maintenance obligations between the adopter and the adoptee and to open to the adoptee the right of succession of the adopter".

As such, the adoption no longer has any effect, the adoptee remains in their family where he fully retains all the rights and duties arising from the parentage, according to the law.

The question is whether an adopted child can inherit natural parents? The answer is very simple.

There are two situations, namely two types of adoption:

1. Adoption with full effects (art. 79 of the Civil Code) – replaces the legal parentage with the biological one, situation in which the adoptee breaks all ties, kinship with his biological family and enters the family of adopters thus acquiring the same legal status as a blood relative. In this case, the rights and duties arising from the affiliation between the adopted person and his natural parents, cease. The situation of adoption with full effects – the natural parents of the adoptee, lose the succession vocation regarding the inheritance left by the adoptee. At the same time, the relationship between them ceases, unless one of the spouses fully adopts the natural child of the other spouse. In this situation, the kinship relations with the natural father are maintained. However, they keeps the succession vocation to the child's inheritance. [2]

2. Adoption with limited effects (art. 75-78 Civil Code) – overlaps the legal affiliation with the biological one. Specifically, the adoptee maintains family ties with their family, the changes taking place only in terms of parentage with the adopters and not in terms of their family. Therefore, the adopted person has a vocation of succession both to the natural parents and to the inheritance of the adopters. In conclusion, the adoptee and their descendants become relatives only with the adopter and not with their relatives, maintaining the kinship ties with the natural family. Whether or not the adopter is the spouse of one of the natural parents, the succession vocation of both natural parents is maintained because the adoption does not interrupt the kinship of the adoptee with the natural parents. [2]

In the case of adoption with limited effects, some authors have contest ed the successor vocation of the adopter, as the adoption is made in the interest of the adoptee and the adoptee's relations with parents and other relatives do not end.... „We also consider that the adopter has a legacy of inheritance left by the adoptee in the case of adoption with limited effects too, because in terms of kinship between them (not his relatives) and adoptee there is no difference between the two types of adoption.

On the other hand, the law admitting the coexistence of the two relatives (from adoption and natural parentage) implicitly recognizes the compatibility of their effects in terms of the right to inheritance, as it recognizes the right to support of both the adopter and the natural parents (art. 86 C. fam.). Finally, this solution is claimed by the principle of reciprocity of the legal succession vocation and it does not contradict the interests of the adoptee, the right to inherit of the adopter being achieved at his death „. [2]

In both cases, the adopted child will inherit the adopter as a child resulting from or out of wedlock.

The family code allowed both types of adoption, but after 1996, Romanian law knows adoption with full effects as the only type of adoption. The effects of adoption, art. 469-474 of the Civil Code, is completed with disp. art. 66-70 of the Law on the adoption procedure.

Here is what the text of the law pervades: „Art. 470 Civil Code. Effects on kinship.

1. Adoption shall establish the affiliation between the adoptee and the adopter, as well as kinship between the adoptee and the relatives of the adopter.

(2) Relationships cease between the adoptee and his descendants, on the one hand, and the natural parents and their relatives, on the other hand.

(3) When the adopter is the spouse of the natural or adoptive parent, the relatives of the adoptee shall cease only in relation to the natural parent and the relatives of the natural parent who is not married to the adopter „.

In a brief summary, the date of the final decision of the court approving the adoption is the starting point from which it is reported that the relationship between the adopted person and the adopter is established and the relationship between the adoptee and the relatives of the adopter as a parent, with all the consequences regarding the civil affiliation relationship and civil kinship, at the same time with the extinction of the natural kinship relations between the adopted, the descendants.

Therefore, the adoptee will have full rights to the adopte r's inheritance. At the time of the opening of the inheritance, they had the status of their descendants. The fact that a new adoption was subsequently approved cannot be considered dissolved until the first adoption is finalized until the date of the final judgment.

Analyzing dispositions of art. 462 paragraph. 2 N. Civil Code.

„(1) Two persons may not adopt together, neither simultaneously nor successively, unless they are husband and wife.

2. However, a new adoption may be approved when:

a) the adopter or the adoptive spouses have died; in this case, the previous adoption is considered dissolved on the date of the final decision of the court approving the new adoption;

b) the previous adoption has ceased for any other reason.

(3) Two persons of the same sex may not adopt together.

The adoptee has the same full rights to inherit the author. At the date of the opening of the inheritance, he had the quality of thir descendant, but the fact that a new adoption was subsequently approved is not relevant. The first adoption is not considered dissolved until the date of finality of the second court decision.

Thus, we are in the situation in which the adopted person has the capacity to inherit both the adopter and their relatives. „It is forbidden to adopt the same person by two adopters together, both simultaneously and successively, regardless of whether the person to be adopted is a child or a person with full capacity to exercise, in order not to reach civil affiliation multiplied or multiplied indefinitely and, in the case of the adopted child, to the dangerous dissipation of responsibilities related to parental care that would be carried out in a formula that is not related to the principle of raising and educating the child in a family environment „[7].

Considering, however, dispositions of art. 477 NCC „(1) The adoption may be revoked at the request of the adopter or the adoptive family, if the adoptee has endangered their life

or that of their ascendants or descendants, as well as when the adoptee has become guilty of criminal acts punishable by a penalty imprisonment for at least 2 years.

(2) If the adopter has died as a result of the facts of the adoptee, the adoption may be revoked at the request of those who would have inherited it together with the adoptee or in his absence.

(3) The adoption can be carried out at the request of the adopter only after the adoptee has acquired full capacity to exercise, in accordance with the law, even if the deeds were committed before this date „, we note the following:

It will be possible to revoke the adoption by the adoptive family or adopter in the situation in which the adoptee threatened their life. There is also the situation when the adoptee was guilty of criminal offenses punishable by imprisonment for at least 2 years.

Following the termination of the life of the adopter as a result of the deeds of the adoptee, in this situation, the adoption may be dissolved at the request of the persons who come to inherit together with the adoptee, even in their absence.

Who are the people who have the capacity to request the revocation of adoption?

These are the adopter and the persons who would have had the ability to benefit from the inheritance with the adoptee. This category includes the adopter's spouse, the other descendants of the adopter or their successors belonging to the other classes of legal heirs.

When the court decision on the dissolution of the adoption has either not been pronounced or it has been pronounced and the final decision has not remained, in this situation, as long as there is no final court decision, the adoption is in existence, the adopter being a descendant of the adopter and so on, they have the right to inherit both him and his relatives.

To conclude

In this article we aimed to highlight the importance of adoption and the right to inheritance of the adopted child. „Given their lack of physical and intellectual maturity, the children need special protection and care, including adequate legal protection, both before and after their death.” [6] „However, many studies show that adoptions have a beneficial effect on the further development of children.

As long as the relationship between the adoptive parent and the child is good, the adopted children will have a good social and academic adaptation in adolescence, even despite some developmental deficiencies during the pre-adoption period or a difficult temperament {Jaffari – Bimmel et al. 2006 „}" [8]

Resources

[1] https://studreptblog.com/2021/08/09/mostenire/

[2] Deak, Francisc (1999). Tratat de drept succesoral. București: Editura Actami, pp: 110-111

[3] Codul civil

[4] Codul familiei

[5]https://www.shutterstock.com/ro/image-vector/children-playing-leaves-park-vector-49519894?irclickid=RTJ0-NW9bxyIWFW1y11AsTLuUkGXQV5nybS0g0&irgwc=1&utm_medium=Affiliate&utm_campaign=Stockfresh%20by%20Stockphotos.com%20GmbH&utm_source=2691128&utm_term=stockfresh&c3ch=Affiliate&c3nid=IR-2691128

[6] Declarația Drepturilor Copilului

[7] A se vedea *E. Florian*, Dreptul familiei, 2011, p. 260, Editura C.H. Beck, Bucuresti, 2008).

[8] Violeta Enea, Abordarea psihologica a adoptiei si asistentei maternale, pag. 255, Editura Polirom, 2921,

[9] Abordarea Psihologica a Adoptiei si Asistentei Maternale, pag. 151, Editura Polirom, 2021.

[10] Abordarea Psihologica a Adoptiei si Asistentei Maternale, pag. 181, Editura Polirom, 2021.

[11] A se vedea V.M. Ciuca, Lectii de Drept Roman, Volumul 1, Editura Polirom, Iasi, 1998, pag. 186

[12] A se vedea Ioana Raluca Toncean Luieran, Adoptia conform.noilor reglementari interne ale Romaniei,, Editura Universul Juridic, Bucuresti, 2020, pag.15.

[13] Sursa: https://www.shutterstock.com/ro/image-vector/children-playing-leaves-park-vector-49519894?irclickid=RTJ0-NW9bxyIWFW1y11AsTLuUkGXQ-V5nybS0g0&irgwc=1&utm_medium=Affiliate&utm_campaign=Stockfresh%20by%20Stockphotos.com%20 GmbH&utm_source=2691128&utm_term=stockfresh&c3ch=Affiliate&c3nid=IR-2691128

THE SUCCESSION CAPACITY OF THE MISSING MINOR

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Abstract

Throughout the time, from ancient times to the present, the legislator's keen concern has been and it continues to be to establish the rights of successors to inheritance, with an increased focus on the protection of the children's rights.

We wonder why the legislator puts such emphasis and legislative pressure on ensuring that children's rights are respected. The answer is very simple and logical: through their own fragility and innocence children are vulnerable to have their rights and freedoms violated very easily. These violations are within the reach of adults either voluntarily or by simply neglecting the best interests of the child. When we speak of a voluntary violation, we are strictly referring to some sort of selfishness manifested by the adult who is entitled to the protection of the child. We can also talk about some degree of disobedience to the law due to the simple negligence shown by the adult.

Keywords*: child, social protection, inheritance, successible, succession capacity, succession*

In the context of free cross-border circulation, both adults and children have the opportunity to move freely outside the country of residence, both accompanied by both parents, by only one of the parents or by a third person. The only formalities required in order to leave the country are the possession of documents proving the identity, as well as documents proving the power of attorney given by the parents to a third person accompanying them, or by one of the parents to the accompanying parent.

As long as we can talk about unrestricted cross-border circulation, we can also talk about their free circulation within the state of residence.

This freedom of movement gives rise to many situations in which both adults and minors can find themselves.

The most common situations are those in which, following a divorce, the minor's domicile is established with one of the parents, with the right to visit and the right to holidays for the other parent. This situation can also be encountered in the case of unmarried parents.

Thus, we can find ourselves in the situation in which a minor, as a result of moving both inside the state of residence and abroad does not return to his home anymore, whether we are talking about the common family home or we are talking about the home established by a court.

A court will determine a particular domicile for the minor if one of the parents so requests and the domicile is established with one of them, or if the parents are deprived of their parental rights and the minor's domicile is established either in a social assistance center, or to a foster carer.

Regardless of the cause that leads to the child's unreturning to the legal domicile, in the situation in which the other parent or both parents can no longer have ties with their own child, even reaching the situation of no longer knowing anything about their existence, we are talking about some disappearance, eventually.

Compared to the situation in which the child is missing, we ask ourselves the natural question, which is the way to preserve and protect the rights to a future inheritance of the successible missing person.

According to the legal norms in force, in order to succeed, the successor must be present at the date of opening the legal succession.

When we use the phrase „to be alive at the time of the opening of the succession", the survival time of one person over another whose legacy has a vocation is irrelevant, no matter how little they survive the other person, it is enough to meet the legal condition of being alive at the time of the opening of the succession and consequently to have the capacity for succession. [1]

If we could not determine which person survived the other (co-deceased) we are in the situation of lack of succession capacity.

The quality of the minor to be alive at the time of the opening of the inheritance is related to the acquisition of the civil capacity of use they are endowed with from birth, a capacity that ceases at their death. [2]

The new legislative provisions (art. 36 of the new civil code) establish the fact that we are talking about the existence of the missing person at the date of opening the succession, if at that date there is no pronounced court decision remaining final and declaring death.

If, however, it is found physically or by a final court decision declaring death that the missing minor was no longer alive at the date of death of the deceased, their capacity for succession shall be revoked retroactively. This is their de cuius predeceased situation, as a result of which the goods received as inheritance in their name are returned to the estate, increasing the inheritance of the other heirs, as the missing minor had no inheritance capacity, their share had been reduced due to the consideration of the minor to be alive at the time of opening the inheritance, which later proved to be inaccurate. [3]

Thus, we conclude that the missing minor subsists, theoretically and apparently, until the date of the presumed death is established, from which the moment until which the missing person had succession capacity is established. [4]

One issue that deserves attention is whether the minor is the child of the deceased and if they are the deceased successor, in the situation in which the minor's mother actually lived separated from their father during conception, given that the paternal grandmother stated that the father was unknown at the time of releasing the birth certificate.

In view of the fact that the deceased father did not deny paternity within the legal time established by the legislator, we consider that the minor is the child of the deceased and consequently his successor. [5]

In order to acquire his patrimony of cuius, the minor must meet three conditions: two positive and one negative.

The positive conditions, the ability to inherit and the succession vocation respectively, were analyzed above, but we are left with the negative condition, which is mandatory to be met, the inheritor should not be unworthy respectively.

The succession indignity, both in the old Civil Code and in the New Civil Code was and it still is sanctioned with the exclusion from the inheritance.

Indignity may be requested at any time by any interested person or may be invoked ex officio by the court, the imprescriptibility could be ascertained both by exception and in the main way. It should be noted, however, that the decision declaring the indignity is only declaratory in nature by the court finding the indemnity of the successor.

When we talk about indignity in the New Civil Code, we must keep in mind that this must be manifested before the opening of the inheritance, and it can be engaged in the situation in which the criminal gesture is directed against another successor, not against de cuius.

The above situation is put into practice when the deceased has several children, and one of them kills one or more siblings so that the share of his future inheritance is higher or whole.

In conclusion, our research shows that the parent has no rights over the child's property, nor the child over the parent's assets, except for the right to inheritance and suport. Both the parent and any interested person must take all necessary steps to ensure that the child enters the legal rights of heir of the deceased parent.

Resources

[1] D. Chirică, Succesiuni, 1996, Luminalex, p. 16-18.
[2] R. Petrescu, Drept succesoral,Oscar print, p. 22.
[3] G. Boroi, L. Stănciulescu, Instituţii, Hamangiu, p. 523.
[4] D. Chiricâ, Succesiuni, 1996, Hamangiu, p. 16-18
[5] Trib. Argeş, dec. nr. 881/1958, cu notă de A. Popescu, în L.P. nr. 7/1959. p. 118.

ACTION IN CLAIM – MEANS OF PROTECTION OF THE SUCCESSORS OF THE OWNER

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Abstract

Over the irreversible passage of time, the human being has been in a continuous process of knowing the rules of conduct regarding the application of civil law.

In this study, we will focus on the importance of the possibility offered to the holder of a real right to bring before the courts an action to regain his right. The fundamental law of the country governs that the right to property is guaranteed, private property being guaranteed and protected in the same way to whoever owns it.

The action in the claim is a real action, because it is based on the very right of ownership of the claimed property. Its importance is evident due to its Regulation both in the old Civil Code and in the current Civil Code. Thus, on the basis of the general principles of civil law and of certain regulations preserved by the old Civil Code relating to movable and immovable property, what we call action for claim has been consecrated. In the literature[1], action in claim is the action of the non-possessor against the non-owner.

Keywords: *means of defense, real action, legal regime, real estate, owner*

1. Introduction

Property rights, as well as the other main rights in rem[2], it can be defended by numerous legal means belonging to various branches of law. The Romanian Civil Code of 1864, inspired by the French Civil Code, defines the right of property based on the legal attributes that make up its legal content. Thus, article 480 of the current Civil Code states that „property is the right one has to enjoy and dispose of something exclusively and absolutely, but within the limits determined by the law"[3]. The right of property is the only subjective right which confers on its holder three attributes: possession, use, and disposition.

It is worth noting that the right to property is perpetual, which assumes that it is unlimited in time and lasts as long as the good that is its object exists. Therefore, this right is not lost by non-use, that is, by non-exercise. When this right is infringed, its holder has the opportunity to bring proceedings before the courts of law. The proprietor may request the courts to give decisions in order to remove any infringement of his right[4].

1.1. Action in property claim

The specific legal means of defending the right to property are directly and directly based on the right in rem or the fact of possession of an immovable property and are

[1] L. Pop., *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 2001, p. 252.

[2] According to Article 551 of the current Civil Code, along with the right of property, there are dismemberment of the right of property: The right of superficies, the right of usufruct, the right of use, the right of abitment, the right of servitude.

[3] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 1996, p. 278.

[4] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 324.

designed to defend the right in rem[5]. Therefore, we can talk about real actions, which are divided into petitioners actions and possessors actions[6].

The petitioners' actions aim at defending the right of property or other principal right in rem by obtaining the recognition of the claimant as the holder of that right. The action for claim is a petitioner's action alongside the action for tabular performance, the action for grating, the negatory action, the confessiory action.

The old Civil Code provides for action for the claim, without defining it, in Article 1909(2), stating that „he who has lost or has been stolen a thing may claim it within three years of the day he lost it or was stolen from it". Neither does the current Civil Code, although it regulates, by Article 563(1), the action for the claim[7], don't define it. In the doctrine[8], the action for the claim was defined as that action by which the claimant asks the court to recognize his right to property in a particular property and, consequently, to order the defendant to return possession of the property. As it is a right in rem, the right of property is opposable erga omnes, therefore, action in claim can be initiated against anyone who owns the unrighteous good. It is important to distinguish between real actions and personal actions. Personal actions may be initiated only against the debtor within the framework of an obligation legal relationship. Therefore, if the property was passed on to a third person who could become the owner, the action for the claim is no longer possible, but a personal action for damages can be exercised[9].

Although there has been controversy as to the prescriptible or imprescriptible nature of the claim under the old Civil Code, most of the judicial practice[10] considered that the action in the claim was, in principle, imprescriptible, in terms of extinguishing. On this latter legal character, we can say that it is the perpetuity of the right of property that attracts the imprescriptibility of the action that defends it, because the right of property does not die out by non-use[11].

[5] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 324.

[6] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 324 defines possessor actions as those actions which seek to defend possession, as a mere state of affairs, against any disturbance. They may be user either to retain possession or to regain possession in the event of loss. The owners' actions have the advantage that the applicant does not have to prove ownership of the property, but only the fact of possession. Most of the possession as an effect of the admission of the action of the possessor, the right of property itself is defended.

[7] 'The owner of a good has the right to claim it from the owner or from another person who owns it without right'.

[8] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 1996, p. 278.

[9] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 326 care face referire la decizia numărul 2574/ 2005, în *Buletinul Casației* publicată de Înalta Curte de Casație și Justiție, Secția civilă și de proprietate intelectuală, p. 23.

[10] Under article 563(2) of the new Civil Code governing the indescribability of the action in the claim, 'unless otherwise provided by law'.

[11] According to article 562(1) of the Civil Code, `the right of private property is extinguished by the destruction of the property, but it is not extinguished by non-use`.

2. Content of the study

2.1. Compliance of the old Civil Code with the current Civil Code

The claim may be brought by the owner of the property right. In addition, legal doctrine[12] considered and judicial practice held, almost unanimously, that the claimant in a claim process must be the sole and exclusive owner of the property. While the idea of imprectibility is supported, the recognition of the limitation of the action in the claim could lead to the unfair solution of the free allocation of the good to the State[13]. Likewise, the limitation of the action in the claim could lead to the situation that the usurper continues to possess the unhindered property, even if he has not usucapat or meets the conditions required by law to usurp.

The idea of the imprectibility of the action in the claim is found in the provisions of Article 6 paragraph 2 of Law no. 213/1998 on public property goods[14] which allow the claim of assets taken over by the State without a valid title, if they are subject to special laws of repair and in those of Article 2 paragraph 2 of Law no. 10/ 2001 on the legal regime of some buildings improperly taken over during the period 6 March 1945–22 December 1989[15], according to which persons whose buildings would have been taken over without a valid title retain the status of owners they had at the time of taking over.

It should be noted that the Romanian doctrine and jurisprudence define the action in the claim, which is not regulated by legal norms in the judgment of 1 December 2005[16], the European Court of Human Rights is an action by which the owner of a particular individual property, who has lost possession of it to a third party, demands recognition of his right to property in order to obtain its return from the non-owner. The argument that the European court has qualified the imprectibility of the action in our civil law is far from decisive. The solution of the indescribability of the claim for property based on the right of private property was, however, contrary to the provisions of Article 1890 of the old Civil Code, according to which „all actions, both real and personal, which the law did not declare unprescriptible and for which a limitation period was not given, it will be prescribed by 30 years". Since the provisions of this Article do not distinguish between actual actions which it declares to be prescriptible within this term, neither should the interpreter distinguish[17]. It is important to bear in mind in this case that the effect of the extinguishing of the right to action, in a material sense, protects this right is consistent with the effect of the extinguishing of the right to action. We cannot talk about the extinction of subjective right. The provisions of article 498 of the Civil Code of 1864 and of article 520 of the Civil

[12] L. Pop, *Dreptul de proprietate şi dezmembrămintele sale*, editura Lumina Lex Bucureşti, 1996, p. 254 care face trimitere la autorul M.N. Costin, *Marile Instituţii ale Dreptului Civil Român*, Editura Dacia, Cluj-Napoca, 1982, p. 257-258.

[13] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 327 care face trimitere la autorii O. Ungureanu, C. Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale,* editura Hamangiu, 2008, p. 279.

[14] Publicată în Monitorul Oficial Partea I, numărul 448 din 24.11.1998.

[15] Publicată în Monitorul Oficial Partea I, numărul 798 din 02.09.2005.

[16]Judgment of the European Court of Human Rights in the case of Păduraru v. Romania unpublished, Internet, www.echr.coe.int, being a case whose object was the impossibility for the applicant to obtain the return of his property illegally owned by the State, restitution ordered by an internal court decision, final and irrevocable, pronounced in its action in claim against the state.

[17] „Ubi lex non distinguit, nec nos distinguere debemus" – latin adage.

procedure Code of 1865 enshrine the limitation of the claim for property in the event of an asset and in the case of buildings which have been the subject of forced execution, in such cases, the right to property can still be considered perpetual.

The current Civil Code no longer leaves room for any discussion in this regard, because article 563(2) expressly enshrines the rule of imprectibility of the action in the claim and provides that it is prescriptible only in cases where the law provides otherwise[18].

2.2. Legal standing

Being a petitioner's action, the action in claim[19] can only be formulated by the owner of the property. In the event that the disputed property is jointly owned, the claim is admissible only if it is brought by all the parties. Consequently, a co-owner cannot promote the claim alone without the consent of the other or the other co-owners[20]. Such an action must be rejected for lack of active procedural quality. In order to initiate this solution, it is necessary to show that the action in the claim is an act of legal disposition[21]. Therefore, in the absence of express Regulation, in the case of co-ownership, any legal act of provision can be concluded only in compliance with the principle of unanimity.

Recently, an opinion was invoked in French legal literature and taken over by some romanian authors[22] is claimed that the action in the claim is an act of preservation and not of disposition. Acts of preservation are those acts which aim to avoid a material loss or legal disappearance of a right. As an act of preservation, an action for the claim of an object, brought by a single co-owner against a third party, is admissible.

It is important to note that, in principle, the action in the claim is imprescriptible and the evidence of ownership of the claimed property is the responsibility of the claimant. As we have previously pointed out, the action in the claim is imprescriptible, but two cases are regulated in the current Civil Code in which the law expressly States that the action in the claim is prescriptible. It shall be prescribed[23] within three years from the date of enforcement of the order for adjudication the action in claiming immovable property that was purchased by public auction in the course of the enforcement of immovable property[24]. At the same time, regarding the avulsion, the claim of the portion of land attached to the land belonging to another owner can be made within 1 year. This term is one of decay[25].

[18] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 328.

[19] Baias F., Chelaru E., Macovei I.,Constantinovici R., Noul Cod civil. *Comentarii pe articole,* editura C.H. Beck regulates the action in the claim as „the specific legal means of defending the right of private property by which the owner whose property has entered into the illegitimate state of another person seeks to obtain recognition of the right of ownership of that property and the regaining of its possession".

[20] D. Lupulescu*, Dreptul de proprietate comună pe cote-părți și aplicațiile sale practice*, editura Științifică, București, 1973, p. 223-224.

[21] From the point of view of civil law, the legal provision act is the civil legal act that results in the removal from a person's patrimony of a right (sale, donation) or encumbrance of an asset with a real burden (mortgage, pledge).

[22] D. Chirică*, Posibilitatea executării acțiunii în revendicare de către un singur coindivizar*, în *Dreptul*, numărul 11/1998, p. 28.

[23] The extinguishing prescription is regulated in Article 2500(1) of the Civil Code according to which 'the material right to action, hereinafter referred to as the right to action, shall be extinguished by prescription, if it has not been exercised within the period prescribed by law'.

[24] Article 520(1) of the 1865 Code of Civil procedure.

[25] According to Article 2545(2) of the Civil Code, 'failure to exercise subjective right within the prescribed period shall result in its loss, and in the case of unilateral acts, the prevention, under the law, of their perpetration'.

2.3. Effects of action in the claim

The court therefore obliges the defendant to return the property to the true owner and to refrain from any act by which it would prejudice the normal and full exercise of the right to property[26]. The return of the good is done in kind and free of the tasks set up by the defendant in favor of third parties. In case of impossibility of returning the good in kind, payment will be made by a monetary equivalent. The analysis of the legal regime of the claim of ownership of immovable property, according to the regulations of the Civil Code, makes it necessary to lay down two principles: The action in the claim is imprescriptible, and the proof of ownership is the responsibility of the claimant who claims to be the owner of the disputed property[27].

Starting from the provisions of Article 1169 of the old Civil Code according to which „the person who makes a proposal before the trial must prove it", the applicant, being the one who initiated the trial, is obliged to prove his claim that he is the owner of that building. In favor of the defendant operates, from the very fact of possession, a relative presumption of property. According to Decision No. 397/1971[28], as long as the claimant does not provide proof of his ownership, the claim must be dismissed.

As regards the proof of ownership of the property claimed, we will have to distinguish between the buildings not registered in the land register or which have been registered with effect of opposibility vis-à-vis third parties, on the one hand, and those that have been entered in the land register with translational property effect, on the other hand. This category includes buildings for which the applicant acquired ownership before the entry into force of the new Civil Code and buildings over which ownership was acquired after its adoption, without registration in the land register. After the entry into force of the current Civil Code, the right to property in buildings may be acquired without registration in the land register, on the one hand, in the cases provided for in article 887(1)[29], and on the other hand, if at the date of the acquisition of the building was located in an administrative-territorial unit within which the cadastre works were not completed and all land books had not been opened.

According to Article 249 of the Code of Civil procedure, in any case, the burden of proof rests with the applicant. Consequently, the claimant in the action for claim must prove two circumstances, namely, that he is the owner of the property claimed and that the defendant has illegitimate possession of that property. Due to the existence of a relative presumption of ownership, the defendant must not provide proof of the title by which he rules the property[30]. Therefore, if the claimant does not provide proof of his title of ownership, the claim will be rejected[31]. Only if the claimant provides evidence to support the existence of his right to property, the defendant will be obliged to step out of his passivity and try, in turn, to prove his tit. In such a situation, the court will compare the titles

[26] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 1996, p. 256.

[27] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 1996, p. 257.

[28] Tribunalul Suprem, secția civilă, în *Repertoriul de practică judiciară în materie civilă*, pe anii 1969-1975, de I. G. Mihuță, p. 95.

[29]According to the quoted text of the law, „real rights are acquired without registration in the land register when they come from inheritance, natural access, forced sales, expropriation for public use, as well as in other cases expressly provided by law".

[30]According to Article 919(3) of the Civil Code, 'until proven otherwise, the holder is considered the owner, except for the buildings entered in the land register'.

[31] Tribunalul Suprem, Secția civilă, decizia numărul 397/ 1971, Repertoriul II p. 95.

of property presented by the parties and will give an advantage to the party whose title is preferable.

2.4. Property titles

In judicial practice[32], procedural requirements for the proposal and administration of evidence require both parties to prove at the same time the titles that claim to be the basis of their rights. By title apt to prove the right of property in a claim action are understood all translational legal acts of property and those declarative of rights, including court decisions of division[33].

The most difficult problem that the plaintiff has to solve in the claim is the proof. The applicant must prove not only that he is in possession of a title of property, but also that the person from whom he acquired the property was the owner, who in turn acquired it from an owner. Therefore, the owner must prove an uninterrupted series of translational acts of property, concluded between persons who have been holders of the property right they have sent to him. In other words, the claimant would have wanted to prove that all previous transmitters, from author to author, had the quality of true owners, which is often impossible. Such a test was called diabolical probatio or demonic test[34].

The existence of difficulties in proof of ownership has led the judicial practice to develop a series of rules for the settlement of claims that have been initiated before the courts. These rules distinguish between situations in which both parties present titles of ownership and those in which only one of the parties has such a title. In judicial practice[35] three hypotheses have been identified as follows: both parties have written titles of property, only one party has title to the property of the claimed property, and the last position in which neither party to the conflict has title nor can invoke the acquisition of the property by usucaption or occupation.

When a party objects to its opponent a title of property, it does not in fact invoke the absolute character of the title, since it does not have that character, but invokes a presumption of property in its favor, arising from the existence of the right. Therefore, the title relied on in support of an action for a claim does not necessarily have to be a translational title, but may also be a declarative title, such as a judgment of division, with the exception of the acquisition of ownership by usucaption or occupation. It should be noted that the presumption of ownership may be overturned by evidence to the contrary.

Thus, in the case of Cretu and others v. Romania, the European Court of Human Rights has recently ruled that the admission of an action for claim by the national courts in which the applicant has proved his right to property in the contested land by means of a land exchange contract concluded with the State, legal owner of the property at the time of the exchange, by removing the defendants' defenses, plaintiffs in the proceedings opened before the european court, defenses consisting in invoking internal court decisions obtained in actions for finding against the romanian state to which the applicant was not a party,

[32] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 331.

[33] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, editura C.H. Beck, 2019, p. 331 care face trimitere la decizia numărul 1287/ 1971 a Tribunalului Suprem, Secția civilă, cu notă de T. Petrescu, în *Revista Română de Drept*, numărul 7/ 1972.

[34] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, editura Lumina Lex București, 1996, p. 258.

[35] C. Bîrsan în *Drept civil. Drepturile reale principale*, ediția a III-a, revizuită și adăugită care face trimitere la autorii O. Ungureanu, C. Munteanu, Bunurile. *Drepturile reale principale*, p. 273.

Deemed immaterial to it, it does not constitute a violation of the right of property guaranteed by Article 1 of Protocol No. 1[36] l to the European Convention on Human Rights. The Court held that, by establishing the inenforceability of the judgments invoked by the defendant in the domestic proceedings, the national courts merely decided on contradictory claims by the parties on the property claimed. Finally, the European jurisdiction stated, by ascertaining the inenforceability of those judgments, the national courts merely deduced all the consequences arising from the fact that the applicants did not understand to bring the land holder also to the proceedings against the State[37].

A person who has been issued the title of property in accordance with the procedure established by the Land Fund Act No. 18/1991[38], in respect of a given area of land, it cannot claim, by way of an action for claim, a larger area, even if it proves that, prior to the co-operation, its ownership or that of the author to whom it succeeds by extinguishing itself by the act of co-operation. The principle of perpetuity of the right of property allowed him to regain a right under the Land Fund Law no. 18/1991, within the limits set by its provisions, the application of which had to take into account the interests of other persons, in order to find the most appropriate solutions for all those concerned. If the persons who have been established the right of property under the Land Fund Law no. 18/1991 are considered injustices, they have only the remedies provided for by this law[39].

3. Conclusions

In conclusion, bringing together the above-mentioned aspects, we can argue that the action in the claim is an effective way with which the ownership of the non-possessor can be restored. The refund by the defendant of the property claimed, the refund of the fruit and the products, the refund of the expenses necessary for the collection of the fruit and the products, and the payment of the chetuels made in respect of the property by the defendant are effects of the action in the claim.

The action in the claim retains a significant number of features of the old Civil Code, which are resumed in the current Civil Code. Action in claim is the connecting element between what we call the right of ownership of a right in rem which is of an absout, exclusive and perpetual nature and its non-interference by non-use. This action is, as we have shown during the course of the study, imprescriptible in principle. Therefore, however long it may not be exercised, this action is not extinguished except by the very extinction of the property right which it accompanies and defends. The extinction of the right of property takes place only on the assumption that another person has acquired it by usucaption, or, as the case may be, by possession of good faith.

4. References

[36] According to Article 1 of Protocol 1, 'every natural or legal person has the right to respect for his property". It is important to note that property means both movable and immovable property'.

[37] Convenția Europeană a Drepturilor Omului, Hotărârea din 8 iulie 2008, nepublicată, Internet, www.echr.coe.int la care face referire C. Bîrsan în *Drept civil. Drepturile reale principale*, ediția a III-a, revizuită și adăugită, p. 214.

[38] Publicată în Monitorul Oficial Partea I, numărul 1 din 05.01.1998.

[39] Curtea Supremă de Justiție, Secția civilă, decizia numărul 467/ 1993, în *Dreptul* numărul 7/1994, p. 92 menționat de autorul C. Bîrsan în *Drept civil. Drepturile reale principale*, ediția a III-a, revizuită și adăugită, p. 216.

[1] L. Pop, *Dreptul de proprietate și dezmembrămintele sale*, Editura Lumina Lex București, 2001;

[2] E. Chelaru, *Drept civil. Drepturi reale principale* ediția 5, Editura C.H. Beck, 2019;

[3] C. Bîrsan, *Drept civil. Drepturile reale principale*, ediția a III-a, revizuită și adăugită

[4] D. Lupulescu*, Dreptul de proprietate comună pe cote-părți și aplicațiile sale practice*, Editura Științifică, București, 1973;

[5] Baias F., Chelaru E., Macovei I.,Constantinovici R., *Noul Cod civil. Comentarii pe articole,* Editura C.H. Beck.

Section G

INHERITANCE IN ROMAN LAW – FROM A DENIED CONCEPT TO AN ARCHETYPE

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Abstract

To believe that Roman law is an allegory of the past, a legal construction without a correspondent in modern law is a sophistry due perhaps to the lack of depth in understanding the Roman spirit. The timelessness of the legal institutions created by the Romans finds its source in their very spirit painted in paradoxical nuances. Thus, as conservative as they were innovative. The meeting point of their conservatism, pragmatism and creativity can be likened to a real Big Bang in law. As a result, both the Continental legal system and the Anglo-Saxon system have deep Roman roots. While the Roman-Germanic system (especially our legal system) took over the legislative technique, the legal vocabulary, the Roman institutions and principles, the Anglo-Saxons surprisingly took over the very spirit of Roman law, a system of law in which fairness and good faith exceeds the limits imposed by formalism.

The idea of transmitting the patrimony mortis causa has not animated the creators of Roman law since ancient times, being the product of a long ideological and social evolution. In the Gentile era, such an idea was inconceivable given that even the transmission of property by inter vivos deeds was not allowed. In this context, how can the transition from the vehement rejection of the concept of the transfer of property due to death to a system of succession that would be a real model for modern legal systems be explained?

This article aims to answer exactly this question.

Keywords: *legal succession, will, inheritance vocation, reforms of the praetors, legal framework of inheritance*

1 Admission of the *mortis causa* transmission of the patrimony concept

To believe that Roman law is an allegory of the past, a legal construction without a correspondent in modern law is a sophistry due perhaps to the lack of depth in understanding the Roman spirit. The timelessness of the legal institutions created by the Romans finds its source in their very spirit painted in paradoxical nuances. Thus, as conservative as they were innovative. The meeting point of their conservatism, pragmatism and creativity can be likened to a real Big Bang in law. As a result, both the Continental legal system and the Anglo-Saxon system have deep Roman roots. While the Roman-Germanic system (especially our legal system) took over the legislative technique, the legal language, the Roman institutions and principles, the Anglo-Saxons surprisingly took over the very spirit of Roman law, a system of law in which fairness and good faith exceeds the limits imposed by formalism.

The idea of transmitting the patrimony *mortis causa* has not animated the creators of Roman law since ancient times, being the product of a long ideological and social evolution. In the Gentile era, such an idea was inconceivable given that even the transmission of property by *inter vivos* deeds was not allowed. In this context, how can the transition from

the vehement rejection of the concept of the transfer of property due to death to a system of succession that would be a real model for modern legal systems be explained?

In order to be able to objectively analyze the evolutionary trajectory of the successions in Roman law, a brief exposition of the essential Roman values is required, but also of the dynamics between the legal regime of the property and the family relations.

1.1 Power, family bonds and the legal framework of the property

From the abundance of Roman values, **power** and **good faith** are distinguished. Although the Romans are recognized in history as a nation of force, from a legal perspective, the power we are referring to does not find its synonym in the word force, but in **dominion**. The dominion of the pater familias over all the persons and goods that constitute his patrimony.

As the illustrious professor Theodor Mommsen put it, „*the father and the mother, the sons and the daughters, the estate and the dwelling, these are the natural elements of the house",* to which he adds that „*the family is constituted as a unit made up of the free man, who after the death of his father becomes master of his own rights, with his wife bound to him by sacred ceremony, with whom he shares water and fire, sons and sons of their sons, with their legitimate wives, with their unmarried daughters, and their sons' daughters, and all their goods, which belong to one of them".*[1]

From this exposition we extract the following pillars: the consecration of the power of the head of the family over the whole family unit, the creation of a new dominion after the death of the *pater familias* and the vital importance of the perpetuation of the family cult.

On closer inspection, it can be seen that from ancient times to imperial times, the paradigm has undergone a real upheaval. Specifically, if in the first centuries, the Romans rejected the possibility of transferring property, because they said that power is not transferred from one person to another, but is created by each individual, in the time of the emperors, access to power was precisely the result of legal acts (we refer here to the act of adoption, being recognized in history that the takeover of power was very rarely due to hereditary criteria) [2].

The dominion of the head of the family is the epicenter of all the Roman legal constructions specific to the ancient era. Absolutely all the legal relations revolved around this power. For this reason, for a long time, no real distinction was made between family and patrimony, both being expressions of the power of the pater familias. Both family members and property were subject to patriarchal property. Pater familias had the same rights over them, even if disguised under various names. Just as he could absolutely dispose of his lands, slaves, animals, or other things, so he could dispose of the person and property of the one in his possession, and it was well known that for a long time, heads of families had the right to life and death over their legitimate descendants. [3]

Moreover, in the same period, the size of a *sui iuris* person's patrimony was also a reflection of his power in the community. Precisely for this reason, the Romans were reluctant to admit the transmission of the patrimony through *inter vivos* or *mortis causa* acts, not being able to conceive the transfer of power from one individual to another.

On the other hand, the Romans also believed that there can be no heritage without a master, which was in clear contradiction with the perception of the twinning of the concepts of property and power as attributes inextricably linked to their owner. From the opposition of the two principles sprang the institution of Roman inheritance [4].

However, the succession was not perceived as a legal instrument to transfer a pre-existing power after death, but as a way for the heir to gain new power over an estate, in the sense of creating a new, independent dominion [5]. The perpetuation ensured by the institution of successions was not that of power, but of the family cult, which was of vital importance, for while death itself had no dramatic connotations, being seen as an occasion for the coming of the gods, „*the extinction of the family, or even of the lineage, is a misfortune for the community itself, which has offered the childless man the legal instrument to avoid this fate by adopting the children of another"* [1].

Although in the eyes of the general public the individualistic spirit of the Romans appeared through the regulation of private property, in reality, in the pre-statal era, Roman property was exclusively collective, whether we are talking about the collective ownership of the gens or family property. It was only in the old era, as a product of political, economic and social evolution, that private property appeared, in its first form – *quiritary property*, accessible exclusively to Roman citizens. The regulation of the *quiritary property* was of course a rigid and primitive one, defined by the excessive formalism specific to the old era. Only through the reforms of the praetors, driven by a deep spirit of fairness and good faith, has the model of private property been set up, which is accessible to all persons, applies to all things, and can be transmitted by a simple manifestation of will [6]. As a result of the use of procedural means, **praetorian property, provincial property** and **pilgrim property** were created [7].

1.2 ***Good faith and the praetorian reforms***

Judicial magistrates (praetors) remain in legal history as the authors of the most important reforms. As the main practitioners of Roman private law, they made an impressive creative effort to adapt the old civil law to the new realities and thus created, procedurally, a new model of law development [8].

Invested with judicial powers, the praetors did not remain passive in the face of the rigidity of the Roman civil procedure expressed by *legis actiones*. The social reality had long gone beyond the scope of the laws, which had proved insufficient if not inefficient in meeting the requirements of practice, making it almost impossible to capitalize on all legitimate claims by trial. As a result, whenever the magistrate found that the applicant's claims were in accordance with the requirements of fairness and good faith, he would issue him a form (a personalized legal action) empowering the judge to pass judgment [8].

Thus, through honorary actions, the praetors sanctioned new subjective rights and extended the scope of some private legal proceedings.

In the matter of property, the praetor created the *fictitious* action, by which the civil property became accessible to the pilgrims as well. In the field of obligations, the praetor promoted the ideas of equity and good faith through *in factum* actions (through which he could sanction a series of insolvent and bona fide contracts, such as pledge, trust, loan or deposit), by the *transposition formula* (through which it was possible to carry out legal operations that civil law did not allow, such as representation in court and representation in contracts) and by acts of good faith (which allowed the judge to settle the dispute according to the intention of the parties when concluding the contract)[8].

The legal action also had a creative role in matters of inheritance, because through it the rule of protection of blood kinship was imposed [9]. More precisely, the praetors also called for blood relatives who were not at the same time civil relatives, although according to the

Law of the Twelve Tables, civil kinship was the sole basis of the inheritance vocation and thus the Praetorian heritage appeared. The praetor's reforms were then developed through imperial reforms, and in the time of Emperor Justinian blood kinship became the sole foundation of succession. As such, without expressly abolishing the regulations of civil law, by protecting the blood kinship, the praetors laid the foundations of a new system of inheritance, which eventually imposed itself and was legislated in modern law.

2 The evolution of inferitance in Roman law

Although in the Gentile era the refusal of the Romans to admit the transmission of the patrimony mortis causa seemed immutable, the founding of the Roman state imposed the need to adapt the principles of an era to the new social realities and thus regulate the transmission of heritage by succession. As a result, three inheritance systems were created, namely the **legal succession**, **testamentary succession** and **inheritance against the will**, as faithful radiographs of the oscillations of family relationships on the scale of Roman values.

2.1 The legal inheritance

Legal inheritance (*ab intestat* – succession without will) was created as a means of protecting family property and later private property. Since not all relatives were considered worthy of mastering the family patrimony and implicitly perpetuating the family cult, but only the agnates, the Law of the Twelve Tables regulated the categories of legal heirs in a very restrictive manner. Thus, based on civil kinship as the sole foundation of the succession, the Law of the Twelve Tables eliminated the cognates (who were mere blood relatives of *de cujus*) from the inheritance. According to the criterion of civil kinship, the first categories of legal heirs known to the Romans were: *sui heredes, adgnatus proximus and gentiles* [10].

The heirs of the first category were those persons who in the eyes of the law had the legal status of sons of *pater familias*. This status was independent of the blood relationship between them and *de cujus*, being defined exclusively by the legal relationship of dominion in which they were with the head of the family until the time of his death. Therefore, *sui heredes* were only those persons who until the moment of his father's death were in his possession, being his *alieni iuris* and who only through his death became in turn *sui iuris* persons.

Equally, *sui heredes* were the sons and daughters, the wife married to the manus (who came to the husband's inheritance as the sister of her own children) but also the adopted or adrogated persons, who, although they were not cognates with the pater familias, were agnates to him.

At the same time, the Law of the XII Tables admitted representation in a direct line, allowing grandsons from sons to come to the grandfather's inheritance, through representation, in the event of their father's premature death. This possibility was legally recognized precisely because of the perpetual nature of the power of the pater familias over his descendants. In the absence of *inter vivos* legal acts of exit from the control of the patriarch, this power ended only by death, the Romans not establishing any temporal limits of this on the descendants and there being no threshold of the age of the descendant up to which he was in the control of the father. Thus, often the sons of the family reached old ages before becoming *sui iuris*, or they could even die before this liberation was achieved. Returning to the question of representation in the direct line, in the hypothesis where the

father died before the grandfather, his succession could not be debated since he died with the status of *alieni iuris*. As a result, at the time of death, he was not the owner of any patrimony, the only owner being the head of the family. It was only through the grandfather's subsequent death that the grandchildren could come to reap their due shares from their father, which was when their father (even long after his own death) acquired something that could be passed on.

In the absence of these successors, the *adgnatus proximus* (closest collaterals, like brothers, cousins etc.) came to the inheritance. Although in a collateral line the law did not allow inheritance through representation, adgnatus proximus were still advantaged over the first category, having the right to repudiate the inheritance.

If the *de cujus* had no heirs from either of these two categories, his patrimony was divided equally among the members of the gesns of which he had been a part.

The way in which the Law of the Twelve Tables regulated legal succession proved from the outset to be profoundly unfair to certain blood relatives of the pater familias, such as emancipated sons or cognates resulting from *without manus* marriages.

If the exclusion of children resulting from marriage without manus from inheritance was a status quo, the situation of emancipated sons was much more delicate. Until the creation of the institution of representation, the sons of the family who wanted to help their fathers in the businesses that supported the whole family, had no other legal option by which they could be helpful apart from emancipation. This is because through emancipation they acquired full capacity, becoming persons sui iuris, able to conclude legal acts. However, in the conditions where often through emancipation the sons of the family made a sacrifice for the well-being of the whole family, knowing that by doing so they would be excluded from the inheritance, the adaptation of the succession system was not only welcome but even mandatory.

The remedy arose in the form of the reforms of the praetors, who procedurally (referring to the principles of equity and good faith, by granting a right of action based on the possession of the inherited goods), created new categories of legal heirs, known as **Praetorian heirs** [11].

These heirs were: *bonorum possessio unde liberi, bonorum possessio unde legitimi, bonorum possessio unde cognati* şi *bonorum possessio unde vir et uxor.* Since the praetors did not have jurisdiction in the matter of legislation, they did not actually intervene on the types of kinship, nor did they fictitiously transform the praetorian heirs into agnates of de cujus, but recognized their right to procedurally claim parts from the patrimony, based on their previous capacity as *bona fide possessors* of that patrimony [3]. The legal instrument by which the praetorian inheritance was protected is called *quorum bonorum* interdict. The prohibitions of possession known in Roman law (retinendae possessionis causa, recuperandae possessionis causa and adipiscendae possessionis causa) constitute an archetype of the current possessory actions, which have as their object the defense of possession over an asset against any disturbances in fact or law, or, as the case may be, regaining possession, if it has been lost [12].

The new procedurally imposed succession order generated a series of new elements. First of all, the emancipated family son and his descendants are no longer excluded from the inheritance, coming to the inheritance together with those in the sui heredes category. In addition, in the event of repudiation of the inheritance by an agnate, it no longer becomes vacant, but passes to the next category of praetorian heirs –the cognates. By introducing this

category of *bonorum possessio unde cognati* on the succession map, the praetor revolutionized the old regulation, in which they did not exist, thus creating a succession vocation for the mother and children resulting from the marriage without manus. Of course, this could only happen in the absence of relatives from the first two categories, the existence of a single agnate making it impossible for cognates to come to succession.

By creating the fourth category, *bonorum possessio unde vir et uxor*, spouses married without manus acquire mutual successional vocation in the absence of heirs from the first three categories [4]. They were, of course, no kind of relatives; being cognates was excluded by virtue of legal impediments to marriage, and cognates they were not because their marriage had not been solemnized. Therefore, by virtue of their de facto communion which makes them bona fide possessors of the same patrimony, the praetors recognize their right to come to each other's succession as praetorian heirs.

As the competence of the praetors had an eminently judicial character, their efforts to protect blood kinship could produce limited effects. But, in post-classical law, the emperors took over the ideas of the praetors and enshrined them in a normative way. Thus, through the senatusconsults Tertullian and Orfitian, blood relatives gain ground in front of civil relatives, the wife married without manus no longer being able to be removed from the succession by the agnates, but reaping the inheritance from the same position as them, and the children resulting from the marriage without manus acquire the same successional vocation enjoyed by those in the first category of legal heirs (*sui heredes*). The last step in the completion of these reforms was made by the emperor Justinian, who created a new order of succession, through which he abolished the old system based on civil kinship, making blood kinship the sole basis of the succession vocation. The categories of legal heirs created by Emperor Justinian have passed the test of time and find their expression to a large extent in the current regulation[13]. These are: the **descendants**, the **ascendants/good brothers and** sisters and their children, **consanguineous or uterine brothers and sisters** and their children, **the other collaterals**.

2.2 The testamentary succession

The **testamentary succession** was also seen as a testimony of the power exercised by the pater familias even after death, since through the will he could dispose of his patrimony according to his own desire, having the freedom to favor by naming one or more heirs, in the detriment of others, who would have had the capacity of successors according to the legal succession. In addition, the legal provisions adopted in testamentary matters reflect both the promotion of the family as a fundamental value of the Roman society and the tendency of its legal protection.

This legal protection of the family as a fundamental value was sometimes achieved even against the trends of society. In this sense, it is worth mentioning the provisions of the lapsed laws imposed by the chameleon emperor Octavian Augustus, by which heirs established by will could not acquire the fullness of their succession rights if they were not married and had no children [14]. These two special conditions fell upon the heirs only if, at the time of the death of the head of the family, they were aged between twenty-five and sixty years (men), respectively between twenty and fifty years (women). If, at the time of accepting the inheritance, those instituted as heirs were only married but had no offspring, they acquired only half of what was passed on to them, and if they did not fulfill either of the two conditions, they acquired nothing. Therefore, they enjoyed the *ius capiendi* (the

right to reap the fruits of an inheritance), only those heirs who at the time of accepting the succession lived in the form of a Roman civil family.

Under the guise of protecting the family, however, it is necessary to mention that Octavian Augustus also pursued another goal. Ensuring the continuity of a strong military. The social reality of that time shows that the Romans had moved away from the values of the old era, choosing for example not to marry solemnly (with manus), preferring simple de facto unions. By that time, marriage *without manus* had already become widespread. This modernization also led to a considerable demographic decline, which was in deep contradiction with the expansionist ambitions of the emperors. As a result, by implementing the lapsed laws, the emperor not only encouraged living in the form of the classical Roman family, but ensured that the armed force of the empire would never be questioned.

Also in testamentary matters, with the aim of protecting his family members from a very dangerous status of infamy and to save them from the effects that the quality of being an insolvent debtor produced, the testator, aware of the situation of his own debts, had the possibility to institute/name the slave as sole heir (who, constituting the second category of testamentary heirs, *heredes necesarii*, could not repudiate the inheritance) [8].

The legal protection of the family was also achieved through other mechanisms, such as *ius abstinendi* (creation of praetors) and *beneficium inventarii* (creation of Emperor Justinian). Both served to shelter the family from the debts burdening the succession, allowing them to answer to the creditors of the de cujus only within the limits of the successional asset [8].

Last but not least, we note, as an accentuation of the man's power in society, a special regulation of the Voconia law, whose provisions prohibited the possibility for women to reap the fruits of an inheritance greater than 100,000 aces [8]. The reason for this regulation resides precisely in protecting the status of men in the community and proves that in 169 BC. the sign of equality was still placed between the power of the person and the size of his patrimony. Speculating of course, we imagine that the reason why women were forbidden to inherit considerable fortunes was not to compromise, in a deeply patriarchal society, the position of men who might not have such patrimony. As long as they did not pose a danger of undermining male power, women had passive testamentary capacity and the social order knew no disturbances.

2.3 The inheritance referred against the will

Disinheritance (inheritance transferred against the will) originally expressed the huge dimension of paternal power, since for a long time the testator had absolute freedom to disinherit whoever he saw fit[4].

This freedom was, however, subject to certain rules. Also in the spirit of protecting the men in the family, the disinheritance of sons required special attention from the testator. Thus, under the penalty of nullity of the will, the disinheritance of family sons had to be done in an imperative and solemn form, through nominal clauses. Their defective disinheritance implicitly led to the opening of the legal succession, according to which the sons came to the inheritance with priority. Also with the nullity of the will and the opening of the legal succession, the **omission** of a son from the will was sanctioned (either through the establishment clause or through the disinheritance clause).

Of course, such rules were not imposed in the case where the testator wanted to disinherit daughters or other heirs, since anyway the perpetuation of the family cult was

achieved through sons and as a result, not constituting a danger in this sense, the disinheritance of daughters and grandchildren could be achieved *en bloc*, through general expressions.

As at present (see art. 74-76 Civil Code), the Roman disinheritance could be done directly, through such testamentary clauses, but also indirectly, through the establishment of legatees. The four forms of legatees in Roman law (*per vindicationem, per damnationem, per praeceptionem* and *sinendi modo*) could severely disadvantage the established heirs, depriving them of the most valuable individually determined things in the estate. To reduce these inequities, three successive laws were passed as follows. By the **Lex Furia testamentaria** it was provided that the bequest cannot have as its object an asset with a value greater than a thousand aces. The **Voconia** Law established that the assets acquired by the legatee cannot exceed the share acquired by the established heir and through the **Lex Falcidia** the institution of the succession reserve was created (which at that time represented a share of 1/4 of what would have been due to the established heir) [14].

On this occasion, we note how the delimitation of the notions of universal successors, successors with universal title and successors with particular title – in this case legatees (as persons who do not succeed the holder in rights and obligations, but acquire a subjective right viewed individually [15]) is not the product of modern legal systems, but the taking over of existing regulations since the time of the Romans.

However, towards the end of the republic, the heirs gained special protection against unfounded disinheritance, through the action *querela inofficiosi testamenti* [16].

Starting from the concept of **officium**, which denoted the legal obligation to love one's family, those who felt they had been unjustly, abusively disinherited could challenge the will containing the disinheritance clause in court, seeking its annulment. If they proved before the court of the centumvirs that they did not give objective reasons to the testator to disinherit them, the will was declared to be an unofficial one (an *inofficiosi testamenti)*, that is a will drawn up in violation of the duty to love one's family. The ground for the annulment of the will was the testator's lack of legal capacity, as only a person lacking in discernment can disinherit his family members in the absence of serious reasons. Naturally, the mere opening of the action does not guarantee the outcome of the annulment of the will.

3 Conclusion

The frenetic pace of contemporary legislative development makes it, not without justification, extremely easy to look superficially towards the ancient legal systems. But Roman law is a three-dimensional organism, which cannot be analyzed in a binary manner. A careful look at the three Roman successional systems will reveal the existence of many aspects also taken over in our legal system, from the categories of legal heirs, to the construction of the institution of the will, to the possibility of disinheritance. Of course, all these Roman institutions and principles have been adapted to the reality of our society.

As the philosopher emperor Marcus Aurelius noted in an exceptional way: „*Some things strive to be born, others to disappear, and from what is born something already begins to die out. Flows and transformations ceaselessly renew the world, as the unbroken movement of time ever renews boundless eternity. In such a river, what could we value among those that pass by us?"* [17]

Bibliography

[1] Mommsen, Th. (trad.2009). Istoria romană, ediția a doua, Volumul I, Ed. Polirom pp. 54.

[2] Strauss, B., (trad. 2021), Zece cezari. Împărații romani de la Augustus la Constantin cel Mare, Ed. Polirom, pp. 15.

[3] Axente, A.M., (2020), Instituții de drept privat roman. Volumul I., Ed. Hamangiu, București, pp. 172, 285.

[4] Molcuț, E., (2011), Drept privat roman, Ed., Universul Juridic, București, pp. 148, 150, 158

[5] Stociescu, C. (retipărire 2009) Curs elementar de drept roman, Ed., Universul Juridic, București, pp. 368.

[6] B. Schmillin, *Droit prive romain*,I, Lousanne,1988, pag.188;

[7] F.De Visscher, Revue historique de droit francais et étranger, Paris, 1957, pag.443;

[8] Gaius, (trad. A.N. Popescu 1982), Instituțiunile dreptului privat roman, București, 4.189, 4.46, 4.34., 4.36., 2.153, 2.158, 2.274;

[9] P.C. Timbal, Droit romain et ancient droit francais, Dalloz, 1975, p. 120.

[10] Hanga, Vl (trad. 2002), Instituțiile lui Iustinian, Ed., Lumina Lex, București, 3.2.1., 3.2.5.,

[11] Hanga, Vl., (1978) Tratat de drept privat roman, Bucureşti, pp. 312.

[12] Răducan, G., Dinu, M., (2020), Fișe de procedură civilă, Ed., Hamangiu, București, pp. 34

[13] Codul Civil Român, art. 970-983.

[14] Besnier, I., (1959), Droits de l antiquite et sociologie juridique, Paris, pp. 25.

[15] Ispas, P.E., (2022), Drept civil. Teoria generală a obligațiilor, Ed. Hamangiu, București, 2022, pp. 85. Ispas, P.E., (2022), Drept civil. Drepturile reale principale, Ed. Hamangiu, București, 2022, pp. 9.

[16] Arangio-Ruiz, Istitutioni di diritto romano, Napoli, 1948, pp. 548.

[17] Aurelius, M., (trad.2020), Gânduri către sine însuși, Humanitas, București, pr.

SUCCESSION TO THE THRONE IN THE ROMANIAN MIDDLE AGES

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Abstract
Succession has played, throughout history, an important role in establishing the poles of political and economic power. Moreover, the succession to the throne was a fundamental element of the institution of the reign, becoming an institution in itself. The succession to the ruling of a group gradually evolves in history, simultaneously with the evolution of legal norms and customs, from the slavery-type democracy, in which the coordination of the group, of the community, of the unions of community is collective, to the mixed elective-hereditary system, for nomination of the successor of the ruler.

Through this article, the authors aim to make a brief presentation of the historical evolution of the legal institution of succession to the throne, a synthesis of the main aspects of the topic, relevant in opening new lines of scientific research in the history of state and Romanian law.

Keywords: *Succession, throne, reign, hereditary, inheritance, Middle Ages*

HISTORICAL EVOLUTION OF THE INSTITUTION OF SUCCESSION TO THE THRONE; GENERAL FRAMEWORK

The succession to the ruling of a group, of a community – whether we are talking about the initial community of a village collectivity, whose coordination was done collectively, or of a group of collectivities – of some principalities and voivodeships, as an expression of the ethnic-linguistic unity of the inhabitants of the Carpathian-Danubian-Pontic space, it is strictly related to the very historical evolution of the mentioned space and of the institution of the ruler (prince, jude, voivode, prince) itself. Therefore, from the village collectivity, whose leadership was ensured jointly, at the time of centralized monarchies [1], when the ruler, the de jure and de facto master of the inhabitants, property and land, chose his successor during his lifetime, the evolution of succession on the throne knows different forms and speeds of manifestation. Sometimes, according to the Ottoman model, a new institution appears, as opposed to the first one, the usurpation of the throne [2], when the aspirant to reign is „forced" to kill his opponent, most often a member of the same family.

1. The Institution of the Ruler, a Fundamental Element of the Existence of the Romanian Medieval States

A complete and complex analysis of the monarchical succession in the medieval Romanian states cannot be made without a detailed knowledge of the course of the institution of the ruler over the centuries. It is known that the medieval states were formed around a military personality, the voivode, who also obtains the title of ruler, from the Latin dominus = master, with general powers and rights over the entire territory and all that it contained – beings and things. [3] He has military, political, diplomatic, judicial and religious responsibilities, from the anointed position of God and head of the country. From this position, the ruler confirmed the bishops and the metropolitan, entered the altar and

fulfilled his regulatory duties in the administrative area of the Church, respectively the establishment of monasteries or bishops, the establishment of jurisdiction of church bodies, the activity of foreign cults in the country etc.; [4] but not just that. After the Ottoman occupation of Constantinople and the entire Balkan Peninsula, the independence, albeit limited, of the two extra-Carpathian Romanian states allowed their rulers to act in areas controlled by the High Gate in order to protect the living space of Eastern Christianity. It is a response to the request of the Orthodox world, which appeals „*to the Romanian rulers, whose authority over the vassals was of an imperial character and who, on the frescoes of the churches, had them painted, with crowns on their foreheads, using on their charters ‹‹by the grace of God›› ”*.[5]

With the establishment of the Phanariot era, the ruler – with a rank similar to European princes, but in fact a simple official of the Ottoman Empire – was appointed by the sultan, among the Greek population, with a helping hand from the Phanar. The Ruler was initially chosen for a reign of three or less years, with the sole purpose of spoliation by the Ottomans of the aspirants and, indirectly, the inhabitants of Wallachia and Moldavia. Subsequently, starting with 1792, the duration of the mandate exercised by the ruler chosen by the High Gate for one or the other of the mentioned Principalities is set at seven years, and the Hatt-i humayun of 1802 establishes a double control of the *special administrators* of the two Romanian territories, thus Russia could intervene in the domestic policy of Iasi and Bucharest.[6]

Although the ruler was elected by the sultan and controlled, starting with 1802, by the tsar, the duties he exercised internally were, thanks to the freedom enjoyed by the two Romanian states, obviously limited; they remained the same as those of earthly rulers. These included the administrative-political sphere, the head of state appointing, confirming or revoking in / from office the governors, and the judicial field, where the arbitrariness of the ruler is fully manifested, taking into account the fact that he enjoyed the right of last resort and the right to set aside court sentences, including those of predecessors.[7]

Although he did not enjoy the same privileges as his counterparts in the other medieval Romanian states, the voivode of Transylvania manifested himself as „*a true supreme ruler of the country*”[8], concentrating in his hands, sometimes at his discretion, the military, administrative and judicial activity, his authority manifesting itself exclusively in the seven counties of Transylvania (Solnocul Interior, Dăbâca, Turda, Târnava, Cluj, Alba and Hunedoara). Sometimes, the Transylvanian voivode also bore the titles of Comite de Solnoc, Comite de Sibiu and, starting with Iancu de Hunedoara, Comite al Secuilor. [9] The situation changed during the Autonomous Principality of Transylvania, when the state structure inside the Carpathian arch was under the suzerainty of the Ottoman Empire. The place of the voivode is taken by the prince, a governing body elected for life and confirmed by the sultan, with increased powers and legislative, administrative, military and judicial powers, the latter from the position of supreme judge of the Principality. [10]

2. Succession to the Throne in the Romanian Middle Ages

In defining the concept of succession to the throne, Professor Manuel Guțan identifies two manifestations of the hereditary-elective system – hereditary succession and elective succession, both applied alternately, depending on the internal and external context of the time. [11]

In the first stage, after the Roman Empire left Dacia and the birth of „*popular Romanians*" [12], the elective form, based on equality between members of the community (territorial collectivity – n.a.), was dominant, gradually giving way until the moment of documentary attestation of the first political formations (Glad, Gelu and Menumorut in the Transylvanian area, Ion and Farcaș south of the Carpathians or Dobrotici in Dobrogea), the primacy of the principle of heredity in appointing the successor to the ruling of the medieval proto-states. This path can be explained by two possibilities: the accumulation of economic, military and representative power of the rulers of the community and by their preservation in office for a longer time, sometimes lifelong. [13] Starting from what Manuel Guțan stated, namely that, during the average history of Romania, the types of succession were applied alternately (**see above**), the successional examples of the thrones of the state formations in Transylvania of the end of the first Christian millennium and Wallachia from the beginning of the 14th century. Thus, in the first case, „*the principle of heredity begins to be present in the appointment of the supreme ruler: Menumorut was the nephew of Morut, who had previously ruled the territories of the Land of Crișuri*" [14], and Gyula-Jula was a descendant of Gelu [15]. In the second case, the principle of electivity is highlighted in the election by the rulers of the left and right formations of Olt of Basarab. [16] ***De facto, he becomes the legal successor of the princes and voivodes of the future politico-state construction.***

After the founding of the two medieval states outside the Carpathian arch, in the climax (15th-16th centuries) of the centralized monarchies, the succession to the throne is hereditary-elective in nature. Taking the information from the Slavo-Romanian chronicles, Letopisețul de la Putna briefly presents the list of rulers who succeeded to the ruling of Moldova, starting with the ruling of Dragos from Maramures and the hereditary succession of his son, Sas, who ruled together for 6 years, continuing with Bogdan and his son, Lațco, who have been on the Moldovan throne for 12 years. In both cases – that of Dragoș-Sas, as well as that of the Bogdan-Lațco binomial – we are dealing with a direct hereditary succession, in which the titular is succeeded to the throne by his male firstborn. Lațco, having no children, is succeeded in ruling the new state by his sister's nephew, Petru I Mușat, succeeded by his brother, Roman I, succeeded to the throne by their brother, Ștefan. Alexander the Good (1400-1432) succeeded to the throne. For more than 50 years, the Slavic-Romanian chronicle retains the reigns of Alexander and his direct or indirect descendants, as well as the long line of fratricides.[17]

The grandson of Alexander the Great and the son of Bogdan II, Stephen the Great ascended the throne of Moldavia by virtue of his right to be a descendant of royal bones. The election of Stephen as ruler takes place following the victory over his uncle, Peter Aaron, who in 1451 killed the father of the great voivode in the second half of the fifteenth century. He is anointed ruler, by virtue of the mixed, hereditary-elective principle, on the Field of Justice, by Metropolitan Teoctist, on April 14, 1457. He will rule Moldavia for 47 years. He will be succeeded by his son, Bogdan III the One-Eyed (1504-1517), succeeded by his son, Ștefăniță Vodă (1517-1527) and by Ștefan's love child, Petru Rareș, who was in charge of the state twice (1527-1538; 1541-1546).[18]

The examples of hereditary succession to the throne can continue with those in Wallachia, where Basarab, who came to power on the basis of the principle of electivity, associates his son Nicolae Alexandru to throne during his lifetime. Descendant of the Bessarabians, he is succeeded by members of his family: brother Dan, son Vlad Dracul, nephew Vlad Țepeș.[19]

There is a general practice in the Middle Ages: the association with the ruler. Basarab associates Nicolae Alexandru, Ștefan cel Mare, the first adults born, first Alexander, who died in the confrontation at Codrii Cosminului, and then Bogdan. This association is made in order to prevent any actions that would have contravened the will of the ruler. The association with the ruler is accompanied by a recommendation: the ruler on his deathbed requesting that he choose the successor recommended by him as his successor. [20] The lifelong association with the ruler could be voluntary or imposed by the boyars.

In the case of elective succession, only the connection with a former ruler did not imply the election of the aspirant. He had to convince the boyars, the military leaders and the spiritual leaders of the country that he had the capacity to maintain the privileges of the feudals. [21] Nicolae Iorga considers that the end of the 17th century brings with it the increase of the role of the great boyars in the election of the new ruler. *After all, although in very rare cases, the choice is made with the same formalities as at the end of the century, only in Muntenia and Moldova the influence of the nobility is greater than before. After the throne was vacated by the death of the ruling voivode, only the great boyars and their deputies, the second boyars, the courtiers, gathered in the Divan or in another room suitable for such a thing [...] Here, without the knowledge of the people, he chooses the ruler, who is called to obey the will of the oligarchs. He is taken immediately afterwards to the Mitropoly or to the royal chapel, and the solemnity ends after the boyars have taken the oath in the Great Divan, where the ruler ascends the Chair for the first time*." [22] Iorga's text completes the overall picture of the increase in the power of large landowners and the anonymity of the ruler.

Traces of hereditary-elective succession are also observed in the case of Transylvania. Even if the Transylvanian voivode is appointed and revoked by the Hungarian king, the principle of heredity, at least in the sense of the existence of dynastic families, tends to be more and more obvious. Thus, between 1344 and 1376, six members of the Lackfi family succeeded to lead the voivodeship, and between 1415 and 1437 the dignity of voivode of Transylvania was occupied by members of the Csaki family.[23]

3. Conclusions

The evolution of the institution of succession to the throne in the Romanian Middle Ages has different forms of manifestation, in line with the evolution of the state and of political and legal institutions over the centuries.

Analyzing the information provided by the documents of the time, corroborated with those identified in studies and articles published by historians specializing in niche areas (History of the state and Romanian law, Average History of Romania), we can conclude that the succession to the throne is, at least for the period between 14th and 17th centuries, a male-hereditary-elective succession of Slavic-Byzantine inspiration, in which the role of heir by right was, in the anti-Ottoman struggle stage, held by the male firstborn of the ruler's family / families in function / families of the great landowners of the time, generators and insurers of power, but also beneficiaries of this status. Subsequently, for a century, the succession to the throne was purely elective, with the Ottoman Empire playing the leading role in appointing and revoking the ruler.

The succession to the throne, like the Romanian customary law and the Romanian political and legal institutions, bears the imprint of originality. The originality is limited to the adoption of the Slavic and Byzantine models, their application adapted to local needs,

depending on the possibilities, within the limits imposed by the Caesar-Papist paradigm of the political leadership of the state. According to this, the Ruler is God's anointed one on earth, anointed, and therefore has the right to life and death over his subjects. This is how it must be interpreted the wish of the multitude of contenders – real or invented – for the highest positions in the Romanian medieval states.

Through this study, the authors set out to briefly present both the defining elements of the institution of succession and its historical evolution, emphasizing the role and place that monarchical descent has occupied on the stage of history.

In conclusion, we can say that the historical data, the realities, the limited capacity of the decision makers, the geographical positioning of the three Romanian medieval states to the interference of the spheres of influence of the great powers of the time led to a development and application, depending on the moment of the succession principles used by Western absolutist monarchies or within the Polish-Hungarian, Byzantine, Ottoman or Russian power structures of the medieval era. We support the position of researchers in the field of the history of law [24], who states that law institutions have been formed for a long time, in parallel with the rules governing political and legal relations, as a manifestation of the disintegration and fragmentation of „democracy" of the territorial collectivity, of the emergence of the feudal relations of production and of the legal provisions that highlighted the societal organization on relations of subordination and hierarchy.[25]

Emil Cernea and Emil Molcuț appreciate that there was no precise system of succession to the throne, the practice revolving around the idea that „*anyone was a relative in a legitimate or illegitimate degree – descendant, ascendant or collateral – with any of the rulers who ever occupied the throne of the country was entitled to make claims to rule*." [26]

The imperfection of the elective-hereditary system proved its limits and led to instability of the political-administrative hierarchy of the Romanian Lands, which allowed the suzerain powers to get involved and directly control the power structures. This system was based on a series of principles, guarantors of stability and legitimacy: the contender had to be a man, be a „bone" or a „seed" of a gentleman, be a Christian Orthodox and be physically intact, principles which generated the surplus of contenders to the throne, some with false genealogies.[27]

In an attempt to strengthen political legitimacy, members of the Mavrocordat family used the „weapon" of genealogy. The chroniclers Radu Popescu and Ion Neculce included in their works texts referring to the belonging of the Mavrocordats to the earthly rulings, trying to establish the descent from Mușatini: „(…) *And Petru vodă Rareș had a son Iliaș vodă. Iliaș vodă had a son Alexandru vodă, the old man from the mother of the too enlightened Ruler Nicolae Alexandru*"[28], it is shown in Radu Popescu's chronicle, for Neculce to conclude: „*And Scarlat sent the emperor's firman and took the girl after Alexander the Great, they took her to Tarigrad and gave her to a grammatic, Mavrocordat. And that Mavrocordat made Alexandru Exaporitul, and Alexandru Exaporitul made Nicolae vodă and Nicolae vodă made Constantin vodă, who was ruler here in Moldova, in the years since the construction of the world 7242 [1734], which is from his ancestor, one of the old Moldavian rulers.*"[29] Going over the historical errors, the desire of the Mavrocordat family to position itself in the long line of portraits of the illustrious rulers of the Romanians is retained.

This article opens up two new areas of research. First of all, a rigorous, detailed analysis of each type of succession to the throne is required for each of the three Romanian

states, for each ruling family (Musatini, Basarabi etc.). Finally, there is a need for a consistent debate on the impact that the system of hereditary-elective inheritance has had on the collective mentality and societal development of Romanians..

References

[1] [1], [3], [4] Tinu, A. Boboc, C. (2020), *Istoria statului și dreptului românesc: note de curs*, ediția a 2-a, revizuită și adăugită, Hamangiu Publishing House, Bucharest, p. 55, p. 56.

[2] [2], [5] Iorga, N. (1972), *Bizanț după Bizanț*, Romanian Encyclopedic Publishing House, Bucharest, p. 83, 126.

[3] [6],[7],[11],[20], [27] Guțan, M. (2017), *Istoria dreptului românesc*, 3rd edition, revised and added, Hamangiu Publishing House, Bucharest, p. 143.

[4] [12] Iorga, N., *non visdi*.

[5] [8],[9],[10],[13], [14], [15], [21], [23] Firoiu, D.V. (1976), *Istoria statului și dreptului românesc*, Didactic and Pedagogical Publishing House, Bucharest, pp. 37-136, *passim*.

[6] [16],[19],[24],[25], [26] Cernea, E., Molcuț, E. (2003), *Istoria dreptului românesc*, Universul Juridic Publishing House, Bucharest, p. 57.

[7] [17],[28], [29] Murgescu, B. (coord.) (2001), *Istoria României în texte*, Corint Publishing House, Bucharest, p. 86, p. 93, p. 94.

[8] [18], [22] Iorga, N. (1985), *Istoria poporului românesc*, Romanian Encyclopedic Publishing House, Bucharest, pp. 238-352.

REFLECTIONS ON THE RIGHT TO INHERIT A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT

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Abstract
Protecting the environment is essential both for the healthy and balanced living of today's people and for future generations. There is a need for continuous improvement of environmental performance through prevention activities.

Each of us has a responsibility to protect the environment both for ourselves and for the people around us, but also for future generations.

We need to be concerned about the legacy we leave to future generations in terms of the environment. This requires an appropriate environmental policy, but also an increase in accountability through the adoption of long-term strategies and action plans.

Keywords*: environmental policies, environment, heritage, environmental responsibility*

The development of the right to the environment has taken place progressively, for several decades now, with important concerns at European level regarding the right to a healthy and ecologically balanced environment as a fundamental human right [1].

Anyone can claim to live in a healthy and ecologically balanced environment.

The right to a healthy environment is considered a collective right of solidarity. Solidarity is essential for a better and more sustainable future. Environmental protection is essential to our prosperity.

Globally, decisive measures must be taken to protect the environment, to enable it to regenerate and to continue to provide such important resources for the continuation of life on Earth: clean air and unpolluted water.

1. Constitutionalization of the right to a healthy environment as a fundamental right of society

The recent doctrine considers that the right to a healthy environment includes other rights such as: the right to live in a clean, non-degraded environment, the right to a high level of health, unaffected by environmental degradation, the right to have access to adequate water and food, the right to a healthy working environment, the right to living conditions, land use and living conditions in a healthy environment, the right not to be expropriated as a result of environmental activities, except in justified cases and the right of expropriated persons to obtain compensation, under the conditions laws, the right to assistance in the event of natural and man-made disasters, the right to benefit from the sustainable use of nature and its resources, or the right to the conservation of natural elements. [2]

The environment must correspond to the physical and intellectual development of man. The healthy environment is an absolute right, necessary for the existence and continuity of life on Earth.

Man is in constant contact with nature, man representing a complex ecosystem that must be protected by all means, including legal ones, which implies a unanimous recognition [3] and a guarantee of the right to a healthy environment.

In the last decades of the twentieth century, environmental problems have been highlighted, at the heart of these problems being man as a biosocial being.

Since the middle of the twentieth century, the ecological problem has become a major political issue, so that, whatever the regime and sensitivities, environmental protection requires consecration at the highest regulatory level, especially by constitutionalizing this approach. [4]

The right to a healthy environment was first proclaimed internationally (Stockholm Declaration, 1972), then enshrined in constitutional and/or legislative law at the state level, and it is jurisprudentially enshrined in the European Convention on Human Rights. [5]

However, the constitutionalization of the right to a healthy environment as a fundamental right took off after the 1972 Stockholm Convention.

After 1972, the states of the European Union provided for the guarantee of the right to a healthy environment in their fundamental laws (France in 2005, Germany in 1994, Austria in 1984).

By constitutionalization is meant the change of the normative value of a pre-existing norm becoming a constitutional norm.

Constitutional recognition of the right to a healthy environment is important for the economy, for environmental legislation and for environmental policy in general.

Certain consequences or implications of enshrining the right to a healthy environment as a fundamental right have also been brought up in the literature [6].

In Romania, the recognition and guarantee of the right to a healthy environment appeared quite late. [7] The fundamental human right to a healthy and balanced environment consists of both rights and correlative obligations.[8]

The 1991 constitution did not recognize the fundamental right to a healthy environment, the only provisions were only indirect recognition of the right to the environment and created the obligation of the state to protect the environment. [9].

If the obligation of the state [10] is to ensure „the restoration and protection of the environment, as well as the maintenance of the ecological balance, then we appreciate that there is a correlative right, which belongs only to the citizen".

Opinions [11] have been expressed on the express constitutional recognition of the right to a healthy environment.

By recognizing the right to a healthy environment, the content of the legal capacity of all persons has been substantially expanded, including this right.[12]

The importance of environmental protection and conservation led to the revision procedure of our fundamental law, which materialized in the revision of the Constitution (by Law 429/2003, published in the Official Gazette no. 669 of September 22, 2003), and the text of the revised Constitution was published in the Official Gazette of Romania no. 767 of October 31, 2003.

The revision of the Constitution in 2003 explicitly recognized the fundamental human right to a healthy environment [13] under Article 35, entitled „The right to a healthy environment".

Article 35 states that: „the state recognizes the right of every person to a healthy and ecologically balanced environment". Therefore, the task of the state to ensure the legislative

framework for the exercise of this right was established, as well as obligations on individuals and legal entities to protect and improve their living environment. [14]

Guaranteeing the right to a healthy environment in the fundamental law of the state is a step forward and a positive step aimed at raising awareness and empowering citizens about the need to protect the environment. Recognition of this right at the constitutional level is important both for the economy and for environmental legislation, as well as for environmental protection policy, pursuing, in addition to the fundamental rights and obligations stipulated, the development of environmental awareness.

Currently, the environmental legislation system ensures an effective protection of the right to a healthy environment because it is characterized by the constitutionalization of the fundamental right to a healthy and ecologically balanced environment, by the ratification of international regulations, but also by the development of internal regulations.

[1] **Environmental policy and the way forward for environmental protection regarding the succession of future generations**

In the 21st century, the issue of environmental quality is one of the most pressing global concerns of mankind, as it is not just about preserving the natural environment, but also about the survival of the human species.

By its nature, the environment transcends politics, law and the frontiers between people. Cooperation between EU countries and the rest of the world is key to meeting environmental challenges.

The aim of environmental policy is to strengthen natural capital, to promote a resource-efficient economy and to protect the health of the population.

The behavior of each of us puts enormous pressure on the planet.

Since 1970 and 1980, the focus has been on traditional environmental issues, such as protecting species and improving air quality, by reducing pollutant emissions.

Awareness that the intensity of human activity puts pressure on the environment has led the international community to initiate and support some necessary actions to prevent, counteract and eliminate the repercussions that disturb the ecological balance.[15]

Environmental policies have emerged and developed, as an integral part of economic policy, in order to protect and sustainably develop the environment.

Environmental policy is a coherent set of measures and means to preserve the support capacity of natural systems for future generations.

In Romania, environmental policy became a component of the overall policy, after 1990, thus recognizing its importance for the development of society.

There is a correlation between environmental protection policy and economic development policy which is based on a national and international interest.

The environmental policy system in our country defines the set of policies on the protection of natural resources and biodiversity conservation, soil and subsoil protection, the protection of water and aquatic ecosystems, the regime of atmospheric protection, protected areas, the protection of human settlements, the regime of hazardous substances and wastes, radiation protection and other activities.

For a good application and functioning of the environmental policy in Romania, several aspects must be taken into account: the elaboration and application of the environmental policies taking into account the temporal and spatial characteristics, establishing the role of technology and technical-scientific research etc.

Environmental protection emerged as an independent area of national policy in 1990, with the advent of the Ministry of Environment. In 1992, the first official document was elaborated – the National Strategy for Environmental Protection, updated in 1996 and in 2002.

The 1992 and 1996 strategies are the documents on the basis of which the national environmental policy was structured until 1999, when the National Accession Program to the EU was adopted.

From 1999 to 2003, the environmental strategy was complemented by additional documents.

Since 2000, environmental policy has been developed in line with the strategy developed by the European Commission for the candidate countries under Agenda 2000.

Accession negotiations for Chapter 22 – Environmental Protection were opened in 2002. In the same year, the European Commission drafted a special document to help Romania join the EU in 2007. Also in 2002, the National Strategy for Environmental Protection was added to the National Waste Management Strategy.

In Romania, the main institutional actors of environmental policy are the Ministry of Environment and Sustainable Development (MMDD) and the Romanian Parliament.

The relevant national legislation is dominated by the idea of the need for economic development based on the superior use of material and human resources, technical and scientific achievements. National legislation regulates economic and social activities with a negative impact on the environment, as well as the conditions and procedure for their authorization, with the aim of directing activities from an early stage, in order to know their negative impact on the environment. [16]

Legal protection of the environment is an essential element for our future prosperity, for the evolution of society.

Decisive measures are needed for a high standard of living to protect the natural environment, to enable it to regenerate and to provide the necessary resources for future generations.

At the end of 2011, EU governments approved the roadmap for a resource-efficient Europe.

Europe's ambitions for environmental policy have been growing year by year. In 2021, a number of policy initiatives were presented in Europe to achieve the vision outlined in the European Green Pact, including the Zero Pollution Action Plan, the new Climate Change Strategy, the Forest Strategy and, most recently, the Soil strategy.

Resource efficiency seeks to dissociate economic growth from resource use. The economy needs to create more, with fewer resources, to have more value with fewer resources, and these need to be used sustainably.

Article 6 of GEO no. 195/2005 on environmental protection, republished with amendments in 2018, enshrines not only obligations on the part of the state, but also responsibilities regarding the environment: „environmental protection is the obligation and responsibility of central and local public administration authorities, as well as all individuals and legal entities".

Environmental policy has crystallized through the adoption of minimum protection measures, taking into account some the principle of action [17]: The „polluter pays" principle, the principle of preventive action, the precautionary principle, the principle of high environmental protection etc.

An effective way forward would be to focus on the most interesting businesses and to adopt a value chain approach, which could have a spillover effect on society.

Our future development is about reconnecting life with nature. It is necessary to abandon the concept of human-centered development, we must advocate for human-nature coexistence, to develop and use resources rationally, to pay attention to environmental issues and to build the future of our generations on a sustainable development.

There is a need for a rational development of fossil energy, but also for the development of clean energy, such as solar energy, wind energy and nuclear energy.

Education can help people to understand the connection they have with nature, to make better use of science and technology to produce from nature without exhausting the environment.

Sustainable development can meet the needs of current generations without compromising the ability of future generations to meet their own needs.

We all aspire for those who will inherit us, in a world without poverty, disease, hunger and scarcity, in a world where everyone has the right to clean water and sanitation, to adequate and sufficient hygiene and food.

We want to create the restoration of generations, to revive and protect the world's ecosystems.

These steps that we are trying to take to prevent, stop and reverse the degradation of ecosystems can help increase the momentum around an optimistic vision for the future.

The countries of the world must fulfill their existing commitments. Restoring ecosystems is one of the most important ways to provide nature-based solutions.

It will certainly not be quick or easy, and it will certainly require profound changes in every area, from the way we measure economic progress, to the way we grow food and what we eat, but the restoration of ecosystems can take place at any scale and each of us has a role to play.

Restoring ecosystems is the key to human prosperity. Ecosystems provide food and water benefits for health and safety, which the world's growing population needs today and will need in the future.

[2] **The role of responsibility towards the environment**

Responsibility for the environment is built together, citizens and authorities!

Living in a healthy environment is the basis of a healthy life. In order to achieve the goal of „all people are equal in rights and duties", all political, social, legal and medical decision-makers, as well as the population, must contribute.

We must strive to ensure that our environmental footprint is minimal and does not affect the legacy of future generations.

If we have a healthy environment, it means that we have healthy people and probably the most precious legacy we can leave to our children.

Everyone should be aware that the right to a healthy environment is incumbent upon him and his obligations to protect the environment, which many of our peers threaten in various forms of aggression.

A serious problem facing modern society is pollution in various forms: air, soil, water and food pollution, noise pollution, moral pollution, but also demographic pollution.

Jonathan Raban, a fine observer of the development of human society, referring to pollution, formulated a maxim of astonishing truth: „In a poorly developed country it is better not to drink water, and in a super-developed country it is better not to breathe."

The interdependence of phenomena in nature is also confirmed by the proven causal relationship between the vice of the human living environment and his state of health. [18]

In recent centuries, people's relationships with the environment have changed substantially, and as such, solutions to ensure normal human cohabitation with the environment are only possible within the global ecosystem and a global environmental strategy.

Any human activity, and thus individual existence, is inconceivable outside the environment. [19]

Civilization has certainly led man away from his natural environment and many of his benefits. What man can and must do is to preserve the natural environment in which he lives and, in no case, to contribute to its degradation. [20]

The environment must be adapted and organized to meet the needs of individuals, which involves taking resources from nature and processing them to serve the population.

Environmental protection is a matter of major interest and of some relevance to social development, therefore, environmental protection is a joint and several responsibility of all those involved, (global, regional and national bodies), which must ensure the health of living things on Earth through health and environmental protection.

Through people's daily activities, the state of the environment can deteriorate, with few human activities being able to rehabilitate it.

The effects of pollution on the environment, but also on people often leave serious traces in social life.

If man threatens the health of the environment through various irresponsible activities (discharges of various pollutants into running and stagnant water, discharges into water and soil of animal manure, toxic substances, chemicals), then the environment also threatens human health.

The health of the planet can only be ensured by humans and for humans.

The participation of the population in decision-making for the environment is very important, as it leads to awareness of environmental issues and the risks a polluted environment can have on health,.

We should be more concerned about the responsibility for the environment and the concern for the community in which we operate.

Responsibility for the environment does not stop at the actions we take when we participate in dedicated events.

We should all be responsible outside of them. We should make better, more environmentally friendly choices, adopt a lifestyle based on reducing energy consumption, reducing water consumption, and focusing on reuse and recycling.

Recycling must be seen as a collective responsibility to ensure a sustainable future. Recycling helps preserve natural resources, saves energy, reduces carbon emissions, reduces the greenhouse effect, causes less harm to the environment and animals than the extraction or manufacture of raw materials.

It is true that each state has essential responsibilities in protecting the environment, but man could also make small efforts in this regard, to pass on to future generations a quality environment.

If everyone were to follow the rules and principles in this regard as much as possible, the effects would be immediately visible, and a return to clean nature would be possible in a relatively short period of time.

In our hands is the future of the planet, through what we do today we will decisively influence the lives of our children and grandchildren.

[3] Conclusions

Environmental degradation threatens life on the planet. The solution lies in making decisions that range from changing the model of economic development to specific technological measures. It is not too late to take firm action to protect the environment.

For the past 40 years, Europe has put in place policies to combat environmental issues, some with remarkable results. There is a need for a change in habits towards lasting sustainability.

Constitutional recognition of the right to a healthy environment has become a general phenomenon, from which very few states have deviated, the environment becoming a major political stake, its protection being possible only through regulations at the highest normative level.

Future generations have a right to inherit a quality environment. Without realizing it, humans have set in motion vast ecological experiments involving the Earth. Actions in support of environmental protection are needed everywhere, which is one of the priority contemporary concerns.

Bibliographical references

[1] Lupan E., Dreptul la un mediu nepoluant (The right to an unpolluted environment), in „Jurisprudența" no. 1/1993, p. 51

[2] Marinescu D., Tratat de dreptul mediului (Environmental law treatise), C.H. Beck Publishing House, Bucharest, 2003, p. 278 apud Amelia Diaconescu, Dreptul la un mediu sănătos este un drept fundamental (The right to a healthy environment is a fundamental right) in the „Revista Universul Juridic" no. 11, November 2017, p. 59-67

[3] Dogaru L., Dreptul mediului (Environmental Law), 2nd Edition, revised and added, Pro Universitaria Publishing House, Bucharest, 2020, p. 60

[4] Duțu M., Duțu A., Răspunderea în dreptul mediului (Environmental law liability), Bucharest, Academiei Române Publishing House, 2015, p. 42

[5] Duțu M, Dreptul mediului (Environmental Law). University course, 2nd Edition, Bucharest, C.H. Beck Publishing House, 2008, p. 129

[6] Francois Dore, Consequences des exigens d'un environnement equilibre et sain sur la definition, Conference de Strasbourg, Volume I, Institute for European Environmental Policy, 1979, p. 7-9

[7] Law no. 9/1973 on environmental protection, was the first law regulating this matter, but did not contain any reference to the fundamental right to a healthy environment.

[8] Marinescu D., Tratat de dreptul mediului (Environmental law treatise), 4th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2010, p. 296 et seq.

[9] Marinescu D, Tratat de dreptul mediului (Environmental law treatise), Lumina Lex Publishing House, Bucharest, 2003, p. 88

[10] In the decision of the SCJ no. 1112 of 12 June 1997, the administrative litigation section referring to the right to a healthy environment recognized by art. 5/Law 137/1995, currently repealed, shows, „this subjective right also has a constitutional basis" being about Article 134 (2) (e) of the 1991 Constitution. Therefore, not only does the administration's decision to build a hotel in that park violate a subjective right, but rather it violates a

fundamental right with a legal basis in the Constitution, even if the right to a healthy environment does not explicitly appear in the sphere of fundamental rights governed by Chapter II of Title II.

[11] Iancu Gh., Drepturile fundamentale și protecția mediului (Fundamental rights and environmental protection), R.A. Official Gazette of Romania, Bucharest, 1998, p. 201

[12] Diaconescu A., Dreptul la un mediu sănătos este un drept fundamental (The right to a healthy environment is a fundamental right), in „Universul Juridic", no. 11, November 2017, p. 65

[13] Constantinescu M., Muraru I., Iorgovan A., Revizuirea Constituției – explicații și comentarii (Revision of the Constitution – explanations and comments), Rosetti Publishing House, Bucharest, 2003; Dușca I.A., Dreptul mediului. Caiet de seminar (Environmental law. Seminar notebook.). Universul Juridic Publishing House, Bucharest, 2015, p. 15.

[14] Duțu M., Recunoașterea și garantarea dreptului fundamental la mediu în România (Recognition and guarantee of the fundamental right to the environment in Romania), in „Dreptul" no. 6/2004, p. 109.

[15] Apostol C, Politici de mediu în România, Lucrări științifice (Environmental policies in Romania, Scientific papers) – vol. 50, Agronomy series, p. 30

[16] Lupan E., Eliberarea acordurilor sau autorizațiilor de mediu – măsură de prevenire a poluării mediului (Issuance of environmental agreements or permits – a measure to prevent environmental pollution), Part I and II, in „Revista de drept comercial" no. 5/1997 and no. 6/1997.

[17] White Paper on Environmental Responsibility, February 2000.

[18] Popescu O., Dreptul la sănătate și sănatatea acestui drept, (The right to health and the health of this right), the Romanian Institute for Human Rights, 2007, p. 40.

[19] Comănescu M., Creșterea responsabilității față de mediu, Economie teoretică și aplicată (Increasing environmental responsibility, Theoretical and applied economics,), vol XVII, 2010, no. 5 (546), p. 41.

[20] Zlatescu Moroianu I., Popescu O., Mediul și sănătatea (Environment and health), IRDO, Bucharest, 2008, p. 14

THE ROMANIAN INTELLECTUAL IN THE LABYRINTH OF TRANSFORMATIONS OF LAW IN THE NATIONAL AND EUROPEAN SPACE AFTER 1989

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Abstract
In 2019, at the UN, Donald Trump surprised with a nationalist speech in which he stated that „The future belongs to the patriots. The future belongs to the sovereign and independent nations, which protect their citizens, respect their neighbour's and honour the differences that make each country special and unique". Regarding the nationalism/patriotism vs. globalism dispute, the American president said, „If you want democracy, keep your sovereignty! If you want freedom, be proud of your country! If you want peace, love your nation! The future does not belong to the globalists! The future belongs to the patriots. The future belongs to the sovereign and independent nations, which protect their citizens, respect their neighbours and honour the differences that make each country special and unique. When you open your heart to patriotism, there is no room for prejudice. The future does not belong to globalists. The Bible says, „How good and pleasant it is for God's people to live together in unity": politicians who support globalism to the detriment of national sovereignty are wrong; national structures must be protected, not replaced by supranational ones! The future belongs to the patriots. The future belongs to the sovereign and independent nations, which protect their citizens, respect their neighbour's and honour the differences that make each country special and unique. That's why we in the United States have embarked on a fascinating program of national renewal. In everything we do, we focus on mobilizing the dreams and aspirations of our citizens. Globalism has exerted a religious attraction on past leaders, leading them to ignore their own national interests. But as far as America is concerned, those days are gone in history". What was, but especially, what will be the role of the Romanian intellectual in the labyrinth of transformations of law in the national and European space after 1989?

Keywords*: Innovation, technology, research projects etc. [Times New Roman 10-point]. Romanian law, the legal order of the European Union, sovereignty, patriotism, globalism*

1. Argument – warning

A very special event, watched a few days ago, on TVR1, in Eugenia Vodă's show, „Professionals", significantly determined me to dedicate this study to the Romanian intellectual in the post-truth era. It is about the interview given by the colossus of the world theatrical world of the Millennium Interview, the famous Romanian director Andrei Şerban who told how and why he resigned from the position of professor emeritus at Columbia University: I could be a professor at Columbia until he was a hundred years old. Nobody

kicked me out, because I had the status of a professor emeritus, a status in which you are considered an exceptional teacher for life, because you had extraordinary results in education and career, so you can be a lifetime holder. In the Trump era, the right is very radical, the left is very radical. Universities in America are usually left-wing, and Columbia University is a kind of socialism that goes to communism, it's a new form of communism. Political correctness is a kind of yellow jaundice of America. We were called, the teachers from the Acting School, where I was the head of the Acting School, and we were told that we had to set up a committee to hire a new teacher, because someone had retired and was left vacant. There were five or six teachers. The dean of the Art School told us that we are too many white teachers, too many heterosexual male teachers and it is desirable to take a new teacher, preferably a woman of color, who, if gay, is very good, and, if he is a man, preferably a Puerto Rican or a black man, „surely he can't be someone like you, Andrei", I was told, „who is a man who has been married, who is heterosexual, and who has children". And then I asked: „If it happens that of all the candidates, the one who is by far the most prepared to instruct these students who spend a lot of money to come to study, is a white man with a family, is he married?" I was told, „No! You can't take this man!" It was a matter of principle, I had no one ready for the job. Then it turned out that someone who was very, very good was not taken and someone else was taken, who was a gay, black person. This was already a point where I felt that I was making a decision against my will, that they were dishonest, and that I was the head of the commission, and that I accepted something because I was told, because I was ordered. I felt communist again!

The second incident was when I had admission for students, where young people from all over the world came, not just from California and not just from America. There were about ten on the spot. At an audition, a transsexual comes along, a boy who has decided to become a girl. I ask him what he has prepared and he answers that he has prepared Juliet's monologue. Juliet is a 14-year-old girl, purity embodied, it was impossible for me to believe that this boy who became a girl three years ago can be Juliet. He could try other roles. And I asked him, „Do you have anything but Juliet?" Do you mind?" He immediately felt that I had doubts. I replied, „I don't mind, but I don't know how I can think you're Juliet." He said the monologue, and after he left, the rest of the committee next to me started blaming me, because I can't believe he could be Juliet. „Because I can't believe it!" become a girl of three years and teach him to be Juliet. I cannot! I would be dishonest to myself if I did that. I resigned and left! I can't draw conclusions for the reader, because I can't think for the future of his children. That's all, I dare to ask him with heaven and earth to be well informed, before urging his child to do a college or another, whether it is one from abroad or one from the country. If she is from one of the countries, keep in mind that the HIV that fools, that kills the masses en masse, the virus of political correctness has penetrated well in many Romanian universities. Already professors in these faculties are agents of influence who spread the disease, for the sake of money, grants and substantial scholarships they receive. Not only do they favour the metastasis of the disease, but they have moved on to the walling of their colleagues who refuse to fool their students.

This was the reason why Andrei Şerban resigned from the position of professor emeritus at Columbia University and, at the same time, the response of a Romanian intellectual to „political correctness", an idea that at first seemed just a joke, a bad one, taken seriously by those who are too useless in this world, but just a joke that, after people got tired of its ridiculous absurdity, would have disappeared from where it came from, out

of nowhere. Therefore, this type of correctness was imposed not by its definition, given by „political corrections", but by the one that defined it caricatured in the shrill colours of the absolute absurdity imposed as the norm of a new morality: „Political correctness is a doctrine cultivated by a delusional, illogical minority, promoted by the official media, who claim that it is possible to grab a piece of shit on the clean side. „This, from the very beginning, is because man's need to get on his feet is the best tool for detecting the absurd. But what started and, especially, where and why did „political correctness" come from? The clearest, most concise and surgical explanation belongs to the prominent French intellectual, novelist and philosopher, Pascal Bruckner. She was given in an interview in *Dilema veche*, no. 760, of September 13-19, 2018: „Political correctness is a kind of railing, a screen of protection, semantically, if you will, to name certain categories. It's a common-sense mechanism, absolutely functional. It's just that, little by little, it's turned into an ideology that keeps you from saying things by name. If you say things by name, if you say exactly what you think, you risk causing a scandal, you are pointed the finger at the wall of infamy. Political correctness is strong in France, but in the United States or Canada it is even worse. There it has really become an instrument that stifles any other view of the world[2].

I think it's the '90s. It was Bill Clinton's years in the United States. It is, more precisely, the moment when the fight for social rights was abandoned to be replaced by a fight for the rights of minorities. This transition was followed by the eruption of political correctness and, since then, the precepts of political correctness have spread to all minorities, so that today everything has culminated in a system that stifles any reflection, any thinking. A system that greatly contributed to Donald Trump's victory in the United States. This is because the right had become exasperated by this new fashion of political correctness, obviously coming from the left. It has also been heard in our country that the „Free World" has turned it into a bizarre nonsense, in which it wants to demolish statues of the Founding Fathers, because their families' owned slaves, vandalizing the monuments commemorating Christopher Columbus, accused of „slavery" and „capitalist exploitation" and banned the film „On the Wings of the Wind" because it would „make a wrong portrait of blacks". I think the nonsense blown from the West is becoming mandatory, often more drastically entrenched than in the courts of their inventors. A year has passed since Pascal Bruckner's words, and Donald Trump's vision has cut off many delusions. This does not mean, however, that any danger has passed. The evil has been done, it is already planted in the minds of the youth, of the students from the prestigious universities in the post-truth era we live in. In the post-truth era, everything is possible and credible, as long as an emotional connection can be established with the public, voters and ordinary citizens, who have vulnerabilities, predispositions, hopes, expectations and personal concerns. All these can be capitalized, enhanced, mobilized with the help of super-technologies and the digital transformations generated by them. Initiating and maintaining such an emotional connection has become possible and has even achieved extraordinary performance with the help of digital technologies, which allow algorithms for messages, posts, likes, topics and sites we access, suggestions from friends and of products, in a way that favours certain interpretations of reality. Thus, the images in our mind filter the reality, but, with the help of state-of-the-art technologies, they come to dominate it[3].

Undoubtedly, the intensive digitization of our lifestyle has brought with it many positive aspects, such as the unprecedented streamlining of communication, the use of technology for educational purposes, to monitor health, and so on. This does not mean that

we can ignore the darker side of this massive digitalization, a dimension populated by interests and organizations that hold post-truths, from which they can fabricate reality – an excellent illustration of the saying „fake it until you make it". The new digital disorder has a completely new terminological baggage, populated by many concepts that have no equivalent in Romanian – digital deceit, narrowcasting, filter bubbles, echo chambers, viral autoboots, like factories, computational amplification, computational propaganda. In the next 3-5 years, new trades and specializations will appear, as digital technologies improve. Dedicated companies combine IT expertise with social psychology tools, providing behavioural profiling services – collecting data and meta-data to build detailed profiles of buyers or voters, precision advertising – placing products by accurately analysing psychographic features, Search Engine Optimization (SEO) – optimizations meant to make a subject, a product, a personality more visible in the search engines, Social Media Management Service (SMMS) – with the help of machine learning, a pre-configuration of the messages is made so that they are well received by certain audiences, depending on the client's goals and the characteristics of the candidate, the product, the service being promoted. The examples can go on. In short, a new market is opening up and, driven by technological advancement, will expand rapidly and will be extremely difficult to monitor and regulate.

The European Commission now sees digital misinformation as a direct threat to our lifestyles, democratic processes and Member States. In the action plan published at the end of 2018, the European Commission promised a better mobilization of resources, in order to counteract digital pathologies. What are the successes of this plan and how can we contribute to the immunization of citizens against information assault? This remains an open question, the answer to which depends largely on our ability to manage current vulnerabilities and security threats. However, we have found that we are only resuming a debate that has been going on for more than 2,000 years and that some of the founders of European culture, the Greek philosophers Plato and Aristotle, have left us arguing quite clearly. However, more and more politicians, consultants and „communicators" – people who specialize in packaging messages – have been trying lately to convince us that this is not the case. Of course, lately we have been told more and more that we will live in a time when people, institutions – politicians, in particular – will be less and less concerned with the idea of truth and the idea. to establish facts. And the expressions that were used to describe these new realities are „post-truth", „alternative facts" or „failure of the notion of objective truth". All of these are just symptoms of an irrational fear of knowing. It is a kind of epistemic irresponsibility, which is becoming more and more visible in today's society. A kind of cultural chasm opens before us, which will put on the one hand those who will continue to believe in the idea of truth, in the idea of goodness and correctness, and on the other hand all the others, who will say that these are only cultural, political and social constructs that we should overcome.

This debate was foreshadowed a few decades ago by an author who formulated this idea very well. Some say it was George Orwell, others say the author is unknown. In English, it sounds like this: During times of universal deceit, telling the truth is a revolutionary act. In other words, in a historical moment of massive deception, of universal deception, telling the truth is a revolutionary act. That is why I believe that the idea of truth, the philosophical notion of truth, returns today with great power at the center of the debates. It should be a central theme for those who deal with the destinies of culture. That is, those

who say that they are the agenda of public discussions, journalists, politicians, people who, in one way or another, are opinion leaders. And we must, indeed, have a calm, but also very sincere, very honest discussion, about the importance that the notion of truth must continue to play, both in the theoretical knowledge of things, but especially in social life. and politics. And the role of intellectuals in this discussion must be decisive, not only because the truth sets us free but also because the truth is important for a society that wants to move forward in the value of transformations of law in the national and European space after December 1989.

2. Transformations of law in the national and European space after 1989

In the current context, Romania needs a change in the current development paradigm to meet the challenges of the 21st century. We live in a period marked by the process of globalization, the accentuation of inequalities and the aggravation of humanity's problems. National law can be one of the solutions and addresses these challenges by proposing interstate cooperation based on the principles of respect for national sovereignty and identity within a prosperous and invigorated European Union. National sovereignty represents, in the Romanian space, the desire to achieve a balance, a synthesis between the aspirations of the citizen born free, the society on which it depends and through which it is defined and the context that allows self-realization. This balance starts from man, the central actor who seeks an individual balance and favourable conditions to achieve it. Favourable conditions are influenced by the society that needs to support and motivate it and by the environment through which it finds itself and can find its balance. The role of the state in the context of globalization and implicitly of Europeanization is to help achieve this balance, not only for the citizens of now, but also for future generations. And for this, I believe that we citizens must take control over what is happening in our Romania. We want a secure Romania where the right to be a part of everyday life. Protecting citizens must be the first priority. The administration needs to be strengthened and the judiciary improved. And for this reason, the aim of this study is to provoke a debate that will bring together specialists in the field of law and is intended to be a forum for analysis of new research directions. And we express our hope, together with all the people of good faith in this country, that a consensus like the one of a century ago will be created to allow the formation of a reflection group on the announced issue, from a multidisciplinary perspective, of law and the science of law, which would simplify and rehabilitate the Romanian law from all the abuses committed against it in the thirty years since the coup d'état of December 1989, not to mention the unfortunate period of the communist right of subsistence in the service of power, totally enslaved its. It is well known that real democracy cannot exist outside the rule of law, which in turn could not be conceived without its basic pillar – justice. I believe that the EU will only be able to secure its future if it is made up of Member States with functioning and strengthened institutions and levels of development as close as possible, with a high regard for human rights in a difficult, if not complicated, era. To address the current situation, we need to understand the ambivalence of this secularization, of this disassembly of laws that, like Renaissance statues, move away from cathedrals to populate squares and gardens. Art history, precisely, is able to explain. It follows a parallel course in the history of law or science.

Starting from these premises, we will find that from the perspective of the requirements of a good functioning of the rule of law, we have a thick legislation, we have fields of

activity in which several regulations coexist, hence the risk of inconsistencies or uncovered areas. It should be unified, using uniform terminology for the same legal realities, by supplementing, correlating and clarifying so that we have clearer, more predictable and predictable regulation and take into account the decisions of the Constitutional Court and European directives to be transposed into national law. The last quarter of a century, in which the Romanian public administration was organized according to a democratic state, has witnessed an increasing mass of normative acts in force in almost all areas of economic and social life. At present, the inflation of issued normative acts and the frequent changes of the regulations that were necessary in the process of their application have generated parallels, overlaps and, implicitly, in practice, difficulties in implementation. We have solutions to solve these problems: simplifying and restricting the legislation, creating a unitary legal framework in a certain field and clarifying a specific topic; simplifying the beneficiaries' access to the legislation in force, improving its application. The problems of the Romanian legislative framework are known by the state authorities, which, through several strategic and programmatic documents, state the need to rationalize and systematize the regulations, including through codification tools. This need is also highlighted in the context of the EU, which places particular emphasis on „good governance" and „smart regulation" with smart people, a field of research less discussed in the literature.

3. The role of the Romanian intellectual in the labyrinth of transformations of law in the national and European space after 1989

We start our foray into the labyrinth of the role of the Romanian intellectual with a question: What defines an intellectual and what is his role in society? Is the intellectual an active leader or a preacher? Ileana Vulpescu gives us a possible answer: „The true intellectual is a serene, impartial, tolerant man, a man willing to discuss, to argue urban, on an equal footing, a man who clings closely to the principles of logic and truth, and who does not want to be right outside of them". Over time, the role of the intellectual in society has been debated with keen interest. It is easy to understand that intellectuals are also opinion formers; they contribute to the definition of a nation's ideals and to the development of national education programs. Who has the right to consider themselves intellectual? According to the dictionary definition, an intellectual is a person who has a higher education and has a diploma attesting to this quality. I wonder, is this an exhaustive statement of the term intellectual? I think that the intellectual is a person who cares about the problems of the society he belongs to and tries to find viable solutions to solve them. Assuming intellectual status involves benefits and sacrifices. I am not original, I take and support the idea that intellectuals must have enough strength of character to position themselves against the general current of opinion, when they consider that the majority is slipping in one extreme or another. Their goal must be the common good, above what their personal interests dictate. This desideratum will remain a utopia and an ideal, because few see the horizon, many are absorbed by the palpable in front of them.

The issue of the presence and impact of intellectuals in public life is a matter of intellectual excellence, and the debate over it, as far as it is concerned, makes visible the existing cleavages in this relatively closed world, albeit without outlines. At a more general level, the role of intellectuals in society is rather low: their ability to influence and guide decisions with social impact remains – regardless of whether they approach or move away from power – extremely low. In a world where „employment" has been unambiguous for

decades, it tends to be identified with partisanship, and the „employed intellectual" ends up being taxed according to a tribal logic: „Whose is it?" Criticized also for the media dimension and for his political involvement, the intellectual has only to retreat to the „ivory tower" from the height of which to contemplate the twilight of a world in which he knows less and less of his purpose. The intellectual is a person with a high cultural and / or scientific level who carries out a spiritual activity in the field of literature, art, science. The intellectual has a very important role in society, namely to provide ordinary people with a guide to their ideals. It can be said that this is a universal situation and that meditation on one's destiny belongs in its own right to the intellectual vocation. However, there are still some specifics of our world that put us in touch with a recent past that has been underestimated by local intellectuals. It is, first of all, a restriction of the notion of intellectual that evokes mainly the 19th century and, with it, the model of the formation of the Romanian culture. For the mentioned century, the intellectual is almost exclusively the creator of the humanist culture and, even within it, the restriction goes further, targeting in particular the writer, the historian or the philosopher. The rest of the professions are perceived as more technical. In all the major moments of his public presence (late nineteenth century, interwar, to some extent the '60s-'70s of the last century) the intellectual is a „provider of ideology" of the nation-state; he is the one who identifies with the historical destiny of the country, a destiny that escapes the contextual policies, if he is not simply betrayed by them.

The intellectual is „beyond" the political context which, if it remains what it should be, he moralizes in the name of categorical imperatives. If, on the other hand, he „descends into the arena," he himself becomes part of the world he criticizes, and the criticism he makes of this world applies to him as well. But, on the other hand, the action of building the modern state presupposes an increasingly specialized professionalization that creates intellectuals focused on more or less technical fields (administration, economy, various engineers etc.). They are not only those who are entrusted with the management of the day-to-day affairs of the state, but also those who, by the very nature of their activity, are in a position to see to what extent the discourse of the „great intellectuals" is appropriate and articulate in the real world. What is amazing in the history of modern Romania is that if the discourse of the great figures of the humanist intellectuals has passed through time, returning to the present after each historical earthquake, the „other discourse" of the domain intellectuals has fallen far short of this success. he failed at all to settle into an „institutional memory". Which may raise the question of whether the former survived just because it was just a speech. From its beginnings in the modern Romanian space, the intellectuals know a cleavage that will be reproduced in all the moments of our history: on the one hand the „little" intellectual, the technical official, caught in the state mechanisms and engaged in the effort to build it; on the other hand, the „great" intellectual, a writer – in the broadest sense of the term – who sovereignly criticizes state-owned enterprises and sees modernization as a sign of predictable failure. On the one hand, the calculated optimism of the one for whom the destiny of the country is at stake in the book of the future; on the other hand, the heroic overbidding of a myth-poetic past that the present and the future alike only compromise. Hence, inevitably, a mutual distrust of the two „orders": for the bureaucratized intellectual the „national prophet" is nothing more than a demagogue and his sublime art has as its reverse the ridiculous when judged „objectively"; and for the „great intellectual," those engaged in administrative work are but a dozen officials, marginalized and condemned to

wander in the ways of an enterprise whose meaning escapes them. These are, in fact, two parallel discourses, which are sovereignly ignored and which seem doomed to never meet. And yet: there was a time when their closeness seemed to be able to generate a conjunction of the two perspectives in a unitary issue: it is the late '30s and early' 40s when the four volumes of „Encyclopaedia of Romania". At that time, the domain histories and the people who illustrated them also seemed to have become mature enough to meet in a common reflective action meant to lay the foundations for reflection on the action in the Romanian public space. But, as we know, it was not to be; The „Encyclopaedia" remained unfinished, the volumes appeared in troubled times, then they were cursed by the logic of another world, and those who conceived them perished or were scattered, victims of a „terror of history." in the face of which both thought and action were powerless.

Undoubtedly, of all the institutional ruptures in Romanian history, the most dramatic was the one that occurred at the end of the Second World War, with the establishment of communism. Nothing that had been done before had prepared us for this radical change of project. For the Jews of the first stage, the past existed only as a negative example, and therefore all its remnants had to be suppressed, regardless of cost. The highest price was paid by the „great intellectuals" of the interwar period: he was completely denied access to public space, the content of his speech was condemned to oblivion, and his representatives eliminated from public life if not simply from life. Those who chose the accommodation had to not only accept, but also justify the unacceptable. For two decades the voice of the great intellect was brutally silenced. The place of her speech was filled, ad nauseam, with a sterile phraseology, most often debited in the form of slogans, which said very little because her main mission was not to do something intelligible, but to „mobilize the masses" in the service. Party projects. The vectors of this discourse were the activists, hypostasized in the „conscious vanguard of the proletariat" which came to power. It is indisputable that they were the only „initiates" in the „most advanced theory" expressed by the Party, and that it was indisputable that they never had the right to question and discuss this theory.

Their role was to transmit the decisions made at the height of communist power, and their personal contribution was to popularize the circumstantial vulgarity of the doctrinal corpus of dialectical materialism and to popularize the adaptation of its theses to the often unpredictable changes of the „Party line". Despite their higher education, the activists never formed an intellectual body, even within the Communist Party (which remained marked by an original anti-intellectualism), and their role always remained subordinate. In a way, it was the logic of the ideology that stopped them from reaching this level: the „teaching of the Party" was given from the beginning as something definitive which, at least in its fundamental articulations, could not be modified or revised. As for its „creative development", it was the monopoly of the highest courts of the Party – in this case its secretary general. However, despite the mountains of rubbish written on his „invaluable contributions", no one took them seriously.

The history of current Romanian intellectualism begins in the second half of the twentieth century, on August 23, 1944. Marshal Antonescu is arrested, and Romania, hitherto engaged in war on the side of the Axis, signs the armistice with the Allies (USSR). The king accepts control of the Soviets. What followed was only the „natural" effect of the historical causes that preceded it. Imposing control of Bolshevik-type power by removing pro-fascist „elements" (historical democratic parties) and total and direct control of public opinion (communist propaganda) were the means by which the People's Republic of

Romania appeared on the map of Europe redrawn in Yalta. It is known what the consequences were in the Romanian society, controlled more and more by the new single party. The control of the masses could be achieved primarily due to the removal of mentors, namely intellectuals. A new generation of intellectuals was born, more „educated" than the traditional ones, many of whom turned into fascists and criminals of the people overnight. The disappearance of communism after the „phenomenon" of 1989, and the establishment of the much-desired democracy, brought with it the liberation of the intellectual class from the control of politics.

It seems that the joy of liberation was so great that a large part of the trained intellectuals, who suffered communist oppression, forgot that there was still politics. In an interview given by the late Corneliu Coposu in 1993 to the radio station „România Libera", he said that: „intellectuals have a moral obligation to integrate into politics. Immediately after the revolution, the idea of a abstention of intellectuals from joining political parties, from their political colouring, with the justification that the intellectual must keep his objectivity in order to notice certain inadvertences of to the political world, to serve as a kind of censor against some manifestations that could, of course, be criticized and that his position would be justified by this impartiality, by this equidistance from political parties. I think it was a serious mistake from the beginning, an error that gave the harmful results that we notice nowadays. After 1989, with the formation of political parties, the survivors of the communist holocaust contributed to the resurgence of currents of opinion and political doctrines. And they addressed the Romanian public opinion, which was completely misinformed, broken by historical realities, broken by the true civilized society of Europe. Under these conditions, the leaders of the political parties who considered that they had a moral obligation to start restructuring the Romanian political conception by re-establishing or relegalizing the political parties had at hand only inexperienced people, people who during the 45 years of communism had lost contact with the obligatory civic attitude of an intellectual. At that time, intellectuals would have been forced, without any reluctance, to join the political parties, raising the intellectual level of the debates within these parties, because a democratic society cannot be conceived without a multiparty conception, without a debate. of ideas". The scenario that would have emerged after 1989 if the intellectuals had mobilized and entered into force in the public and political life of Romania is difficult to outline.

Following all these theories, we can ask ourselves the following question. What is an intellectual? Are there still true intellectuals today, or are they just a myth of the last millennium? „Some say that a true intellectual is the relaxed intellectual, others say that the intellectual must be stressed. Some say that the true intellectual is the well-paid intellectual, others that he is the poorly paid. No one wants to admit that an intellectual is an intellectual. „Their existence is as real as possible but buried in an abysmal unknown precisely because they are lovers of wisdom and truth. This isolation is all the more serious as it is guarded precisely by those people who are most in need of intellectuals, namely political leaders. The militants are not happy when it is announced that an intellectual has joined their party because the parties are a kind of team of gold diggers who are not happy to increase the number of mouths to be fed from prey after winning the election. All parties have intellectuals, university professors or artists, but you will rarely find them on parliamentary or government lists. From time to time, in situations where there should be a serious public debate on important issues, there is a list of almost 100 intellectuals who support something

that cannot be imposed by any president or prime minister, or party. One weakness of the politically engaged intellectual is that he cannot bring money to the party. When the campaigns around the leader come, praetorian guards are born consisting of former waiters, road workers, gas stations or other forms of capitalists who invest in politics. They are given as examples of dedication; they change alliance strategies and the intellectual feels how money defeats ideas. This state of affairs is due to the principles of morality which are a standard in the survival and health of the reason of the intellectual. No true intellectual has given up his ideational belief in favor of material temptation, and this is due to the fact that he can rise above the demands of his belly. In order for intellectuals to be able to make a visible contribution to the life of society, the conscience of the common man, of the citizen must be cleansed of the lies inserted in the 50 years of communism and the 30 years of neo-communism. This is quite difficult today due to the sedimentation of harmful ideas in the conception of the average society, but it is not impossible. Regarding their contribution to political life, the role of the intellectual is to create and maintain the balance of the political framework. The problem of the Romanian political class is that it has too few intellectuals. Decades of repression of the socialist extreme have produced an academic hatred for the academic class, being drawn into immense processes of ridicule. Intellectuals are at best ignored or despised. At most they are given honours. But they are not listened to, because they forgot to come up with their own wording on current issues. As for the intellectuals themselves, they are most afraid of failure and carelessness. This may not be the case with specialized intellectuals.

4. About the role of the intellectual specialized in today's Romania

In the conditions of rapid globalization, the problem of identifying the distinct role of intellectuals has become a fairly current research object in philosophy, sociology and political science[4]. The intellectuals in general and those in Romania in particular, as a sociocultural community, continue to perform the functions of preserving and disseminating cultural heritage, positioning themselves towards the continuity of relations of domination-submission, legitimizing the configuration of society, criticizing political power, brainstorming, action models, political and social programs, learning and education[5]. It seeks to understand its place and role in the new socio-political and economic conditions, advancing alternative projects and models for the development of postmodern society. That is why the multidisciplinary study of intellectuality as a specific social phenomenon is very current. Intellectuals have fulfilled a social mission of major importance, because the ideas, concepts and theories developed by them in the field of philosophy, science, culture or religion have always been the basis and means of transformations of social, political, cultural and economic nature of social existence. Currently, belonging to this specific social stratum called intellectuality, especially in the conditions of the society in transition from the totalitarian to the democratic system, means having the courage to publicly evaluate the crucial events that take place in society, which are usually related by the activity of the state power bodies. Therefore, being intellectual means taking part in the political life of society. Under these conditions, courage is needed to support the actions of state power, but especially, if necessary, to hold a speech on the positions of conscience criticizing the actions of political power.

Several types of intellectuals are elucidated in the literature, but the emphasis is on two of them: the „universalist" intellectual and the „specialist" intellectual. In the opinion of

Michel Paul Foucault, the „universalist" intellectual of the twentieth century. of the XIX – the beginning of the sec. the twentieth century originated from a determined political figure: from the legal jurist, who opposed power, despotism, who abused and showed impropriety in the face of wealth through universal justice and the fairness of the ideal law[6]. What we today call „intellectual" arose, in M. Foucault's opinion, from the legislator, or from the man who defends the universal character of the just law, often in rivalry with the professionals of justice. The universalist intellectual comes from the respectable legislator and discovers his full incarnation through writers as bearers of the meanings and values that are characteristic of any human being.

The intellectual-specialist arises from other circumstances, not from the mouth of the „respectable legislator," but from the „scientist who knows." M. Foucault considers that the type of intellectual-specialist appeared after the Second World War, which contradicts the intellectual-universalist. This new figure has an original political importance: it offered the possibility if not to weld, then, at least, to innovatively formulate the neighbouring categories that remained separate. If until then the intellectual was predominantly a writer with a general conscience, it was a free subject that was opposed only by specialists who served the state or capital. However, at the moment when the initial point of politicizing the society became the special activity of each intellectual, in these conditions, the art of writing, as a sacramental peculiarity of the intellectual, gradually disappears. M. Foucault considers that the intellectual-specialist was the physicist-atomist, rather Robert Oppenheimer, professor of theoretical physics at Berkeley University of California, who served as a transmission belt between the intellectual-universalist and the intellectual-specialist, because he had a direct and localized connection with education and scientific knowledge. Oppenheimer manifested himself as a physicist-atomist, on the grounds that the danger posed by the nuclear weapon threatened all mankind, all the human race, the fate of all mankind, and his reasoning could at the same time become judgments about universality. Relying on the worldwide outrage over the emergence of the weapon of mass destruction, the atomic scholar was forced to serve the common cause of civilization – peacekeeping and ensuring the principle of continuity of development of human generations, based on the specific situation determined by knowledge. accumulated. According to M. Foucault, it was then that the intellectual was first subjected to persecution by the political power, not for general reasoning, but because of the concrete knowledge, the holder of which he was, on the grounds that at this level he is a danger. for the political class. Another example of an intellectual-specialist was the Russian academician, Nobel Peace Prize winner Andrei Sakharov, who believed that among the virtues of scientist's great importance must have been given to responsibility for their actions before society, on the grounds that no one can be free not to take responsibility for other people. He wrote about this and fought with intolerance, bigotry and oppression for the morality and social responsibility of scholars. He did not hide behind the idea that the use of the results of science does not depend on scientists, but on state institutions, he showed courage and defended the principle of morality and social responsibility of the scientist for the protection of human rights, dignity and freedom of expression. The USSR, where a totalitarian communist regime ruled, persecuted him and exiled him for his actions.

Based on the typology developed by M. Foucault, Sorin Adam Matei, author of the volume Boyar of the Mind, launched, as coordinator, a collective volume of essays Idols of the Forum, which is the collective response of an impressive number of specialists in the

social fields, political, literary and philosophical. In the articles published in this book, she „unmasks" the so-called „elite of public intellectuals" as idolatry, and advocates a „middle class of the spirit". They seek to answer two fundamental questions about the society in which they live: Why do encyclopaedic public intellectuals believe that their lack of specialization gives them a greater right to speak from an imaginary podium, soaring above the „masses"? collective issues? Why are specialized intellectuals so little heard in public life? In this paper, an attempt is made to discuss the latent problems that the fascination with the idea of elite intellectual, generalist, encyclopaedic, moralizer brings with it. The opinions gathered in this volume reject this model and converge on a different vision, which proposes a model of social behaviour that includes, but does not exclude. The conclusion that emerges from the work of the Forum Idol is that a middle class of the spirit is preferable to the „elite of public intellectuals". Matei opposes two categories of prominent personalities in the cultural world: one, which from a historical point of view, obsolete, that of the „generalist intellectual" or „encyclopaedic", which constitutes the „public elite", enslaved to the cultural public as an idol of the forum, and that of the specialized intellectual, who, however, does not have the aplomb or the opportunity to intervene in the intellectual market as it should be. Furthermore, Matei claims that the „intellectuals-generalists" impose the cult of „genius", he refuses any questioning of his own ideas, based on the consideration that „genius" is infallible. The hardest thing to understand in this text is why the „middle class of the spirit" is no more successful with the public. In fact, S. Matei creates an imaginary opponent, the intellectual-generalist, who, in his opinion, self-idolizes, ignores modernity and criticism. I have previously remarked that in a society intellectuality should be precisely that basis of the spiritual development of society which guarantees, sustains the free expression and true democratization of society.

What do we have at the moment in Romania? Some intellectuals have been and are politically and financially corrupt. They are largely responsible for the perversions and failures of social transformations and without noticeable results of the transition period. This was due to the duplicity of a considerable part of the local intelligentsia, which was and remains devoid of moral values and principles, of national dignity, which erodes their unity and spiritual integrity, making them vulnerable to pressure from power during totalitarianism. communist as well as in the transition period. We must recognize that part of the intellectuals has some authority over the population, have relative access to the media, to promote their personal attitude and assess cultural and political issues. However, if we refer to the intellectual-specialists, we can see that they are not very involved in social life, they do not always take an attitude towards certain problems that society faces.

Therefore, it would be useful for generalist intellectuals, together with specialist intellectuals, to become more actively involved in social life, for them to become a real driving force capable of ensuring social transformations in our country on a constructive path that would result in building a genuine democratic society, with integration into the family of the peoples of Europe, with affiliation with the values of unity – unity, communication, tolerance, solidarity, respect, equality, pluralism, peace, democracy and freedom. It is time for the intellectual elite of this country to become a real landmark and take an active role in social life. They should be vigilant about the evolution of society, as their role is crucial and irreplaceable. Without the participation of intellectuals in socio-political life, in education and culture, we will never have a well-run and organized state, based on general-human moral principles. Only by the active and constant involvement of

the intellectual elite in the life of society, by assuming the mission to address the nation, to „set the tone", to react critically, whenever it deems it necessary to have remodelled and healed society Only in this way can we be reborn and come to occupy a place in this world that is in a continuous process of globalization. Serious people accuse each other of being liars, hysterical, irresponsible, or throwing insults at the most grotesque. These disputes only ridicule the very term intellectual. Georges Clemenceau wrote in the Aurora newspaper that the intellectual is the one who fights against injustices in society. He said that intellectuals are people who aim for social justice, they are citizens who want to see justice applied. The intellectual has this function of resistance to abusive ideas and manifestations, to injustices of all kinds. However, when intellectuals become abusive themselves, when they become oppressors of opponents and censors of ideas that do not suit them, they are downgraded. The intellectual is not the one who generates injustices in his turn, much less the one who injustices his colleagues! These intellectuals are, in fact, „intellectuals", that is, people without understanding, people who do not understand what is important in society. Perhaps this also explains why in Romania we had very few true dissidents in the age of Ceausescu's – because, in fact, we did not have too many authentic intellectuals.

Yesterday's obedient people turned into little dictators today. Just as not everyone who can read and write becomes an intellectual, not even those who were once at the top of the Romanian intelligence elite remain there forever. Because there are also toxic intellectuals who, instead of helping society fight injustice, infest it with their unjust deeds and ideas, which act like cancer cells. Such are the so-called intellectuals of today who, without being compelled by any repressive system, continue to practice denunciation against their own colleagues. They become carriers of a disease that disqualifies them from the position of possessors of intelligence. Because true intellectuals are not represented by that thin layer of the educated bourgeoisie, they are not necessarily doctors who read novels, lawyers concerned with cinema, or civil servants who struggle to read, or actors or theatre critics who know little political philosophy. Not even graduates of master's degrees and doctoral studies run on tape are automatically intellectuals. Intellectuals are the „masters of thought", the protectors of collective reason, the creators of meanings in the realm of ideas. They are the ones who have the ability to intervene critically in society. We need people who are able to think independently, to conceive ideas autonomously, to generate knowledge and ideational progress. Where are the people with fresh ideas from contemporary Romania? What innovations have the self-proclaimed leaders of Mioritic intelligence brought to the history of European and world thought? Or what contributions have they made to the betterment of their society? Romania was once ruled by intellectuals. I am thinking of an era when the Prime Minister of Romania was Mihail Kogălniceanu – historian, prose writer, director of literary publications; an era in which school inspector, journalist, leader of public opinion was Mihai Eminescu; an era in which the critic, aesthetician and philosopher Titu Maiorescu was the prime minister of this country. We can only wonder: what happened to the intellectuals of this country?

In Romanian academic culture, superficiality is king and incompetence is king. According to Academician Ioan-Aurel Pop, President of the Romanian Academy, plants and animals, the Renaissance and humanism, the great geographical discoveries, the difference between the Alps and the Andes Mountains or between Latin and Latin America? There are many people today, especially among the representatives of the new generations, who do not feel any handicap in their lack of culture, in their ignorance, in their

intentionally emptied minds and who – educated for the contingent and accustomed to living the moment – will so that in school not knowledge is acquired, but only skills, only living and survival techniques, only ways of adapting to the environment. Man's adaptation to the current life he lives has never been done through practical disciplines that exclude those considered „theoretical", but through serious theory that explains everyday life well. That is why it is nonsense to say that mathematics is useless, because students will never use integrals or limits in life. Mathematics is present in all the fibres of contemporary man, in all the events of daily life, but it must be studied in school in order to be used. Otherwise, the measurement of a plot of land, the expression of a percentage, the simple rule of three or the transformation of hectares into square kilometres become problematic. You will say that the computer does all this now. Fake! Man does them with the help of the computer, and if man does this mechanically, without understanding and being able to explain what he is doing, then contemporary man has already become a mechanism, ceasing to be human. In literature, a student can no longer read all the important novels of mankind or Romanians, nor does he accept to mechanically take the opinions of literary critics and historians and learn them by heart. But that doesn't stop him from saying that nineteenth-century literature – for example – is obsolete and claiming sports texts, natural disaster reports, regulations and instructions, and so on. instead of literary texts. Classical reading can be complemented by literature-inspired film (and literary art can be combined with cinematic art). Instead of boring texts from established critics, debates can be held and students can be guided to discover for themselves the meanings of a literary text. But the literary text cannot be replaced by the ordinary text! Of course, the years have passed and the school is forced to keep up with life, but not throwing overboard the real values in favour of some illusory ones. And European, national or local education programs are very important, but we do not lack them, first of all, but the application of existing laws, the removal of education from the status of ash, the serious treatment of the school. Otherwise, we will destroy, without bombs and pandemics, but step by step, this people".

From this perspective, the issue of education reform in Romania is something I think about a lot. I am Romanian and I care about the country and I would like to see that Romania is doing better. I think there is no other state system more important than education. If you want to change a country, you have to start here. And if you have an efficient education system, the standard of living and culture rises. So we should also give priority to education. My idea for change is relatively simple. We should not reform but reinstitutionalizing. We know from classical theories of organizations since Max Weber that bureaucracies are resistant to change. That is why reforms often fail. Reforming an organization is almost a contradiction in terms. Instead of reform, which has already failed so many times in Romania, we should probably think about refunding and reinstitutionalizing. What would it be like to take the model of the fathers of modern Romania from the 19th and 20th centuries and start to create new institutions? I think that at the university level we would like a new institution with sufficient funds, both public and private, which has very high selection criteria and which would focus exclusively on educating and supporting the best researchers in all fields of knowledge. This institution would not replace the current system, but would complement it. We would have professors, researchers of the highest level who would collaborate with other Romanian and foreign universities. At pre-university level we could start by creating a new institution for training pre-university teachers on very clear and innovative criteria. Of course, I think that if

Romania were to follow this path of institutional innovation, we could also attract European funds and increase our visibility a little because we would do something interesting and new. How is it possible that after 30 years, of which 10 as an EU member state, the political class is equally affected by corruption and incompetence? Maybe I will surprise you when I tell you that I am more optimistic now about the situation in Romania than I was a few years ago. Of course, things are not ideal, but if we look around us and the international situation, we somehow appear as an exception to stability and, even if we have corruption, justice as it is, still has somehow done its job and civil society he reacted promptly to the worst manipulations. What I would most like for the country in the future would be to enjoy a maturation of our political class against a background of resistance of civil society to any tendency to decline. If we do this, we could enjoy an unexpected rise in our geopolitical importance and relative power in Europe. I show that globalization is also linked in the post-truth era to the paradigm shift of the world. Of course, what is meant by this is just the idea of radical transformation, and that when the world changes, change happens extremely quickly. Me now, seeing what is happening in America and Europe, if we are not again in such a moment of sudden change, this time of the international system. Yes, we are in the middle of the post-truth era.

„Post-truth" was named the 2016 word of the Oxford Dictionary. How would you describe the post-truth world? It seems that the factual truth matters less than ever. I went through these moments as if at the very beginning of the 20th century, when mass literacy made the press the main way to get information. Then the result was mass manipulation and the triumph of ideology. Now, the place of the press has been replaced by the Internet, and we are still in the age of the Wild West in the field of the Internet, in which the guarantees of factuality have not yet been established. In the early 20th century, the result of ignoring the truth was war, racial hatred, genocide. Will we repeat this story? I certainly don't want to force analogies, but the similarities are bizarre. Let's hope that history just rhymes and doesn't repeat itself. Let's not forget that the moment 1918 was essential in the country's history, because we emerged victorious from that macabre spectacle that was the First World War, and despite all expectations, the Romanians fulfilled their secular dream of being sovereign and autonomous in the territory there. The Romanian politicians of that period played an extremely skilful alliance with France, which wanted to end the Austro-Hungarian Empire once and for all. We should think back to those people who came out of the world uncomplicated and served our best interests, not just theirs as individuals. At the same time, we must think that 1918 was not only a victory but also an end of the road for our country, because once the transcendent political ideal of all Romanians was fulfilled, we were left without an ideal. After 1918 we struggled to find our identity and our purpose, and even today it has not found its solution. Our national anthem is „Wake up Romanians". Initially the idea was to wake up to unite as a nation, but today why wake up? A man who must always remember that he must wake up, still sleeping. I think that at some point we need to stop understanding our country as being in constant transition to something else and become that something. We are, after all, the most important country in South-Eastern Europe, the seventh largest country in Europe and the eleventh largest in terms of population. It is absolutely paradoxical and incomprehensible that, due to internal disorganization, we are not able to occupy at least the position of power and responsibility that we deserve in Europe. This is the great tragedy of contemporary Romania and probably

a national project would be to regain our dignity and play in Europe the natural role we must play.

The need for integrity is a priority, and preventing breaches of ethical norms is meant to strengthen trust in social relations. Romanian society is currently constructively concerned with one component of ethics, namely integrity in various sectors of activity. In consolidating the rule of law, individual integrity is reflected globally in the way social relations take place, generating the need to establish transparent standards in this regard, in terms of recruitment in professions in general, in legal ones in particular, in the activity of civil servants, their interaction with the private environment, the notification of some dysfunctions regarding the cumulation of functions, which attract incompatibilities, procedures and ways to prevent the conflict of interests and abuse of office, the need for compliance. We need, more than ever, a recourse to ethics and academic integrity to become aware of immoral behaviours in order to combat them because the Romanian has a vocation for holiness, that is, a strong and steadfast faith in God. There were moments in history when the destruction of Romania was wanted and we are talking about the beginning of the First World War. But God intended otherwise. I don't know if today's times are any different, but I'm convinced that God has not turned his face away from us.

5. Instead of conclusions. Are the transformations of law in the national and European space after 1989 the fruit of intellectuals?

As we have seen on other occasions, through the scientific approach, this study seeks to reaffirm its position on the role of the Romanian intellectual in the labyrinth of transformations of law in the national and European space after 1989, a laboratory of thought open to different schools. and current, to promote not only national diversity, but not as a validation court for theoretical legal ideas and constructions, in the conditions of pluralism, controversy, dialogue and debate, creativity and legal foresight, in a global world, increasingly unpredictable in which contemporary law reveals that the legal world is multiple, heterogeneous, complex, interactive and fluid. The complexity and vastness of the legal phenomenon gives rise to an appetite for legislation, which tries to keep up with the multitude of forms in which it materializes and acts. Although the regulation tries to solve the problems, the simplification of the ways, in reality, the consequence is, as a rule, the opposite. And instead of reducing the bureaucracy, reducing the procedures, simplifying the ways, it is more complicated, not only is it regulated, much, it is „over-regulated", but it is also poorly regulated. In addition to the agglomeration of legal norms, we also face the rhythm, with an instability with which it is very difficult to keep up, along with the concern to find legal solutions not general, but specific, the Constitutional Court, called to make order in this „debauchery" of the phenomenon of legal regulation, he constantly points out that public authorities must exercise their competence within constitutional limits, not arbitrarily. Referring to the legislature, she ruled that „accepting the idea that Parliament may exercise its power of legislative authority in its discretion, at any time and under any conditions, by adopting laws in areas which belong exclusively to illegal, administrative acts, would be equivalent to a deviation from the constitutional prerogatives of this authority enshrined in art. 61 para. (1) of the Constitution and its transformation into an executive public authority". Mutatis mutandis, neither the Government, as the delegated legislator, can replace the Parliament, which is the only legislative body, becoming a legislature. „ In this context, the modern paradigm of the role of the intellectual in today's world is increasingly

configured in the sense of connecting the scientific approach in all its diversity to the general network of knowledge, where each can prove its potential for solving contemporary problems with other entities. of knowledge. At the same time, it would be desirable that these debates on current issues, which are in the attention of the world of lawyers, but also of the whole society, be consistently aimed at conveying a message of unity and solidarity for Romanian lawyers, as well as a plea with theoretical arguments. and practical in order to uphold and strengthen the rule of law based on an independent, impartial, strong and professional judiciary, with strict observance of the law, human rights and fundamental freedoms in both public administrations. Today's Romania needs more than ever clear, concise, predictable legislation that facilitates social cohesion, welfare and economic growth, as well as a lower level of inequality. Any slippage from the constants, the fundamental principles of law, politics, economics etc. in favour of small groups temporarily and conjuncturale in power, it would be a danger for any democratic construction, not to mention a still fragile one such as the one in Romania. That is why it is time for intellectuals to be more united than ever and to send a strong message in favour of the rule of law and the independence of the judiciary. Let's get out of festivity and resignation! We can't afford to go on without breaking the bank. I remind you that Romania did not have a lustration, so that after the fall of the communist regime in the administration, the Securitate civil servants continued to work in the same way in all legal professions and not only. It's time to dump her and move on. finally revealed. It is never too late for the truth, and for the recovery of the Romanian public administration it is important to shed light on the dark judicial system.

Bibliography

The following bibliographic indications have no other purpose than to provide a general orientation to the reader who would like to deepen any of the researched ideas. As a source for the problem of the role of the Romanian intellectual, the reader will have to resort to libraries and archives, both public and private. With regard to our topic, we appreciate that the treaties and works below are comprehensive.

Djuvara Mircea, General Theory of Law, All Beck Publishing House, Bucharest, 1999;

Popa Nicolae, General Theory of Law, All Beck Publishing House, Bucharest, 2002;

Popescu Sofia, General Theory of Law, Lumina Lex Publishing House, Bucharest, 2000;

Ioan-Aurel Pop, History, truth and myths, Encyclopedic Publishing House, Bucharest, 2014;

Ioan Leş, Contemporary Legal Institutions, C.H. Beck, Bucharest, 2007;

Alain Supiot, Homo Juridicus, Rosetti Educational Publishing House, Bucharest, 2011;

References

[1] Mirel Curea, *The career of a Romanian genius, drowned* in the pit of Political Correctness, taken from the website: https://evz.ro/cariera-unui-roman-de-geniu-inecata-in-haznaua-corectitudinii-politice. html.

[2] Ibidem.

[3] Walter Lippmann, *Public Opinion*, Editor, Harcourt, 1922. Walter Lipmann was one of the first American political scientists to find that democracy often uses methods of propaganda, an example he used being that of American intervention in World War I. being

against this intervention. All these observations were made in the essay Public Opinion, which has had and continues to resonate among those who study the phenomenon.

[4] Valeriu Capcelea, *The importance of the specialized intellectual for the progress of the postmodern society*, taken from the site: https://ibn.idsi.md/sites/default/files/imag_file/231_237.

[5] Valeriu Capcelea. *The functions exercised by intellectuals in social life*, in: Studies and research in the field of socio-human sciences. Vol. 30. Cluj-Napoca: Editura Limes & Argonaut, 2017.

[6] Andrei Pleşu, *Self-criticism*, in: Dilema Veche, 2004, no. 24, pp. 24-30.

THE LEGAL NATURE OF THE RIGHTS OF THE ADMINISTRATIVE-TERRITORIAL UNITS AND THE STATE OVER THE VACANT INHERITANCE

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Abstract
The inheritance is declared vacant, in accordance with the law, when there are no legal or testamentary heirs, or if there are, they cannot or do not want to collect an open succession, and in this case, the goods enter the private property of the Territorial Administrative Unit.

Keywords: *succession, successive, succession vacation, vacant inheritance, succession option*

1. Introduction

According to art. 953 of the Civil Code, „inheritance" means the transmission of the patrimony of a deceased natural person to one or more persons in existence (natural persons legal persons, administrative-territorial units – commune, city, municipality, as the case may be – or the state. may understand that legal and testamentary inheritance are ways of acquiring property rights, as provided for in Article 557 (1).[1]

Also, instead of the notion of „inheritance", the term „succession" is frequently used.

In this sense, for example, the Civil Code provides in art. 627 para. 5 that

„The transfer of the property by inheritance cannot be stopped by stipulating inalienability".

According to the source of the succession vocation of those who acquire the deceased's patrimony, the inheritance is (in principle) of two types: legal and testamentary.

2. The seat of matter

The inheritance is guaranteed by the provisions of art. 46 of the Romanian Constitution.[2]

The most important regulations are contained in the Civil Code, Book IV, entitled „On inheritance and liberalities", Title I „Provisions on inheritance in general" (art. 953-962), Title II „Legal inheritance" (art. 963-983) and Title IV „Transmission and sharing of inheritance" (art. 1100-1163).[3]

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[1] „The right to property may be acquired, in accordance with the law, by convention, legal or testamentary inheritance, accession, usufruct, as an effect of the possession of good faith in the case of movable property and fruit, by occupation, tradition, and by court decision, when it is a transfer of ownership by itself".

[2] The Constitution of Romania of November 21, 1991 published in the OFFICIAL GAZETTE no. 767 of October 31, 2003, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003.

[3] Starting with October 1, 2011, the new Civil Code enters into force, adopted by Law no. 287/2009, republished in M. Of. no. 505 of July 15, 2011, pursuant to art. 218 of Law no. 71/2011 for implementation (Official Gazette no. 409 of 10 June 2011). The provisions on inheritance are contained in Book IV, entitled „On inheritance and liberalities" (art. 953-1163 new Civil Code).

The vacant inheritance is regulated in art. 1135-1140 of Chapter II (Vacant Inheritance) of Title IV (Transmission and Sharing of Inheritance) of Book IV (On Inheritance and Liberalities) of the Civil Code.

3. The notion of vacant legacy

In order to define the notion of vacant inheritance, we will mention the legal texts that refer to it, as follows:

- according to art. 963 para. (3) of the Civil Code, „in the absence of legal or testamentary heirs, the patrimony of the deceased is transmitted to the commune, the city or, as the case may be, the municipality in whose territorial area the goods were at the date of opening the inheritance";

- art. 553 (3) The Civil code, stipulates that the vacant inheritances, located abroad, belong to the Romanian state;

- according to art. 1135 of the Civil Code, „if they are not legal or testamentary heirs, the inheritance is vacant. If only a part of the inheritance has been assigned by the legatee and there are no legal heirs or their vocation has been restricted as a result of the will left by the deceased, the part of the inheritance left unassigned is vacant".

The total absence of legal or testamentary heirs is equivalent to the total succession vacation. There are no legal or testamentary heirs even in the event that the heirs do not want or cannot inherit, because in these situations they are foreign to the deceased's inheritance.

There will be a total succession holiday in the following situations:

- the deceased has no surviving spouse and no legal heirs in the four classes of heirs, and by will he did not establish legatees;

- the deceased has only non-reserved legal heirs whom he totally disinherited and did not establish legatees.

The following situations may also be considered in which the partial succession leave occurs:

- when there are no legal heirs of the deceased, and by will, legatees have been established with universal title or with private title for a part of the inheritance, which means that for the rest of the inheritance the succession vacation occurs.

If the testator has established universal legatees, the succession vacation cannot exist, as they have a succession vocation for the entire inheritance;

- when the legal heirs are disinherited and the testator establishes bequests regarding a part of his property. In this case of succession holiday, a distinction must be made between the situation of the existence of reserved and non-reserved legal heirs. In the case of disinherited legal heirs, they will collect the reserve reserved by law, the legatees will collect the part of the estate according to the will of the deceased manifested by will, and the rest of the inheritance will become vacant. In this case, the legal inheritance will coexist with the testamentary inheritance and the vacant inheritance. In the case of non-reserved heirs, they can be completely disinherited, in which case the legatees will collect the part of the succession mass assigned according to the will, and the rest of the inheritance becomes vacant;

- the situation in which the testator disinherits his reserved heirs and does not establish legatees, in which case the reserved heirs will collect the reserve and the rest of the inheritance will be vacant.

4. Beneficiaries of the vacant legacy

In the process of drafting the Civil Code, it was considered that – in order to support local communities and better manage the assets that are part of a vacant legacy, amid the accentuation of the decentralization process[4] – it is more appropriate to state that, in In principle, the vacant inheritances no longer belong to the state, but to the territorial administrative units (commune, city or municipality) and only where this is not possible – respectively in the case of vacant inheritances abroad – they belong to the state.[5]

Taking into account the fact that the legal regime of vacant inheritances also belongs to the matter of „Goods", the indication of the beneficiaries of vacant inheritances is not only found in the book dedicated to inheritances, but also in the one regarding goods.

Corroborating the texts of art. 963 para. (3), art. 553 para. (3) and art. 1138 The Civil code. it is observed that the beneficiaries of the vacant inheritances are the administrative-territorial units and the state, as the case may be.

Thus, according to art. 1138 of the Civil Code, „the vacant inheritances belong to the commune, the city or, as the case may be, to the municipality in whose territorial area the goods were at the date of opening the inheritance and enter their private domain (…)", and the vacant inheritances, located abroad, belong to the Romanian state [art. 553 para. (3) The Civil code]. Last but not least, we must remember that the legal provisions that assign vacant inheritances to the private domain of the administrative-territorial units (commune, city, municipality) are imperative, and their application cannot be removed by the deceased by will.

Thus, according to art. 1138 of the Civil Code, any testamentary disposition is considered unwritten, which, without stipulating the transfer of the assets of the inheritance, seeks to remove the right of the administrative-territorial unit to collect the vacant inheritance. Instead, the deceased can prevent the legacy he leaves from becoming vacant by establishing legacies that have a vocation to his entire fortune.

5. The legal nature of inheritance rights over vacant inheritances

The right of inheritance over the vacant inheritance is a special right of inheritance, which cannot make it possible to assimilate its beneficiaries with the category of legal heirs (relatives of the deceased and his surviving spouse), as the vacant inheritance is not confused with legal or testamentary inheritance. The acquisition of property over the vacant inheritance is based on the provisions of art. 557 para. (3) The Civil code.[6]

A controversy has arisen in the specialized legal literature[7] regarding the legal nature of the state's right over the vacant inheritance:

a) in a first opinion[8], the state collects the goods of the vacant inheritance under the right of sovereignty, as it collects any property without owner from its territory;

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[4] According to art. 2 lit. 1 of the Framework Law on decentralization no. 195/2006 (published in the Official Gazette no. 453 of May 25, 2006) „decentralization" means „the transfer of administrative and financial competence from the central public administration to the local public administration or to the private sector".

[5] Romeo Popescu, Treaty of Succession Law, 3rd edition, updated and completed, vol. I, Legal inheritance, Legal Universe, Bucharest 2013, p. 280.

[6] Article 557 para. 3 of the Civil Code stipulates: „The law may regulate other ways of acquiring property rights".

[7] Ion Dogaru (coord.), Civil law. Successions, Ed. All Beck, 2003, p. 124.

[8] M. Eliescu., M. Eliescu, Her inheritance and devolution to R.S.R., Edit. Academy, Bucharest, 1966, pp. 146-148.

b) according to the second opinion, which belongs to the majority of the doctrine[9], the state acquires the succession based on a right of legal inheritance, a thesis that we share in this study, because:

- first of all, the state, like any other irregular heir, is obliged to apply for possession, as it is not a cesarean heir.

Therefore, this obligation of the state contradicts the idea of exercising a right of sovereignty, because in this situation there would be no need for possession;[10]

- secondly, the state is no different from other ordinary heirs.

6. Peculiarities of vacant inheritance rights

The succession vacation can be ascertained by the notary public or by the court, and the administrative-territorial units or the state, as the case may be, will collect the vacant inheritance, by virtue of the law, from the date of its opening. The certificate of succession holiday and the court decision are declaratory of rights, and not constitutive of rights, operating retroactively from the date of his death.

Article 1139 para. (1) The Civil Code stipulates, in its content, that „the inheritance is acquired retroactively from the date of its opening".

a) The notary public has the possibility, based on the provisions of art. 1136 para. (1) NCC, to appoint a special guardian of the inheritance, in the event that the inheritance has not been accepted or if the successor is not known. The special trustee has the duty to defend the rights of the eventual heir. The provisions of art. 1117 para. (3) and (5) NCC.[11]

Also, if the inheritance has not been accepted or if the successor is not known, the actions against such inheritance will be directed against a special curator, appointed by the competent notary public, at the request of the plaintiff [art. 1136 para. (2) NCC].

Thus, the appointment of a special curator can be made only by the notary public, competent from a territorial point of view, and only in the event that the inheritance has not been accepted (there are known successors) or if the successor is not known.

Therefore, two situations are distinguished: – the notary public must make this appointment, if there is a dispute regarding such an inheritance and the plaintiff requests this; – the notary public can make such an appointment, whenever, regarding an inheritance that has not been accepted or whose succession is not known, there is no dispute.

b) According to the provisions of art. 1136 para. (3) NCC, „If there are indications that the inheritance is to be declared vacant, the competent notary public shall also inform the body representing the commune, the city or, as the case may be, the municipality".

Such an indication would be the absence of the deceased's legal heirs, doubled by the absence of a will of his, containing legacies.

c) According to the provisions of art. 1139 para. (1) NCC, „The commune, the city or, as the case may be, the municipality enters into the de facto possession of the inheritance as

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[9] C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, Romanian Civil Law Treaty, vol. III, Edit. All, Bucharest, 1998, p. 413; Fr. Deak, *op. cit.*, pp. 156.

[10] I. Dogaru (coord.), *op. cit.*, pp. 124.

[11] According to art. 1117 para. (3), „If the preservation of the assets of the inheritance requires certain expenses, they will be made, with the approval of the notary, by the custodian provided in par. (1) or, in the absence of the custodian, by a special curator, appointed by a notary for the administration of the property. „ According to para. (5), of the same text of the law, „The custodian or curator is obliged to return the goods and to account to the notary on the expenses of conservation or administration of these goods at the end of the succession procedure or when the notary deems it necessary".

soon as all known successors have renounced the inheritance or, at the fulfillment of the term provided in art. 1137, if no heir is known. The inheritance is acquired retroactively from the date of its opening".

d) The commune, the city or, as the case may be, the municipality does not have the right of succession option. According to the provisions of art. 1139 para. (2) NCC, „The commune, the city or, as the case may be, the municipality bears the liability of the vacant inheritance only within the value of the goods from the succession patrimony".

As a result, the beneficiaries of the inheritance rights over the vacant inheritance are not recognized the possibility to opt for it, using the two valences of the succession option, accepting the inheritance and renouncing it.

As for the vacant inheritance, the beneficiaries of the succession rights over it are always considered accepting, bearing the succession liability, only within the value of the succession assets (intra vires hereditatis). As the right of option of succession is not recognized to the commune, the city or, as the case may be, to the municipality, the term of one year is not relevant, the notary finds the succession vacancy at the request of an interested person inheritance.

The same reasoning also eliminates the need to draw up an inventory of estate assets.

e) The commune, the city or, as the case may be, the municipality is the sesara heir. In the light of the new Civil Code [art. 1,126 para. (1)], which does not list the commune, the city or the municipality among the sessile heirs, the issue of the seat of the beneficiaries of the succession rights over the vacant inheritance remains controversial. However, in light of the provisions of art. 1139 para. (1) NCC, according to which the commune, the city or the municipality enters into de facto possession of the inheritance as soon as all known successors have renounced the inheritance or, at the fulfillment of the term provided in art. 1137, if no heir is known, the beneficiaries of the succession rights over the vacant inheritances are sessile heirs.

f) A succession holiday certificate is issued to the commune, the city or, as the case may be, to the municipality [art. 553 para. (2)]. Since the coexistence of the succession holiday with the legal and / or testamentary inheritance is admitted, in practice, the situation can be encountered in which the notary public issues, regarding the same inheritance, both the certificate of heir and the certificate of succession holiday.

It also cannot be ruled out the hypothesis that the administrative-territorial units, beneficiaries of the succession rights over the vacant inheritances, should be issued a certificate of heir, insofar as they were gratified by will by the deceased. Moreover, it is possible that the said legal persons may be issued two certificates, relating to the same inheritance: one of the heir, as they were established by the deceased as legatees, and one of succession leave, for the rest of the inheritance, remaining vacant due to the absence of the deceased's heirs. At the same time, in the absence of goods, no succession holiday certificate can be issued.

In such a case, in the conclusion in which it is found that there are no goods, the specification regarding the absence of the heirs of the deceased is also made, the file being closed with the mention „without wealth", according to art. 110. of Law no. 36/1995 according to which: „If the notary public finds that there are no assets in the succession table, he orders by conclusion the closure of the succession procedure and classifies the case as without object".

Therefore, the last three features also characterize the succession rights of the Romanian state[12] over vacant inheritances abroad.[13]

7. Conclusion

In concluding this study, we conclude by defining the right of inheritance over the vacant inheritance as a special right of inheritance, which cannot make it possible to assimilate its beneficiaries with the category of legal heirs (relatives of the deceased and his surviving spouse) and by emphasizing the distinction types of inheritance, so that the vacant inheritance is not confused with either the legal or the testamentary inheritance.

[12] The state can be established by the testator as legatee, thus creating a testamentary succession vocation, even in the light of the provisions of the new Civil Code, which assigns vacant inheritances located on the territory of Romania, commune, city or, as the case may be, municipality.

[13] Titu Ionașcu, Particularities of the rights over vacant inheritances, Annals of the „Constantin Brâncuşi" University of Târgu Jiu, Legal Sciences Series, Nr. 4/2014, pp. 51-54.

THE ACTIVE ROLE OF THE ADMINISTRATIVE-TERRITORIAL UNITS IN THE PROCEDURE OF TRANSFERRING LAND LOCATED IN THE COUNTRYSIDE TO THEIR OWNERSHIP

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Introduction

A specific individual asset or, equally, a universality of assets, if the *de cuius* has no heirs, the State is responsible for taking an active position with a view to taking possession of them. Article 680 of the old Civil Code expressly regulated the legal status of property subject to vacant inheritance: „In the absence of legal or testamentary heirs, the property left by the deceased shall pass to the State[1]".

With regard to the „duty" of the State or the administrative-territorial units to take an active role, it is also necessary to mention that, compared to the other heirs, the State or the commune, town, or municipality „does not have a right of inheritance option".

In this case, the State or the administrative-territorial units will collect the property – vacant inheritance with „title of an heir"[2], several provisions reinforce this reasoning:

- the fact that Article 963(3), which provides for the legal regime of vacant inheritances, is located in Title II 'Legal succession – Legal heirs';
- the fact that the state or commune, town, city or municipality will acquire the inheritance by universal title;
- the fact that the State or administrative-territorial units acquire the *de cuius* estate, bearing the liabilities of the inheritance;
- the fact that the notary public issues the certificate of inheritance vacation.

Over the years we have witnessed several legislative changes concerning the legal status of assets subject to vacant inheritance, as well as the regulations *per se* in this area.

At present, the law recognizes the right to collect vacant inheritance assets to the Territorial Administrative Units, and according to art. 1138 C. civ. „Vacant inheritances are the property of the municipality, town or city or, where appropriate, the municipality in whose territorial area the property was located at the date of opening of the inheritance and shall become part of their private domain", as well as other legal texts in the same act[3].

According to the legal provisions, there are several cases in which we find ourselves in a situation of total or partial disinheritance:

i. there is no heir of the deceased, legal or testamentary;

ii. by bequest, the *de cuius* has assigned only part of the inheritance and there are no other successors;

iii. although there are heirs, the deceased has restricted their vocation (disinheritance) or they are unworthy;

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[1] Art. 680 Old Civil Code.

[2] Francisc Deak, Romeo Popescu, Succession Law Treatise, Vol. 1, Legal Inheritance, Universul Juridic, Bucharest 2019, p. 287.

[3] Art. 553 alin. (3), art. 963 alin. (3), art. 1.135 alin (2) etc.

iv. the legal or testamentary successors have renounced the inheritance;

v. the legacy is void, if the legatee is incapable, has not accepted the legacy or is deceased, or is revoked for ingratitude.

If we find ourselves in one or more of the cases described above, the property that is the subject of the vacant inheritance shall, following the procedure expressly provided for by law, become the property of the municipality, town or city where the property is located.

As mentioned in the introduction, an inheritance can comprise several assets or a single asset. If the inheritance is a piece of land located in the countryside and the inheritance is declared vacant, then the procedure of Law 18/1991 must be followed, where the administrative-territorial unit has an active role in taking over the property.

1. The procedure of transferring land to the ownership of Administrative Territorial Units

According to the legal provisions, the land located in the urban areas of the municipalities, which belonged to persons who have no heirs or, as mentioned above, exist but have no vocation, passes into the private property of the administrative-territorial units.

Land which is the subject of reconstitution of ownership in favor of the former owner or his heirs is subject to the special provisions of Law 18/1991 – Land Law, republished, with subsequent amendments and additions.

Thus, according to article 26, the land located in the urban areas of the localities, remaining at the disposal of the local public administration authorities, from persons who are deceased and/or have no heirs, shall pass into the public property of the administrative-territorial units and into the administration of the respective local councils, on the basis of the certificate of inheritance vacancy issued by the competent notary public. Consequently, according to the second sentence of this article, the administrative-territorial unit acquires the right of ownership and must play an active role in the possession and disposal of the land.

The representative of the administrative-territorial unit in this procedure is the secretary (general) of the administrative-territorial unit, who is responsible for various tasks. First and foremost, he or she is responsible for registering the deaths of persons who have owned land located within the municipality's boundaries and for providing the relevant chamber of notaries public with the necessary data for the succession procedure.

This obligation is also expressly laid down in the Administrative Code in Article 243(3). Concerning the duties of the secretary general of the administrative-territorial unit: „The secretary general of the commune, town, municipality or administrative-territorial subdivision of the municipality shall communicate a request for the opening of the inheritance procedure to the Chamber of Public Notaries and to the land registry and real estate publicity office in whose territorial district the deceased had his last residence".

This request must contain the following information:

- Name, surname and personal number code of the deceased;
- Date of death, in the day, month, and year format;
- Date of birth, in the day, month, and year format;
- Last place of residence of the deceased;
- Movable or immovable property of the deceased registered in the tax records or, where applicable, in the agricultural register;

- Details of any successors, in the format of surname, forename and address at which service is to be effected.

1.1 Procedural provisions: time limit, the competence of the secretary, sanction etc.

Conditions required for the procedure of taking possession of land located in the countryside:

1. The land must be located within the urban area of the municipality;
2. The land is left by deceased persons who have no heirs;
3. The active role of the secretary of the territorial administrative unit concerning;

- Timely registration of deaths;
- Requesting the certificate of in heritance.

The Secretary General of the administrative-territorial units – a position established in 1860, which was originally called notary „as a body with complex duties at the level of rural communes... a key figure in the communal administration, at a time when, as a rule, communal councilors were chosen more for their intelligence, moral and material qualities and less for their attitude in the field of writing and reading, the vast majority being illiterate[4]".

Thus, in the procedure provided for by Law 18/1991 on the reconstitution of property rights, the public official exercises powers in relation to the citizens of towns, communes and municipalities, as well as in relation to other subjects of law such as the National Union of Notaries Public, chambers of notaries public.

The Secretary General of the territorial administrative unit has 30 days to notify the Chamber of Notaries Public of the information necessary for the competent notary public to start the debate on the inheritance procedure and issue the certificate of inheritance vacancy.

If the secretary of the administrative-territorial unit does not comply with the obligations and duties provided for in Article 26 of the Law, as well as in other normative acts, he shall be administratively sanctioned.

According to Art. 241 (3) lit. (f) if the public official does not transmit within the time limit provided for in Art. 243 para. (3), i.e. within 30 days, to the Chamber of Notaries Public the referral for the opening of the inheritance procedure, then this conduct, according to the Administrative Code, constitutes a contravention.

The penalty prescribed by law for this is a fine of between 1,000 lei and 5,000 lei, and the prefect is responsible for establishing, monitoring, and applying this penalty „in his capacity as a public authority, representing the Government at the local level".

The provisions of Article 26 of Law 18/1991 provide for administrative liability „failure by the secretary of the administrative-territorial unit to fulfill the obligation provided for... shall be administratively sanctioned". Administrative liability occurs from the moment public officials culpably breach their duties, for which sanctions such as written reprimand, reduction of salary rights etc. are applied, following the procedure laid down in the Administrative Code in Articles 492-495.

[4] C.C. Feurdean, Legal status of the secretary of the administrative-territorial unit, Ed. Universul Juridic, Bucharest, 2018, p. 125.

Civil servants are responsible for the performance of the duties assigned to them by the position they hold, as well as the duties delegated to them, thus, the civil servant is obliged to comply with the provisions laid down by law and/or received from hierarchical superiors, in this sense the responsibility of civil servants, as well as the conduct of their activities, must be corroborated with the principle of hierarchical subordination[5].

After the notary public has been notified, she will, on the basis of the documents provided, proceed with the debate of the succession, in accordance with Law 36/1995, ending with the issue of the certificate of inheritance vacancy. This certificate is the title on the basis of which the administrative-territorial unit will acquire the right of ownership of the land located within the urban area of the locality.

The land obtained by the administrative-territorial units can be put into use, concessioned, given free of charge or sold, thus benefiting from a full right of disposal.

1.2 Legal regime of property in the light of the provisions of Law No 18/1991

According to the provisions of Law No 158/2010, which amended Article 26 of Law No 18/1991 on the land fund, the property becomes the „public" property of the state.

The provisions of these articles relate to individually determined assets, namely: land within the urban area of localities, which enters the public domain of territorial administrative units, in the event of inheritance vacancy.

Alin. (2) of the same article expressly prohibits the change of legal status „of the land referred to in para. (1), from the public property of the respective administrative-territorial units to their private property, is prohibited and shall be sanctioned with absolute nullity."

1.3. Legal status of land under the provisions of the New Civil Code

The new Civil Code that entered into force on 1 October 2011 contains provisions contrary to the Land Law regarding the legal regime of vacant inheritance property. According to them, „vacant inheritances are established by a certificate of inheritance vacancy and enter the private domain of the commune, town or municipality, as the case may be, without registration in the land register".

The provisions of the Civil Code are general provisions on inheritance and vacant inheritance, without any distinction being made as to the nature of the property to which they apply. Thus, the provisions apply to all property belonging to a vacant inheritance and must become the private property of the territorial administrative units.

With the entry into force of the New Civil Code, any provision to the contrary is repealed, as ruled by ICCJ Decision no. 22/2016, which upheld the referral to the Court of Appeal of Brasov – Administrative and Fiscal Litigation Section and established: „The provisions of Article 26 of the Land Law no. 18/1991, republished (in the form as of the date of entry into force of Law no. 158/2010 amending Article 26 of the Land Law No 18/1991) were repealed by the entry into force of Article 1.138 of the Civil Code, regarding the legal status of land within the urban area of localities, remaining at the disposal of local public administration authorities, from persons who are deceased and/or have no heirs."[6]

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[5] Tudor CHIUARIU, Romanian Administrative Litigation, Hamangiu Publishing House, Bucharest, 2020, p. 141.

[6] http://www.scj.ro/cms/0/publicmedia/getincludedfile?id=19333.
Preliminary rulings on points of law – Civil Law, Page 24.

As a consequence of the entry into force of the New Civil Code, the repeal of Article 26 is partial. Paragraph (2) of Article 26 is repealed in its entirety, and only the provisions in paragraph (1) concerning the transfer of real estate located within the urban area of the municipality, town or city to their public ownership are repealed.

1.4. Principles governing the legal nature of land located in urban areas in the light of the New Civil Code

The provisions of Article 26 of Law 18/1991 will continue to produce their effects, according to the principle of tempus regit actum, because, with reference to Article 5 para. (1) of the Law implementing the Civil Code 'the provisions of the Civil Code shall apply to all acts and deeds concluded or, as the case may be, produced or committed after its entry into force, as well as to legal situations arising after its entry into force, the new law – the Civil Code, according to Art. 6 para. (1), does not apply retroactively.

The entry into force of the provisions of the Civil Code indirectly repealed the provisions on the transfer of property subject to vacant inheritance to the ownership of administrative-territorial units, applying the principle of lex posterior derogat priori, given that the provisions of Law 18/1991 on this matter are in contradiction with those of the Civil Code, even if a rule of a special normative act is repealed by a subsequent general law.

Conclusion

The active role of the Territorial Administrative Units includes both their rights to benefit from property that belonged to deceased persons and an obligation to make every effort, within the mandatory time limits laid down by law, to take possession of the immovable property – land located in the countryside.

Article 26 of Law 18/1992 provides for the special procedure whereby administrative-territorial units acquire real estate located within the urban area of localities, which becomes their full property following the procedure laid down in this law.

The active position of civil servants in administrative-territorial units must be demonstrated throughout the period of taking possession of the property. They initiate the procedure, carry it out and then, when they take full ownership of the property, take care of it like a good owner.

Among the essential conditions for the transfer of vouchers to the ownership of administrative-territorial units is the condition that the land is a vacant inheritance.

Otherwise, if the certificate of inheritance vacancy is issued in breach of the legal provisions, the persons concerned may bring an action before the court for annulment of the certificate of inheritance vacancy.

For these reasons, in order to prevent disputes that may arise, the administrative-territorial unit must show a continuous active role, to make all the necessary steps in order to acquire real estate land located in the intra-village within the legal limits.

References

1. Deak F., Popescu R. (2019), Succession Law Treatise, Vol. 1, Legal Inheritance, Universul Juridic, Bucharest.

2. Deak F., Popescu R. (2019), Succession Law Treatise, Vol. 2, Testamentary Inheritance, Universul Juridic, Bucharest.

3. Deak F., Popescu R. (2019), Treatise on Succession Law, Vol. 3, Transmission and sharing of inheritance, Universul Juridic, Bucharest.

4. Feurdean C.C. (2018), Legal status of the secretary of the administrative-territorial unit, Ed. Universul Juridic, Bucharest.

5. CHIUARIU T. (2020), Romanian Administrative Litigation, Hamangiu Publishing House, Bucharest.

6. http://www.scj.ro/cms/0/publicmedia/getincludedfile?id=19333 – Preliminary rulings on points of law – Civil Law, Page 24.

7. Vedinaș V. (2020), Annotated Administrative Code, 2nd edition, Universul Juridic,.

8. Baias F.A., Chelaru E., Constantinovici R., Macovei I. (2021), Civil Code. Commentary on articles. Edition 3, C.H. Beck.

THE LEGAL STATUS OF THE HUMAN EMBRYO. TIME OF CONCEPTION AND TIME OF ACQUIRING PERSONHOOD IN MEDICALLY ASSISTED REPRODUCTION[1]

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Abstract

If we did an imagination exercise and imagined a „person", how would that person look like? Would it be an adult human being of discernment? A minor with limited capacity for exercising their rights and assuming civil obligations? A child or a new-born? Or maybe even an embryo that has been conceived in a laboratory? Medical technology today has made it possible to have eggs fertilised with spermatozoids in a laboratory and so to create human embryos in an extracorporeal environment. The best-known medical procedure of this kind is in vitro fertilisation (IVF), through which approximately 8 million[2] children were born. There are numerous international legal instruments and national documents that protect human beings and their inherent rights. In a legal perspective, a person is a human being that holds rights and obligations. However, inevitably, a question comes to mind: Can we extend personhood to human embryos too? Can human embryos enjoy the same protection granted within the scope of human rights like any born person does?

This article is intended to analyse the complex issue of the legal status of the human embryo, starting with the time of acquiring civil capacity and with the identification of the time of conception in those situations when assisted reproductive technologies such as IVF are involved. The analysis is concerned with the right to life, which is closely connected with the human embryo, as established both in international instruments relevant to the matter of human being protection and in national documents, pursuing to demonstrate that assigning personhood to the human embryo is incompatible with the right to private and family life, the right to life and the reproductive rights. This assertion is supported by a presentation of the relevant case-law.

Keywords: *the legal status of the human embryo; personhood; time of conception; the legal time of conception; civil capacity; assisted reproductive technologies*

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[1] This article was presented at the 9th edition of the Law, European Studies and International Relations Conference (2021). By mistake, this article was not published in the 2021 volume of the conference, although it was supported by the author. In the 2021 volume of the conference was published the article which the author was supported at the 8th edition of the Law, European Studies and International Relations Conference (2020).

[2] This figure was mentioned by the endocrinologist David Adamson in a presentation of the Report of the International Committee for Monitoring Assisted Reproductive Technologies at the Congress of the European Society of Human Reproduction and Embryology (ESHRE) in 2018. See https://www.eshre.eu/Annual-Meeting/Barcelona-2018.

1. Introductory considerations on personhood and the legal status of the human embryo

The possibility to create human life *in vitro* by manipulating reproductive cells (eggs and spermatozoids)[3], to store cryopreserved embryos for long periods of time, to have them genetically tested before implantation through pre-implantation genetic diagnosis, to use them for research purposes, and the possibility to destroy them have given rise to a range of legal, ethical and medical controversies concerning the legal status of the human embryo, especially because it has the potential of becoming a human being.

Although there is no international legal provision that defines the concept of „human being", based on the multitude of legal instruments adopted in the field of human rights, both at the UN level and by the Council of Europe, one can distinguish the assertion that „any person" should have their rights and freedoms recognised[4] and that „persons" make up the „members of the human family"[5] and represent „human beings"[6]. Inevitably, questions have been asked recently in the specific literature like „Can we equal a person to a human being?" and „Can we consider that a human embryo is a person?"

On one hand, there are opinions[7] upholding the recognition of the personhood of the human embryo as from the very moment it is conceived in laboratory, but there are also other opinions[8] arguing that such a recognition would touch some of the rights already regulated in international documents adopted in matters of human rights.

Internationally, in recent years, a protectionist current has taken shape regarding the human person – the 'personhood'. According to it, fertilised eggs, zygotes, embryos and foetuses are „persons" whose rights should be recognised as from the time of conception in laboratory, including the right to life, which is incompatible with the possibility of their destruction.[9] The supporters of this current want the adoption of a legislative framework that bans abortion, with no exception, prohibits different forms of contraception and the *in vitro* fertilisation, on grounds that these procedures violate the „person's" rights, i.e. the rights of foetuses or human embryos.

In respect of our national law, there is no specific human embryo regulation in Romania or any regulation concerning the situation when the personhood of a human embryo is recognised or not. At present, Romanian citizens do not have any special law on

[3] In this article, creating human embryos in laboratory only refers to the human embryos created by uniting gametes *in vitro*, which follows the natural fertilisation procedure and not to the embryos created by the nuclear transfer of somatic cells, a procedure also known as human cloning.

[4] Council of Europe, The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS no. 005, Article 1.

[5] General Assembly of the United Nations, The Universal Declaration of Human Rights, 10 December 1948, Resolution 217 A (III), Preamble; The Universal Declaration of Human Rights was signed by Romania on 14 December 1955.

[6] *Idem,* Article 1.

[7] See, Halva-Neubauer, G., & Zeigler, S. (2010). Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after Planned Parenthood v. Casey. *Feminist Formations, 22*(2), 101-123. Accessed on 22 April 2021 at http://www.jstor.org/stable/40835373.

[8] Greer Gaddie (2018). The personhood movement's effect on assisted reproductive technology: Balancing interests under a presumption of embryonic personhood. Texas Law Review, vol. 96, issue 6, p. 1293-1326; Paulk, Lauren B. (2014). „Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law." American University Journal of Gender Social Policy and Law 22, no. 4, p. 781-823.

[9] See more: https://rewirenewsgroup.com/legislative-tracker/law-topic/personhood/, accessed on 24 April 2021.

assisted reproductive technology. The only provisions referring to assisted reproduction, but only with a donor as a third party, are found in the Civil Code[10] – Articles 441-44 – without any express mention of *in vitro* fertilisation or the status of human embryos.

Nevertheless, it is worth mentioning Article 58 of the Civil Code on the personality rights, which provides that „any person has the right to life, health, physical and mental integrity, dignity, their own image, respect for their private life, as well as other such rights recognised by the law". Even the term „personhood", in a free translation into Romanian, stands for „*personalitate*" (personality – the condition of being a person), the equivalent of a human person status. Moreover, the Constitution of Romania[11] makes reference to the fundamental rights and freedoms that are specific to a person.[12] Although the legal status of the human embryo is not expressly regulated in our national legislation, based on the interpretation of the law texts and their enforcement throughout the territory of Romania, one can infer that it does not enjoy the status of a person. Parents[13] to be who resorted to medically assisted reproduction with a donor as a third party, in case that their consent has no effect any longer, as provided by Article 442 of the Civil Code – in case of death, if a divorce application is lodged or in case of actual separation before the time of conception – can no longer use the embryos which were conceived in laboratory. This aspect would reflect on the human embryo provided that its personhood was recognised. No matter if we refer to individuals who resort to assisted reproduction with a donor as a third party or to couples that use assisted reproductive technology for conceiving a child who is genetically related to them, and for whom natural reproduction is not possible, in Romania, these categories of people may dispose of the embryos so created, which means that they can choose not to use them anymore, a situation which may lead to their destruction.

What is certain and unanimously accepted at international level is that the human embryo needs some legal protection, a special protection we might say, because of its possibility to become a human being. Nevertheless, it is necessary to distinguish between the human being, who was born, and the human embryo, that, in my opinion, is a potential human being.

2. The time of conception – the time of acquiring anticipated civil capacity

In outlining the legal status of the human embryo, it is important to determine the moment at which human life begins and from what point we can speak of the existence of the right to life and the other human rights that are granted and protected at international level. For this reason, a distinction is necessary to be made between these two moments –

[10] The Code came into force on 1 October 2011. It was adopted by Law 287/2009, published in the Official Gazette of Romania no. 511 of 24 July 2009, with all the specifications brought by Law 71/2011 for the enforcement of Law 287/2009 on the Civil Code (published in the Official Gazette of Romania no. 409 of 10 June 2011), republished in the Official Gazette of Romania no. 505 of 15 July 2011 and last amended and complemented by Law 138/2014.

[11] The Constitution of Romania, adopted at the meeting of the Constituent Assembly of 21 November 1991, published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991, which took effect following its approval by the national referendum of 8 December 1991, updated and republished in the Official Gazette of Romania no. 767 of 31 October 2003.

[12] As an example, see the Constitution of Romania, Article 22 referring to the right to life and physical and mental integrity, Article 23 on individual freedom, Article 27 on domicile inviolability.

[13] For the purpose of Article 441 of the Civil Code, parents can be only a man and a woman or a single woman.

which may look similar at first sight – in order to identify the legal status of the human embryo. Another aspect refers to the importance of determining the time of conception, a time which, in many legislations, like that of Romania, is the point from which a human being acquires rights provided that they are born alive.

As regards the time of conception, Article 36 of the Romanian Civil Code (the first sentence) acknowledges the rights of the child as from the time of conception, but only provided that they are born alive. In this situation, the civil capacity, starting at the birth of a person according to Article 35 of the Civil Code, is extended, with a retroactive effect, to the unborn foetus ever since the time of conception, the foetus acquiring anticipated civil capacity only provided that they are born alive.

Starting from this regulation and taking into account the possibility to fertilize, *in vitro*, eggs with spermatozoids and transfer the embryos so created into a mother's uterus after a period of time, which may be days or years (the current record is 27 years[14] – a period when the embryo was cryopreserved and then successfully implanted to a mother in Tennessee), we have the issue of identifying the time of conception or, according to the Romanian civil law, the time of acquiring anticipated capacity for exercising rights and assuming civil obligations. This is either the time when the embryo is created in the laboratory or the time of the embryo transfer into the uterus of the mother to be.

Article 36 of the Civil Code also includes a referral to the provisions of Article 412 regarding the legal time of conception applicable in order to determine the time at which anticipated civil capacity starts. According to the text of the law, the legal time of conception is „the span between the three hundredth day and the one hundred eightieth day before the birth of the child". In order to determine this legal presumption referring to the time of conception, two terms should be considered: the term of 300 days which is the maximum term of gestation and the minimum term of 180 days. Therefore, the time of conception may be determined in any of the 121 days contained in this interval, noting that the 180th day is also included.[15]

Furthermore, Article 412 paragraph (2) of the Civil Code removed any uncertainty regarding the absolute or relative nature of the presumption referring to the legal time of conception. Therefore, according to the text of the law, it is possible to prove by scientific means the conception of a child within the 121-day span or even outside this interval.

In respect of medically assisted reproduction, I consider that the time of a child's conception indicated in Article 36 of the Civil Code and determined according to Article 412 of the Civil Code is the time when the embryo is implanted into the uterus of the mother to be and not the time when the embryo is conceived in a laboratory through the fertilisation of the egg with the spermatozoid in a medical procedure performed by a doctor.

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[14] In February 2020, Molly Gibson was born following the transfer of the embryo which was cryopreserved in October 1992. Parents resorted to medically assisted reproduction with donated embryos given the existence of cystic fibrosis, a genetic disease which cannot be cured and may be genetically transmitted to a child. See more on https://www.webmd.com/baby/news/20201204/baby-girl-born-from-embryo-frozen-for-27-years#:~:text=A%20baby%20girl%20born%20in,The%20New%20York%20Times%20reported.

[15] See Iosif R. Urs, Carmen Todică (2016). Drept civil. Teoria persoanelor [Civil Law. Theory of Persons], Hamangiu, p. 17.

3. The international protection of the human embryo

3.1. The right to life is protected under Article 3 of the Universal Declaration of Human Rights, which states that „*Everyone has the right to life, liberty and security of person".*

Article 2 paragraph (1) of the European Convention on Human Rights states that *„Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".* Article 6 paragraph (1) of the International Covenant on Civil and Political Rights stipulates that „*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".*

The right to life has a particular importance for determining the legal status of the human embryo with regard to the time of conception and the moment from which this right is granted protection when the embryo is conceived through *in vitro* fertilisation.

The international legal instruments adopted by the United Nations and the Council of Europe assert the idea that the protection of human life should be granted by the States without specifying whether this protection is absolute as from the time of birth or it applies both to the unborn child and to human embryos. Nevertheless, the American Convention on Human Rights stipulates, in Article 4, that „*Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life".* This assertion, which is unique in an international document that is binding for its Contracting States, is a clear proof that special attention should be paid to the foetus or to human embryos. We need to point out that this regulatory document should not be interpreted as meaning that the right to life is granted to human embryos, which would extend the right to life to the unborn child, with implications on the possibility of access to the medical procedure of abortion. Actually, as I said above, some special protection should be granted to human embryos taking into account their potential of becoming a human being.

Pursuant to the provisions of Article 4 of the American Convention on Human Rights, the Constitutional Court of Costa Rica prohibited in 2000 the assisted reproductive technology of *in vitro* fertilisation finding that the Executive Decree no. 24029-S violates constitutional provisions. The Decree regulated the *in vitro* fertilisation procedures for couples and allowed the birth of 15 Costa Rican citizens in the period 1995-2000.

With regard to the American Convention, the Costa Rican Court argued that „*as soon as conception occurs, a person is a person"* and, therefore, we are in the presence of a human being, who has the right to be protected by the legal system.[16] The Constitutional Court of Costa Rica intended to protect the human being irrespective of their stage of development (zygote, embryo, foetus, child etc.) arguing that the *in vitro* fertilisation allows the destruction of those human embryos that are not used and holding that this action harms „the right to life" of the embryos. Basically, the conclusion drawn by the Constitutional Court of Costa Rica was that the „*human embryo is a person from the time of conception"* and that „*it cannot be treated as an object"* for research purposes, it cannot be subject to a

[16] Decision no. 2000-02306, 15 March 2000, The Constitutional Chamber of the Supreme Court of Justice, Costa Rica, no. 95-001734-007-CO. See *Case Artavia Murillo and others ("In vitro Fertilization") v. Costa Rica,* Preliminary objections, merits, reparations and costs*,* Ser. C N0 257, November 28, 2012, §73 and §75.

selection process or be cryopreserved and that it is not constitutionally legitimate to expose it „*to a disproportionate risk of death."*[17] In the opinion of the Constitutional Chamber, the use of assisted reproductive technology leads to a significant loss of human embryos, a loss that cannot be justified by a couple's intention to conceive a human being when natural reproduction is not possible.[18]

The American Commission on Human Rights took notice and sued the state of Costa Rica in 2011 for violating the right to family life of couples who could not procreate naturally and for whom *in vitro* fertilisation is the only possibility to have biological children. The solution of the international human rights court was to require the state of Costa Rica to amend its legislation on the *in vitro* fertilisation so as to allow access to reproductive procedures for the people concerned. At the time when the Inter-American Court had to pronounce a decision in the *Artavia Murillo Case*, Costa Rica was the only state in the world where *in vitro* fertilisation was completely prohibited.

With reference to the time of conception, I think that the Inter-American Court provided a global perspective in the *Artavia Murillo Case* on how we should understand the conception phenomenon, especially in the context of assisted reproductive technology. Taking into account the current scientific context, there are two interpretations of the „conception" concept. The first one refers to conception viewed as the time of unification or fertilisation of the egg with the spermatozoid, resulting in the creation of a new cell: the zygote. The zygote has the capacity to develop into an embryo. In other words, the fertilisation of the egg is the biological moment at which life begins. As viewed in the second interpretation, the time of conception is that moment when the fertilised egg is implanted into the uterus of the future mother. With the implantation of the fertilised egg into the uterus, the zygote may connect to the woman's circulatory system, which will provide it with all the necessary hormones and all other necessary elements for embryo development.

The Inter-American Court, taking scientific progress into account, has drawn attention to those two essential and complementary moments of embryo development: the fertilisation and the implantation. Moreover, the Court noted that only after the conclusion of the second moment, that of implantation, we can say that conception took place. If the embryo is not implanted into a woman's uterus, it could not develop.[19] Although this interpretation of the time of conception was put forward by the Inter-American Court in the context of the American Convention, it is my opinion that this interpretation should be considered for defining the legal status of the human embryo and the moment from which it should be protected.[20]

3.2. At European level, although there is no express regulation in the European Convention on Human Rights with regard to the time of conception and the moment from which a human entity enjoys the rights and freedoms enshrined in the Convention, we

[17] *Idem,* §76.
[18] *Ibidem.*
[19] *Idem*, §186.
[20] For more philosophical, ethical and moral approaches to the human embryo, see Natalia Ochoa Ruiz *El embrión humano en la jurisprudencia del Tribunal de Estrasburgo: un análisis a la luz de la normativa internacional y europea*, Seria Cuadernos Aranzadi de Tribunal Constitucional, no. 39, Thomson Reuters, 2017, p. 47-53.

should emphasise that, based on the decisions of the European Court of Human Rights (ECtHR), one can infer that the Strasbourg Court refused on different occasions to extend personhood to the human embryo, leaving this possibility to the signatory states of the Convention. The *Vo v. France Case*[21] is such an example.[22]

Specifically, in the *Case of Vo v. France* the applicant, Ms Thi-Nho Vo, a French citizen of Vietnamese origin, went to the General Hospital of Lyon for a gynaecologic examination, being 6-month pregnant. The same day, at the same hospital, another woman, Ms Thi Thanh Van Vo, had an appointment for having a contraceptive coil removed. At the time when dr. G. (who was to perform the removal of the coil) called the name „Ms Vo" in the waiting room, the applicant responded to the call. After a short interview, the doctor saw that the applicant was having difficulties with communicating and understanding the French language. Based on the medical file, dr. G deemed it appropriate to remove the contraceptive coil without examining her first. The consequence was the rupture of the amniotic sac and the loss of a substantial quantity of amniotic fluid. Afterwards, during the examination, dr. G realised what he had just done and that it was a mistake related to the identity of the patients. The applicant was immediately hospitalised. On the other hand, due to the impossibility of removing the contraceptive coil of Ms Thi Thanh Van Vo, she was recommended to have surgery for its removal under general anaesthesia the second day. Another error occurred at the time when Ms Thi Thanh Van Vo had to be taken to undergo surgery, the applicant being taken instead of her, and the later avoided the surgery after she protested and because she was recognised by the anaesthetist. On 29 November 1991, the applicant left the hospital and returned on the 4th of December for several tests. The doctors found that the amniotic fluid had not been replaced and the pregnancy could no longer continue. Therefore, the pregnancy was terminated for medical reasons on the 5th of December 1991.

The applicant and her partner initiated a criminal procedure before the national courts for involuntary homicide of her baby and to have dr. G suspended from the medical profession for 3 months. They also stood as plaintiffs claiming damages in the trial.[23] These actions were not successful as the Court of Cassation decided that the foetus could not be the victim of involuntary homicide, because it was not a person. Consequently, Ms Vo applied to the Strasbourg Court complaining about the lack of protection for the unborn child in the French criminal law and arguing that the French state could not comply with the right to life established in Article 2 of the European Convention on Human Rights.[24]

The Court stated that it had to determine the issues related to the beginning of the right to life of all persons and whether the unborn child had this right too.[25] Precisely, the Strasbourg Court had to decide whether the injury of the foetus by the doctor as a result of an error, when the pregnant woman wanted to be a mother and expected a healthy child, and where the consequence of the doctor's act was the necessity to terminate the pregnancy, fell within the scope of Article 2 of the Convention and whether the respect that must be given

[21] Case of *Vo v. France* [MC], no. 53924/00, §84, ECHR 2004-VIII.

[22] For other case-law examples, please see N.R. Predescu (2016), *Aspects regarding the status of the human embryo and the issues associated with this matter at international level* in the volume of the International Conference „Education and creativity for a knowledge-based society", organised by Titu Maiorescu University, 10th edition, Bucharest.

[23] *Idem,* §9 – §13.

[24] *Idem,* §74.

[25] *Idem,* §75; See also the *X v. The United Kingdom Case* §74.

to human life also presumes the protection of the foetus. The Court considers that, generally, establishing the moment at which the right to life begins comes under the margin of appreciation by the states because there is no consensus at European level on the scientific and legal definition of the beginning of life and because the issue of such a protection has not been settled yet in the majority of the Contracting States.[26]

The Strasbourg Court observed that there was no consensus at European level on the nature and status of the embryo or the foetus, although they had begun at that time to receive some form of protection in the light of scientific progress and the potential consequences that could derive from research into genetic engineering, medically assisted reproduction or embryo experimentation.[27] The Court considers that, at best, there can be some common ground between the states that „*the embryo/foetus belongs to the human race"*, and the potentiality of this being and its capacity to become a person (that enjoys legal protection under the civil law at national level, for example, in states like France or Romania) need protection in the name of human dignity, *without making the embryos/foetuses persons with the right to life,* safeguarded by Article 2 of the Convention.[28]

Taking into consideration these aspects, in the *Vo Case*, the Court avoided drawing a definite conclusion, being convinced that „*it is neither desirable, nor even possible [...] to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention"*.[29] Moreover, the Court „*considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention."*[30]

The Strasbourg Court also held that the lack of a legal status of the unborn child does not completely deprive it of protection under the French law. With reference to the present case, it was held that „*the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party."*[31]

The conclusion of the Court was that there was no violation of Article 2 of the Convention in this case.

It is worth mentioning the separate opinion of Judge Rozakis joined by judges Caflisch, Fischbach, Lorenzen and Thomassen, according to which, considering the present state of

[26] *Idem,* §81.
[27] *Idem,* §84.
[28] *Ibidem.*
[29] *Idem,* §85.
[30] *Ibidem.*
[31] *Idem,* §86.

development of science, law and morals, both in France and in other European countries, the right to life of the unborn child has yet to be secured.

Even if one accepts that life begins before birth, it does not mean that this automatically and unconditionally confers on this form of human life a right to life equivalent to the corresponding right of a child after birth. This also does not mean that the unborn child does not enjoy any form of protection in the human society, especially since the relevant national legislation and European documents show that the unborn life is worthy of some protection. In the judge's opinion, this protection is different from that given to a child after birth, and its scope is therefore much narrower in the case of the unborn child. Thus, the life of the unborn child, although protected to some extent, cannot be equated to postnatal life, and it does not enjoy therefore „a right to life" in the sense of Article 2 of the Convention.

Having regard to the case-law aspects set out above and the current evolution of the case-law concerning the right to life and the relation between this right and some aspects referring to medically assisted reproduction, specifically the protection which should be granted to the human embryo or to the unborn child, we can say that, at European level, the states enjoy a wide margin of appreciation with regard to the moment when a human being enjoys the right to life. Moreover, the European states tend not to recognise the human embryo's capacity as a law subject and, therefore, there is no violation of the right to life since the human embryo has not the legal status of a person.[32]

Conclusions

The possibility to create human embryos *in* vitro through assisted reproductive technology, the possibility offered by scientific medical progress to store human reproductive cells and the embryos so conceived for a long period of time by cryopreserving them has given rise to the controversial dilemma of identifying the legal status of the human embryo (thing vs. person) and the moment from which it should enjoy legal protection.

Although there are still many controversies at international level regarding the time of conception and the moment at which human life begins, I think that the human embryo should be granted some protection as from the time of conception, that is the time of its implantation into a woman's uterus, and such protection should not interfere with women's reproductive rights, and that also the embryos stored in cell banks need some special legal protection until they are used, and this protection should not be equated to that conferred to a human person.

Moreover, the possibility to dispose of human embryos should be left to the discretion of the people who initially consented to their creation.[33]

In my opinion, the solution of the Inter-American Court in the *Case of Artavia Murillo v. Costa Rica* is a significant breakthrough in the recognition and protection of reproductive rights and of the right to assisted reproduction in the regional inter-American context. Based

[32] See also Carmen Sánchez Hernández, *La reproducción médica asistida en la jurisprudencia del Tribunal Europeo de Derechos Humanos: Especial Consideración desde la perspectiva de la seguridad jurídica*, Revista de Derecho Privado, no. 4, July-August 2018, p. 53.

[33] For a perspective on the human embryo: a thing or a person, see Lavinia Tec, *The fate of the frozen human embryos – a new challenge for law,* Revista Română de Drept Privat, 2017.

on the analysis of the Court's decision we can infer that the reproductive rights have been recognised as human rights. As regards the protection of the human embryo and its presumed right to life, I agree with the solution of the Costa Rican court that the right to life begins at the time of implantation and not at the time of fertilisation and that the human embryo is not a person holding rights and obligations.

At the same time, I consider that the recognition of personhood for the human embryo is incompatible with the right to life, the right to private and family life and the reproductive rights which people who want or not to have a child have them recognised. If the embryo belonged to personhood there would be a violation of the right of these categories of people to access medical services such as abortion or assisted reproductive technologies.

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